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Page 555, At G. for [1934] O.L.R. 560, read [1934] O.R. 560.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

MERCANTILE UNION GUARANTEE CORPORATION, LTD. *v.* BALL.

[COURT OF APPEAL (Scott, L.J., and Finlay, J.), **April 23, May 11, 1937.**]

Infant—Necessaries—Trading agreement—Hire-purchase agreement—Agreement to purchase a motor lorry.

The infant respondent carried on business as a haulage contractor. He entered into a hire-purchase agreement with the appellant company for the purchase of a motor lorry, but was unable to keep up the instalments. In an action brought to recover the arrears, the respondent pleaded infancy. The appellant company contended that the lorry was a necessary, and that the contract was one beneficial to the infant :—

HELD : the contract was not one for necessaries, and could not be enforced.

Decision of His Honour JUDGE RUEGG, K.C. (1937), **4 L.J.N.C.C.R. 352,** *affirmed.*

[**EDITORIAL NOTE.** The present case decides that in the ordinary way a hire-purchase contract cannot be for the benefit of an infant. If it is a trading contract, it will not be a contract for necessaries ; but this part of the decision will not be relevant to the case of hire-purchase contracts for household goods. As to these, a different result may be reached ; but they are open to the objection that they are subject to onerous terms.

AS TO NECESSARIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 610-613, paras. 1312, 1313 ; and FOR CASES, see DIGEST, Vol. 28, pp. 165-171, Nos. 215-315.]

Cases referred to :

(1) *Doyle* v. *White City Stadium, Ltd.,* [1935] 1 K.B. 110 ; Digest Supp. ; 104 L.J. K.B. 140 ; 152 L.T. 32.

(2) *Walter* v. *Everard,* [1891] 2 Q.B. 369 ; 28 Digest 169, *280* ; 60 L.J. Q.B. 738 ; 65 L.T. 443.

(3) *Clements* v. *London & North Western Ry. Co.,* [1894] 2 Q.B. 482 ; 28 Digest 156, *168* ; 63 L.J. Q.B. 837 ; 70 L.T. 896.

(4) *Cowern* v. *Nield,* [1912] 2 K.B. 419 ; 28 Digest 173, *338* ; 81 L.J. K.B. 865 ; 106 L.T. 984.

(5) *Chapple* v. *Cooper* (1844), 13 M. & W. 252 ; 28 Digest 170, *291* ; 13 L.J. Ex 286 ; 3 L.T. O.S. 340.

(6) *Clyde Cycle Co.* v. *Hargreaves* (1898), 78 L.T. 296 ; 28 Digest 171, *297.*

(7) *Roberts* v. *Gray*, [1913] 1 K.B. 520 ; 28 Digest 157, *171* ; 82 L.J. K.B. 362 ; 108 L.T. 232.

(8) *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430 ; 28 Digest 154, *146* ; 60 L.J. Ch. 63 ; 63 L.T. 438.

(9) *Flower* v. *London & North Western Ry. Co.*, [1894] 2 Q.B. 65 ; 28 Digest 154, *147* ; 63 L.J. Q.B. 547 ; 70 L.T. 829.

(10) *Lavell* v. *Richings*, [1906] 1 K.B. 480 ; 18 Digest 298, *338* ; 75 L.J. K.B. 287 ; 94 L.T. 515.

(11) *Fawcett* v. *Smethurst* (1914), 84 L.J. K.B. 473 ; 28 Digest 179, *392* ; 112 L.T. 309.

(12) *Peters* v. *Fleming* (1840), 6 M. & W. 42 ; 28 Digest 167, *236* ; 9 L.J. Ex. 81.

Appeal from a decision of His Honour Judge Ruegg, K.C., given at Hanley, on Oct. 22, 1936, and reported in (1936), 4 L.J.N.C.C.R. 352.

H. E. R. Boileau for the appellant company : This motor lorry was a necessary for this infant ; it was his only means of livelihood, and he could not have bought it without hire-purchase facilities. The contract is therefore enforceable. The definition of necessaries contained in the Sale of Goods Act has since been extended ; in *Chapple* v. *Cooper* (5), it was held that the burial expenses of the husband of an infant widow were necessaries, and, in *Clyde Cycle Co.* v. *Hargreaves* (6), a racing cycle was held to be a necessary. [Counsel referred to *Walter* v. *Everard* (2), *Roberts* v. *Gray* (7), *De Francesco* v. *Barnum* (8), *Clements* v. *London & North Western Railway Co.* (3), *Flower* v. *London & North Western Railway Co.* (9), *Doyle* v. *White City Stadium, Ltd.* (1), *Cowern* v. *Nield* (4), and *Lavell* v. *Richings* (10).]

F. T. Atkins, for the respondent : An infant can never be bound by a hire-purchase agreement because of the onerous terms contained therein. The very tragedy which the law tries to prevent happened in this case—the defendant could not continue paying the instalments. It cannot be a necessary if there are onerous terms attached to the bargain : see *Fawcett* v. *Smethurst* (11). It is a question of fact whether an article is a necessary. In *Doyle* v. *White City Stadium, Ltd.* (1), the contract was for the benefit of the infant ; here it was not.

Boileau, in reply : On the given facts, it is a question of law for the court whether an article is a necessary : see *Peters* v. *Fleming* (12). The facts here were not in issue. There was no evidence upon which the judge could find as he did.

Finlay, J. [reading the judgment of the court] : The action was brought by the plaintiff company, claiming a sum of £96 7*s.* 6*d.*, arrears due under a hire-purchase agreement in respect of a motor lorry. The total price of the lorry was £666. It is unnecessary to refer in detail to the terms, which were those common in such contracts. The defendant was, at the time of the making of the contract, an infant, being aged 20. He had been carrying on business as a haulage contractor for about two years. He got into financial difficulties, and fell into arrears with his instalments. Being sued, he raised two defences, but to one only of these—that of infancy—is it necessary here to refer. The judge has held that this defence succeeded, and we think that he was right in so holding. The law on this matter has been discussed in many cases. The position is thus stated in COKE UPON LITTLETON, p. 172:

> A An infant may bind himself to pay for his necessary meat, drink, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards.

To this enumeration some addition has in the course of years been made, particularly, as pointed out by SLESSER, L.J., in *Doyle* v. *White City Stadium, Ltd.* (1), at p. 131, with reference to contracts of service. Our B attention was drawn to several modern cases: *Walter* v. *Everard* (2), *Clements* v. *London & North Western Ry. Co.* (3), *Cowern* v. *Nield* (4). In this last case, the law is thus laid down by BRAY, J., at p. 424:

> It is true that there are certain contracts which, if they are for the infant's benefit, can be enforced against him; and it is said this trading contract was for the C benefit of the infant because it was for the benefit of the infant that he should learn how to carry on a trade. But in my opinion there is no authority for saying that a trading contract, even if for the benefit of the infant, is an exception to the rule that an infant is not, except in certain cases, liable on contracts made by him.

The most recent case appears to be *Doyle* v. *White City Stadium, Ltd.* (1).

Applying the law laid down in these cases, it seems to us, in the first D place, that this contract is not one of the class by which an infant can be bound. It is not a contract for necessaries within the enumeration of LORD COKE. Nor is it a contract of service or apprenticeship, or analogous to any of these. But there is a further, and, in our view, an insuperable, difficulty in the plaintiff company's way. Not only E must the contract be within the class of contracts by which an infant may be bound, but also it must be one beneficial to the infant, and whether it is so is a question to be decided on the facts of each particular case. The judge here has found that the contract was not for the benefit of the infant. Even if it be assumed, contrary to our view, that the F contract is one of the class by which an infant could be bound, we find it quite impossible to differ from his view that a contract for a large and expensive lorry, on onerous hire-purchase terms, was not a contract for the benefit of the infant.

For these reasons, we are of opinion that the judgment of JUDGE G RUEGG was perfectly correct, that it should be affirmed, and this appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors: *G. H. Drury* (for the appellant company); *Miller & Smiths*, agents for *Thomas Bagley, Stone* (for the respondent).

H [*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* MANCHESTER JUSTICES, *Ex parte* LEVER.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 29, 1937.**]

Criminal Law—Autrefois convict—Magistrates—Conviction and fine in absence of accused—Conviction not recorded in court register—Further conviction and fine in respect of same charge—Summary Jurisdiction Act, 1879 (*c.* 49) *s.* 22 (1), (4).

On Jan. 20, 1937, the applicant was charged with having committed two motoring offences. He did not appear in court, and the magistrates after hearing evidence convicted him and imposed fines of 20*s.* and 10*s.* On the same date, and prior to the convictions being entered in the register kept by the court under the Summary Jurisdiction Act, 1879, s. 22 (1), the magistrates, who were still sitting, on being informed that several fines imposed on the applicant for previous motoring offences had not yet been paid, issued a warrant for his arrest for failing to answer the summonses on Jan. 20, with the result that on Jan. 23 he appeared before a different bench of magistrates. He was then convicted and fined £2 in respect of each of the two offences :—

Held : although they were not recorded in the register kept by the court, the convictions on Jan. 20 were nevertheless complete, and the convictions on Jan. 23 must therefore be quashed, as the applicant was entitled to plead *autrefois convict.*

[**EDITORIAL NOTE.** The question here is whether the conviction was sufficiently complete for it to be made the subject of a plea of *autrefois convict.* It is held that the fact that it has not been recorded in the court register does not prevent it being so pleaded.

As to Plea of Autrefois Convict, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152, 153, para. 212 ; and for Cases, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.]

Cases referred to :

(1) *Jones* v. *Williams* (1877), 41 J.P. 614 ; 33 Digest 357, *669* ; 46 L.J. M.C. 270 ; 36 L.T. 559.

(2) *R.* v. *Sheridan*, [1937] 1 K.B. 223 ; [1936] 2 All E.R. 883 ; Digest Supp. ; 155 L.T. 207.

(3) *R.* v. *Blaby*, [1894] 2 Q.B. 170 ; 14 Digest 496, *5464* ; 63 L.J. M.C. 133 ; 70 L.T. 879.

(4) *R.* v. *Miles* (1890), 24 Q.B.D. 423 ; 14 Digest 341, *2594* ; 59 L.J. M.C. 56 ; 62 L.T. 572.

Application to make absolute a rule *nisi* for *certiorari* directing the removal into this court of two convictions of the applicant, dated Jan. 23, 1937, and that the said convictions be quashed. The facts are set out in the judgment of Lord Hewart, L.C.J.

William Gorman, K.C., and *Vernon Gattie* showed cause against the rule.

R. M. Montgomery, K.C., and *B. S. Wingate-Saul* in support.

Lord Hewart, L.C.J. : This is a rule *nisi* for a writ of *certiorari* to remove into this court two convictions under the hand of certain justices for the city of Manchester bearing date on or about Jan. 23, 1937, whereby one Lever was convicted of two offences, one under the Road Transport Lighting Act, 1927, s. 1, and one under a local Act in connection with the police regulations of Manchester. The ground on which the rule was granted was that the defendant Lever on Jan. 20, 1937, was *autrefois convict* of the same two offences.

The facts of the case are not in dispute, and they may be very shortly summarised in this way. The applicant for this rule was summoned A for these two offences and ought to have appeared, but did not appear on Jan. 20 last at the court of petty sessions at Manchester. The two justices then heard the evidence and decided to convict the applicant and to impose a small fine. Very shortly afterwards, in the course of the same day, it was brought to their knowledge that Mr. Lever had a B rather considerable record about offences connected with the use of a motor car. Seeing those offences and seeing also that the fines which on those occasions had been imposed had never been satisfied, the justices decided to consider the matter further, and for that purpose to issue a warrant to bring the defendant, the present applicant, before C them. That course was accordingly taken, and on the later date, which was Jan. 23, the case was examined further in the presence of Mr. Lever, the same conclusion was arrived at, that he had committed the acts complained of, and a more severe penalty was imposed. Those convictions were recorded, and it is to quash those convictions that this rule D for the writ of *certiorari* was obtained. The justices who sat on the second occasion were not the same justices as those who had sat on the first occasion. Now Mr. Gorman in his very frank and ingenious argument, if I may say so, has naturally and necessarily admitted that there is a good deal of authority against him, but he seeks to rely upon a E decision now 60 years old in the case of *Jones* v. *Williams* (1). This case, I take it, was cited in support of a proposition that a distinction is to be drawn between a potential or incomplete conviction and a complete and actual conviction, and that it is only the second which is a conviction properly so-called. Now this case decided, as it seems to F me, very little and nothing that helps in the present case. I need not repeat the facts, but the point of substance in the present argument was that before a conviction was drawn up the justices changed their minds, or at any rate one justice did with the help of a new one. GROVE, J., said that that would be a good reason for his, that is, the G magistrate's, refusing to draw up the conviction, there being a *locus pœnitentiæ*, the conviction not having been formally drawn up and signed. LINDLEY, J., in the same case said:

> Two magistrates were in favour of reversing the conviction previously pronounced, but one of them only had heard the evidence in his case, and the third magistrate who had heard the evidence was for upholding the conviction. No doubt that was H irregular, but no conviction had been drawn up, and the proceedings may be said not to have come to an end. The action of the justices was not perhaps an acquittal, but it did not amount to a conviction. I think it may be treated as a part heard case.

The question in that case, which was raised upon a case stated, was whether the two justices were justified in reversing their first judgment, one justice who had been concerned not concurring. That seems to be a different point from the present one. Here it is not suggested that there was any change of mind on the part of the justices. All that happened was that the defendant to the summonses had not appeared. The justices were quite prepared to deal with them in his absence, and did deal with them, until it was brought to their knowledge that he had been previously convicted, and then they proposed to re-open the whole matter. The defendant was brought before the justices upon a warrant and a larger penalty was imposed. Now all that remained to be done in regard to the decision of the justices—I refrain from using the word " conviction " at this moment—on the earlier occasion was to enter it in the register, and the argument is that until that entry had been made there was no conviction properly so called.

Reference has been made to the provisions of the Summary Jurisdiction Act, 1879. When I look at those provisions in sect. 22 (4), I think a great deal of light is thrown on the essence of this matter. That is in the part of the Act which is called " Supplemental Provisions," and it is dealing with the register of the court of summary jurisdiction. That subsection provides as follows :

> The entries relating to each minute memorandum or proceeding shall be either entered or signed by the justice or one of the justices constituting the court by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had, except that when a court of summary jurisdiction is not a petty sessional court a return signed as aforesaid, and made and entered in the register in manner provided by a rule under this Act, shall suffice.

In other words, the making of the conviction is antecedent to the entry in the register. It is not the entry in the register that makes or contributes to the conviction ; that has already been done. The entry in the register records the conviction that has been made. It seems to me, therefore, that all that remained here on the first occasion was to carry out a formal act ; the conviction itself was complete. However, as Mr. Gorman, I think, concedes, this matter is really concluded by judgments delivered long since the year 1877, quite recently in the Court of Criminal Appeal in *R.* v. *Sheridan* (2). It was held : " that in order to support the plea of *autrefois convict* it was not necessary that the conviction should have been followed by sentence." It was indeed argued in that case, as appears at p. 229, that there should be no conviction such as would support a plea of *autrefois convict* unless there was also a sentence. The Court of Criminal Appeal said : " In our judgment that is not the law," and referred to the case of *R.* v. *Blaby* (3). In *R.* v. *Blaby* (3), the question to be decided was the meaning to be given to the word " conviction " in a statute which provided that certain consequences should ensue upon a conviction for a misdemeanour following upon a previous conviction for a similar offence. That case was a case heard in 1894 before a Court of Crown Cases Reserved. It was there held :

> that the expression " convicted " [as used in the statute referred to] must be taken to refer only to the finding of a verdict of guilty or a plea of guilty, and not to

include the sentence or judgment of the court; and that, therefore, upon the trial of an indictment for felony [under another section] a previous conviction . . . was sufficiently proved by the production of a certificate which showed that the prisoner had been released upon finding a recognisance to come up for judgment when called upon.

Hawkins, J., delivering the judgment of a court of five judges, began with these expressive words at p. 172:

> We have no difficulty in holding that this conviction should be affirmed, and on this simple ground: that upon carefully considering the language of the Coinage Offences Act, 1861, ss. 9, 12, there can be no doubt of the meaning of the word "convicted" as there used; it appears plain that it is not necessary that there should be a judgment before there can be a conviction.

A little later he says: "And a plea of guilty would equally be a conviction." In those circumstances I cannot think that argument, convenient as it is, has any real weight. It goes without saying that these justices acted in perfect good faith, but it is also obvious that if there had been suitable diligence on the part of the proper official, information which came a quarter of an hour too late might have been in their hands. The mere fact that the conviction had not then been entered in the register does not seem to me to detract from the completeness of the conviction. When, therefore, the same matters were heard three days later the plea of *autrefois convict* was, in my opinion, sufficient.

I think, therefore, without entering on the other matters which are suggested by this argument, that this rule must be made absolute and these convictions quashed.

Humphreys, J.: I am of the same opinion. The rule which is the basis of the plea of *autrefois convict* is stated by Charles, J., in *R.* v. *Miles* (4), in language which in truth had often been used before, in these words at p. 438:

> The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation.

On the facts of this case it appears to me as plain as possible that this person was placed in peril of legal penalties more than once on the same accusation. I find it difficult to treat seriously the argument that a statement by magistrates who are a court of competent jurisdiction that a person who has been tried before them is guilty, followed by a statement that he is to pay certain penalties does not form a conviction, and that there is no conviction unless and until some clerk has made a record of that finding and sentence in a book which the court is required to keep.

I think this is a plain case, and I agree with the judgment of Lord Hewart, L.C.J. I also think the matter is concluded by authority.

Singleton, J.: I agree. In my view the question which has been argued before this court is covered by the decision of the Court of

Criminal Appeal in *R.* v. *Sheridan* (2), to which reference has already been made.

Rule made absolute.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Cobbett, Wheeler & Cobbett,* Manchester (showing cause); *Wontner & Sons*, agents for *Leslie M. Lever & Co.*, Manchester (in support). A

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

BANK OF ETHIOPIA *v.* NATIONAL BANK OF EGYPT AND LIGUORI. B

[Chancery Division (Clauson, J.), **April 29, 30, May 3, 4, 11, 1937.**]

Action—Who may sue—Action in name of company incorporated in foreign state—Liquidation of company by de facto government recognised by British C *Government—Effect of existence of de jure monarch—Validity of action by person not having authority of liquidator.*

The Bank of Ethiopia was formed under the law of Ethiopia in 1931. It was a bank of issue and was the only bank in the Ethiopian Empire. In the autumn of 1935 hostilities began between Italy and the Ethiopian government and on May 1, 1936, the Emperor left the country. On D May 5, 1936, the Italian army entered the capital and thereafter the affairs of the bank were carried on under the supervision of the representative of the Italian authorities. In Dec., 1936, the British government recognised the Italian government as being the *de facto* government of the area then under Italian control. On June 20, 1936, a government decree, valid according to the law as recognised and administered by the *de facto* government, had placed the bank in liquidation and E appointed a liquidator:—

Held: (i) it was the duty of the court to treat the acts of the *de facto* government with all the respect due to the acts of a duly recognised foreign sovereign state, and this was not affected by the fact that the British government in addition to recognising a *de facto* government, recognised the Emperor as a *de jure* monarch.

F (ii) the Bank of Ethiopia had been dissolved under or by virtue of the laws of the country under which it was incorporated, and had accordingly ceased to exist, except in so far as might be necessary for the liquidation of its affairs.

(iii) no action could be brought in the name of the Bank of Ethiopia otherwise than by or under the authority of the duly constituted liquidator of the bank. G

[**EDITORIAL NOTE.** The question in this issue is whether the rights of a *de facto* government are limited by the fact that there is a person recognised as a *de jure* sovereign who may at some time successfully reclaim his kingdom. Where the *de facto* government is recognised by the English Government as such, its decrees must be treated as effective. In a case, therefore, where such a government has H decreed the dissolution of a company except in so far as its existence is necessary for winding up its affairs, an action by the company in England must be commenced by the liquidator or a person authorised by him.

As to Actions by or against Foreign Companies, see HALSBURY, Hailsham Edn., Vol. 5, p. 868, para. 1509; and for Cases, see DIGEST, Vol. 10, pp. 1204, 1205, Nos. 8523-8529.]

Cases referred to :

(1) *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) & Co.*, [1921] 3 K.B. 532 ; 22 Digest 149, *1267* ; 90 L.J. K.B. 1202 ; 125 L.T. 705.

(2) *White, Child & Beney, Ltd.* v. *Simmons, White, Child & Beney, Ltd.* v. *Eagle Star & British Dominions Insurance Co.* (1922), 127 L.T. 571 ; 22 Digest 149, *1268*.

A

Issues ordered to be determined in an action in which the Bank of Ethiopia claimed from the National Bank of Egypt (i) an account of all moneys and securities received or held by the defendant bank for the account of the plaintiff bank, and payment of the amount found due on B the taking of such account, and (ii) an order that the defendant bank should forthwith transfer to the plaintiff bank or as it should direct all securities held by the defendant bank for the account of the plaintiff bank. The liquidator of the Bank of Ethiopia, Wladimiro Liguori, was later added as a defendant. The issues to be decided were : (i) whether C the Bank of Ethiopia had been dissolved, or otherwise had ceased to exist as a company, under or by virtue of the laws of the country under which it was incorporated, and (ii) whether the Bank of Ethiopia had authorised the action to be brought.

The Bank of Ethiopia was incorporated in the Empire of Ethiopia by D imperial decree dated Aug. 29, 1931. The defendant bank is incorporated in Cairo as the Société Anonyme Egyptienne, and carries on a business in England, and is registered under the Companies Act, 1929, Part 11.

Sir William Jowitt, K.C., and *Andrew Clark* for the Bank of Ethiopia.

Wynn Parry, K.C., and *V. R. Idelson* for the National Bank of Egypt.

E *Lionel Cohen, K.C.*, *John Forster*, and *Raphael Valls* for Liguori.

Clauson, J. : Previously to 1931, an Egyptian company, the Bank of Abyssinia, conducted the business of banking at Addis Ababa, the capital of Ethiopia, under a government concession. This arrangement F was brought to an end in 1931, when a company, the Bank of Ethiopia, was formed under the law of Ethiopia. Its constitution provided for a board of management of 10 persons, 6 to be appointed by the government of Ethiopia (who held six-tenths of the capital), and 4 by the holders of the remaining capital. An important function of the company was to be G a bank of issue, and it appears in fact to have acted in close contact with the Minister of Finance for the time being. As I understand it, there was no other bank in the Ethiopian Empire. The bank had branches in various parts of the country, and a forwarding agency in Djibouti, within French territory. Mr. Collier, who gave evidence before me, H became governor of the bank upon its formation, and appears to have been in fact in control of its operations. Oddly enough, the constitution of the bank, while providing for the office of governor, does not define his powers or his duties, but appears to vest control entirely in the board of management, which, as I read the material documents, is to meet at the *siège social* of the company, that is, at Addis Ababa, and is to function with a quorum of 5. There is a provision that a member of the board who absents himself for 6 months from the meetings is to cease to hold office. In Apr., 1935, Mr. Collier left Addis Ababa, on 6 months' leave of absence, for Europe, where he seems to have been acting on behalf of the bank, and (as it would appear) on behalf of the government, in regard to the provision of war-like personnel and stores, in anticipation, A apparently, of a threatened outbreak of hostilities between the Ethiopian government and Italy. The affairs of the bank in Ethiopia were left under the control of Mr. Wright, who later, by a deed of settlement, in Feb., 1936, was formally constituted a member of the board. In the autumn of 1935, hostilities in fact began. Mr. Collier did not return to B Ethiopia, but continued his activities in Europe, further leave of absence being granted to him. If regard is to be paid to the letter of the bank's constitution, there would seem to be good ground for saying that Mr. Collier ceased, towards the latter part of 1935, to be a director, and it may be (though this is obscure) that he no longer had general authority as C governor or otherwise to act on behalf of the bank. However, in fact, no question seems to have been raised, and, though absent from Addis Ababa, Mr. Collier continued to represent the bank in Europe, and, so far as communications remained open between him in Europe and Mr. Wright in Addis Ababa, to exercise general control, through Mr. Wright, D over the activities of the bank. Subject to a general adherence to Mr. Collier's instructions, Mr. Wright seems to have been in control at Addis Ababa. It would seem that, until the events of May, 1936, about to be related, board meetings were held periodically at Addis Ababa, and anything Mr. Wright did seems to have been done with either the authorisation E or the acquiescence of such meetings. In due course, the fortunes of war turned against the Ethiopian government. At the end of Apr., 1936, the Italian army approached the capital. On the night of May 1, or early on May 2, 1936, the Emperor left the capital and the country. There was an interval, in which the capital appears to have been given F over in great measure to looting and rioting. On May 5, the Italian army entered the capital, and, from and after May 6, the affairs of the bank in the capital were conducted by Mr. Wright, and his staff, under the supervision of the representative of the Italian authorities. The country branches of the bank had been gradually closed down as the Italian army G obtained control of the areas in which they were situated, the last being closed on or about May 8. There was, however, an agency at Gore, in the remote west of the country, in a part where the Italian forces did not obtain effective control until Aug. or Sept., 1936, and the staff there seemed to have kept the agency open in some sense or other until H about Aug. or Sept.

On May 9, 1936, the Italian government issued an annexation proclamation. Marshal Badoglio on May 9, 1936, was appointed Governor-General and Viceroy as representing the King of Italy, and from that date it appears as a fact, from the evidence before me, that the Italian government, through its officers, exercised effective governmental control over Addis Ababa, the *siège social* of the bank, and over a gradually increasing tract of Ethiopian territory. In the middle of December, at which date the territory under Italian control seems to have covered the whole of the portion of Ethiopian territory in which any activities of the bank had ever been carried on, His Majesty's government, as I am authoritatively informed by a communication from one of His Majesty's principal secretaries of state, recognised the Italian government as being in fact (*de facto*) the government of the area then under Italian control. The effect of that communication is that I am bound to treat the acts of the government which was so recognised as acts which cannot be impugned on the ground that they were not the rightful but a usurping government. That follows from the decision of the Court of Appeal in *Luther* v. *Sagor* (1), and my last observation applies, not only to acts done after the date when His Majesty's government recognised the Italian government as the *de facto* government, but also to any acts of that government done at any time at which, on the facts proved before me, they were in fact the government, though not yet recognised as such by His Majesty. For this proposition it is sufficient for me to refer to the decision of the Court of Appeal in *White* v. *Eagle Star* (2).

I have had before me a very experienced Italian lawyer, who has given me quite clear evidence as to the law as administered by the *de facto* government in Ethiopia, and has referred to authenticated copies of various decrees made under that governmental authority. In view of this evidence, I find the facts to be as follows: The Italian troops having entered the capital on May 5, 1936, the government control of an area which included the whole of those portions of Ethiopia in which the Bank of Ethiopia was carrying, or ever had carried, on business (save so far as concerned the agency at Gore) was, on May 9, effectively assumed by Marshal Badoglio on behalf of the Italian government, and, on or about June 1, a regular governmental administration was set up, which was expressed to cover the whole of Ethiopia, and did effectively cover at least the area in which the bank operated or (with the trifling exception already mentioned) had ever operated. From May 5, onwards, the operations of the bank were controlled by the Italian government authorities. Early in June, Mr. Wright was directed to suspend business, save for the purpose of getting in credits. On June 20, a government decree, valid according to the law as recognised and administered by the *de facto* government, placed the bank in liquidation, and appointed one Castagnaro its liquidator. The effect of that decree, according to the law as recognised and administered by the *de facto* government, and accordingly prevailing at that time in the area of Ethiopia controlled by the Italian government, was to dissolve the bank, save in so far as it might be necessary to keep it on foot for the purposes of liquidation. Further, this governmental act had, according to law administered by the *de facto* government, the effect of putting an end to the authority of any person other than the liquidator, or those acting under his authority, to represent, act for, or bind the company. I am satisfied, on the evidence, that, if to-day the courts of the *de facto* government at Addis Ababa had before them the question which I have to consider, namely, whether the Bank of Ethiopia has been dissolved, and has accordingly ceased to exist, except in so far as may be necessary for the liquidation of its affairs, and whether any one, acting otherwise than under the authority of the liquidator of the bank, appointed as I have mentioned, can conduct litigation on behalf of the bank, the answers given would unquestionably be in the affirmative to the first question, and in the negative to the second question. The original liquidator, Signor Castagnaro, has been replaced by a Signor Liguori, but it is not suggested that that circumstance makes any difference, apart from the change in the person of the liquidator.

A good deal of discussion took place before me as to the validity of certain meetings of shareholders, and of directors, which were subsequently convened. The shareholders' meetings took place in Addis Ababa, and it may well be that they were irregular as tested by the provisions of the bank statutes. Various meetings of directors were convened by Mr. Collier in Europe, and it may well be (and indeed I think it was) the case that, tested by the provisions of the bank statutes, they were entirely irregular, and ineffective for any purpose. At the last moment, there was produced in court a decree, signed by the fugitive Emperor of Abyssinia at Bath, in this country, which, it was suggested, had the effect of altering or modifying the legal position in regard to the regularity or effectiveness of those meetings of directors. I cannot imagine any ground upon which it could be seriously argued that I could pay any attention to this decree. However, I do not purpose to go into any of those matters, because it appears to me that if the decree, which placed the bank into liquidation, has the effect which I have indicated, these matters become entirely irrelevant.

I must, however, deal with the grounds upon which it was suggested, by counsel for the Bank of Ethiopia, that the liquidation decree was ineffective. The argument, as I understood it, was as follows: It was said that the present was an entirely novel case, a case in which there was a *de facto* government recognised as such by His Majesty's government, and at the same time a sovereign, namely, the fugitive Emperor, recognised as a *de jure* monarch. It was suggested that, in those circumstances, it was open to this court to depart from the duty carefully indicated by Bankes, L.J., in *Luther* v. *Sagor* (1), at p. 543, namely, the duty of treating the acts of the *de facto* government with all the respect due to the acts of a duly recognised foreign sovereign state, and that it was open to this court to test, and indeed its duty to test, the validity of those acts by some special test, and the first such test suggested was whether the acts in question were necessary to secure the safety of the occupying army, whose presence secured the government in its position of *de facto* control. It may be (it is, of course, not necessary for me either to express, or even to form, an opinion on the topic) that such a test may be applicable to measures adopted by the authorities of an army occupying part of the territory of an organised state; but the test seems to me to have no relevance in principle to the case of a *de facto* government set up in an area from which the former government has departed, and in which there is no governmental authority except that of the *de facto* government. The *de facto* government must necessarily make such provision as may be proper for regulating the concerns of the inhabitants, and cannot confine itself to the protection of its military forces. It must necessarily, in such circumstances, assume the full responsibility of government, and its acts must, I should have thought, necessarily have the status of acts of a fully responsible government.

It was then sought, as I understood, to argue that the recognition of some measure of sovereignty *de jure* in the fugitive Emperor logically led to the denial of full sovereignty to the *de facto* government, and it was, as I understood, suggested that there existed this limitation on the acts of the *de facto* government which are to be recognised as internationally valid, that they must be acts which were strictly necessary for preserving peace, order and good government within the area controlled by the *de facto* government. This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a *de jure* monarch appears to me to mean nothing but this, that, while the recognised *de facto* government must, for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognised foreign sovereign state, His Majesty's government recognises that the *de jure* monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's government has recognised a *de facto* government, there is, as it appears to me, no ground for suggesting that the *de jure* monarch's theoretical rights (for, *ex hypothesi*, he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's courts.

This being my view, it is perhaps superfluous to point out that, even if I could accede to the last-mentioned argument, and if I were free to test the acts of the *de facto* government by the test of such acts being necessary for preserving peace, order and good government, the test could hardly fail to lead to my accepting as valid the acts questioned in the present case. It is difficult to see how confusion could fail to ensue if the only bank of issue in the country were allowed to continue its business under the control of persons who, until the last moment, seem to have been engaged in strenuous attempts to assist the displaced government to resist the attacks of those who have become the *de facto* government. But I need not pursue this topic, since I am, in my view, not free to apply any such test.

I turn now to the proceedings in the present case. This action was started on Sept. 29, 1936, in the name of the Bank of Ethiopia, under the authority of some person or persons (apparently Mr. Collier and various persons in Europe who, before the liquidation, were directors of the bank) who are not acting under the direction of, or with the approval of, the liquidator. The defendant is the National Bank of Egypt, which appears to have been the correspondent of the Bank of Ethiopia in Cairo and London. The Bank of Ethiopia in substance claims a settlement of outstanding accounts between the two banks. As I understand it, there is no dispute that these accounts must, as between the proper parties, be ultimately adjusted, but the question at once emerged whether the right party to adjust the accounts with the Bank of Egypt is not the liquidator appointed as I have above stated. The matter has been brought to a head by the settlement of two preliminary issues, and these issues now come before me for trial. The issues are as follows: (i) whether the plaintiff bank has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated; (ii) if the plaintiff bank has not so ceased to exist, whether the plaintiff bank has authorised this action to be brought.

Since the issues were settled, the liquidator appointed in accordance with the law, as administered by the *de facto* government in Ethiopia, has been added as a party. In my view, as already stated, of the facts and the law, I must on these issues make declarations to the following effect: (i) that the plaintiff bank has, under or by virtue of the laws of the country under which it was incorporated, been dissolved, and has accordingly ceased to exist, except in so far as may be necessary for the liquidation of its affairs; (ii) that this action, having been brought otherwise than by or under the authority of the defendant Liguori, the duly constituted liquidator of the plaintiff bank, has not been authorised by the plaintiff bank.

Motion to stay all further proceedings granted. Costs of the Bank of Egypt and the defendant Liguori to be taxed as between party and party, including the costs of the issue, and to be paid by the solicitors who issued the writ.

Solicitors: *Wordsworth, Marr Johnson & Shaw* (for the Bank of Ethiopia); *Norton, Rose, Greenwell & Co.* (for the National Bank of Egypt); *Park Nelson & Co.* (for Liguori).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re GLYN VALLEY TRAMWAY CO., LTD.

[CHANCERY DIVISION (Simonds, J.), **April 22, May 6, 1937.**]

Companies—Statutory company—Liquidation—Priority among creditors—Debenture holders—Debentures created on undertaking and future calls on shareholders.

A statutory company, which had issued debentures upon the undertaking of the company and all future calls on shareholders, went into liquidation. The company's unsecured creditors claimed to rank *pari passu* with the debenture holders :—

HELD : although the debenture holders could not have appointed a receiver or manager or otherwise have interfered with the continuance as a going concern of the company, it being an undertaking created by statute, once the company had ceased to be carried on as a going concern, the debenture holders were entitled in its liquidation to be paid in priority to the unsecured creditors.

[EDITORIAL NOTE. In the case of an ordinary limited company a debenture holder can, subject to the terms of his debenture, appoint a receiver, but in the case of a company carrying on a public undertaking it is clearly impossible to allow the public to be inconvenienced by the cesser of the undertaking in that way. If, however, the undertaking has ceased to be carried on as a going concern and is in process of being wound up, the debenture holder then occupies the usual position of a secured creditor and must be paid in priority to unsecured creditors.

AS TO DEBENTURES OF STATUTORY COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 53, 54, para. 89 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1186, 1187, Nos. 8409-8420.]

Cases referred to :

(1) *Gardner* v. *London, Chatham & Dover Ry. Co.* (*No.* 1), (1867), 2 Ch. App. 201 ; 10 Digest 1181, *8375* ; 36 L.J. Ch. 323 ; 15 L.T. 552.

(2) *Furness* v. *Caterham Ry. Co.* (1859), 27 Beav. 358 ; 10 Digest 1187, *8416*.

(3) *Re Woking Urban Council* (*Basingstoke Canal*) *Act*, 1911, [1914] 1 Ch. 300 ; 10 Digest 1164, *8246* ; 83 L.J. Ch. 201 ; 110 L.T. 49.

(4) *Re Hull, Barnsley & West Riding Junction Ry. Co.* (1888), 40 Ch. D. 119 ; 10 Digest 1187, *8240* ; 58 L.J. Ch. 205 ; 59 L.T. 877.

(5) *Re Panama, New Zealand, & Australian Royal Mail Co.* (1870), 5 Ch. App. 318 ; 10 Digest 744, *4641* ; 39 L.J. Ch. 482 ; 22 L.T. 424.

(6) *Marshall* v. *South Staffordshire Tramways Co.*, [1895] 2 Ch. 36 ; 10 Digest 1191, *8450* ; 64 L.J. Ch. 481 ; 72 L.T. 542.

SUMMONS to determine whether certain debentures or some, and, if so, which of them, constituted a charge upon the undertaking and assets of the company, or on some, and, if so, on what part thereof, and how the charges should rank as between themselves.

W. Geddes for the liquidator.

Lionel Cohen, K.C., and *T. D. D. Divine* for Col. Middleton, the holder of a rentcharge.

Cecil W. Turner for the Eagle Star & British Dominions Insurance Co., Ltd., mortgagees of the rentcharge.

Fergus Morton, K.C., and *C. Cozens Hardy Horne* for the debenture holders prior to the date of the rentcharge.

Roger W. Turnbull for the debenture holders after the date of the rentcharge.

Cohen, K.C.: This company is a statutory company, and the charge conferred by the debentures is a charge upon the fruits of the tree, and it has no concern over the particular assets, whether they are surplus land, or money, or chattels, in a winding up. The company has been registered under the Companies Act, 1929, Part IX, but such registration cannot affect the matter. The company could, after that registration, have created a charge on the whole undertaking, but the legal effect of a charge previously made cannot be affected by registration under Part IX. Having regard to the nature of a statutory company, and the fact that this is a statutory company, incorporated by special Act, which incorporated general Acts which do not contemplate winding up, the charge is in reality a charge only upon the profits of the undertaking. The winding up provisions of the Companies Act, 1929, provide what the liquidator is to do with the money. If it were held that the charge created by these debentures were a charge upon the proceeds of the undertaking, the liquidator would be under a statutory duty. The Companies Clauses Consolidation Act, 1845, contains the provisions as regards calls. The court should interpret the word " calls " as meaning calls made by the company as a going concern, and not calls made by the liquidator. The charge is a charge on a going concern, and on its fruits, and, if it ceases to be a going concern, the charge lapses, and the debenture holders are in the same position as are any other creditors. [Counsel referred to *Gardner* v. *London Chatham & Dover Ry. Co.* (1), *Re Hull, Barnsley & West Riding Junction Ry. Co.* (4).]

Morton, K.C.: Prima facie, this charge is a floating charge on all the assets, and it crystallises on a winding up, and all that *Gardner's* case (1) decides is that, while the company is a going concern, debenture holders cannot interfere with it, because they have no specific charge on any of the assets. But, if there is a sale of the undertaking, it takes effect on the proceeds of sale. As the company is being wound up, the debenture holders are secured creditors. [Counsel also referred to *Re Hull, Barnsley & West Riding Junction Ry. Co.* (4), *Re Panama, New Zealand & Australian Royal Mail Co.* (5), *Marshall* v. *South Staffordshire Tramways Co.* (6).]

Simonds, J.: The Glyn Valley Tramway Co. was incorporated in 1870 under the Glyn Valley Tramway Act of that year, and, under that and subsequent Acts of the years 1878 and 1885, to which it is unnecessary to refer, it continued actively to carry on and operate a tramway in the county of Denbigh until 1935. In that year, as it had been unable, since 1932, to trade at a profit, it took the steps which resulted in its liquidation, and in these proceedings. It first obtained registration under the Companies Act, 1929, Part IX, so that all the relevant provisions of that part of the Act came into operation. It then passed an extraordinary resolution on Oct. 7, 1935, that the company should be voluntarily wound up, and that one George Henry Haswell should be the liquidator. In the winding up proceedings, the liquidator has applied to the court to determine, amongst other questions, the question what are the rights *inter se* of the holders of debentures of the company and its unsecured creditors. The debentures of the company have, it is conceded, been validly created and issued under the provisions of one or other of the A Acts of 1870, 1878, and 1885, which incorporated the Companies Clauses Act, 1863, Part III (relating to debenture stock). They are in the form which is familiar in such kinds of undertaking, and are intended to secure an aggregate principal sum of £8,500, the whole of which, together with some arrears of interest, is outstanding. By each debenture B the company, in consideration of the sum paid to it, assigns to the lender, his executors, administrators and assigns, the undertaking of the company and all future calls on shareholders and all the tolls and sums of money arising by virtue of the said Acts, and all the estate, right, title and interest of the company in the same to hold to the lender, his executors C administrators and assigns until the said sum, with interest at the rate therein mentioned, be satisfied. It then provides for payment of the principal at the end of a certain number of years, and for payment of interest half-yearly on stated days.

The liquidator, having ceased to carry on the undertaking, and having D now, so far as they are realisable, realised the assets of the company, except that he has still to get in some debts and to call up certain uncalled capital, has, and will have, a sum insufficient to satisfy the claims of debenture holders and unsecured creditors of the company, and, in these circumstances, the latter claim that they are entitled to rank *pari passu* E with the former against the assets of the company available in the winding up. It is this claim, involving as it does the proposition that the debentures do not confer any priority upon their holders, that I have to examine. The claim is one that, upon its face, appears to be untenable, for the debenture, although it does not use the word "charge," is in a form F apt to create in its holder an equitable interest which must rank before an unsecured creditor. That which is assigned is the undertaking of the company and all future calls on shareholders. "Undertaking" is a word of the widest import, meaning the undertaking or works, of whatever nature, authorised by the several special Acts to be executed: G see the Companies Clauses Consolidation Act, 1845, s. 2, which is incorporated with the special Acts. If the debenture creates an equitable interest in the undertaking and works, so must it also in the proceeds of sale in the hands of the liquidator.

It is urged, however, on behalf of the unsecured creditors, that I cannot H give to the debenture the meaning and effect which it plainly appears to me to bear, because I am debarred from doing so by authority which is binding on me. The argument is founded on the well known decision of CAIRNS, L.J., and TURNER, L.J., in *Gardner* v. *London, Chatham & Dover Ry. Co.* (1). That case decided points of importance, which are, I think, correctly stated in the headnote, viz., that a mortgage debenture in such a form as that before me does not give the holder a specific charge upon the lands of the company or the proceeds of sale of them so as to entitle him to an order for a receiver of the sale moneys or interim rents, that the "undertaking" of the company which is pledged in or assigned by such a debenture is the going concern created by the Act, which cannot be broken up or interfered with by the debenture holder, and that the court will not appoint a manager of a railway. But these were matters which arose in regard to a company which was still actively carrying on the undertaking for the purpose for which it had been incorporated by statute, and it would, in my judgment, give to the decision an effect which it was never intended to have if I took from their context certain observations of Cairns, L.J., in particular, and upon them founded the proposition for which the unsecured creditors here contend, namely, that the debenture, upon its true construction, does not create a charge upon the proceeds of sale of the undertaking or any assets in the winding up of the company. As I read *Gardner's* case (1), it is directed to nothing else than to ascertain the rights and remedies of the debenture holder while the statutory company is a going concern, and determines that while it is a going concern it cannot be interfered with by the exercise of a mortgagee's rights. It is for one and the same reason that the court will not appoint a manager, and that the mortgagee will not be allowed to intervene, or, as Cairns, L.J., puts it, the undertaking is to be treated as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and pay the debt. But that case did not purport to determine what the result would be if the axe were lawfully laid at the foot of the tree. On the contrary, the undertakers had not taken, and did not contemplate taking, the steps which were necessary to be taken before they could lawfully abandon their undertaking.

A case which more nearly approaches that which I have to decide is *Furness* v. *Caterham Ry. Co.* (2), where, a railway undertaking having been sold under the authority of an Act of Parliament, it was held that the debenture holders were entitled to the proceeds of sale in priority to judgment creditors of the company. That case was cited, and not disapproved, in *Gardner's* case (1), and was cited and approved in *Re Woking Urban Council* (*Basingstoke Canal*) *Act*, 1911 (3), at p. 314, where Swinfen Eady, L.J., speaking of similar debentures, said :

> Again it has been decided that a holder of such mortgage debentures "of the undertaking" is not entitled to foreclosure or sale : *Furness* v. *Caterham Ry. Co.* (2) ; although if the property be sold and conveyed under the authority of an Act of Parliament, the debenture holders are entitled to be paid out of the proceeds of sale.

It cannot, in my judgment, make any difference whether the undertaking is sold as a whole, for a lump sum, or whether it is realised piecemeal in the liquidation of the company. In the latter case, as in the former, I can rely upon the authority that I have cited for the proposition that the debenture holders are entitled to priority.

It may be further observed that the debenture purports to assign, not only the undertaking of the company, but also all further calls on shareholders, and, while it is not clear, upon the evidence, from what source the liquidator has obtained the moneys that he has in hand, some substantial sums he has, or will have, from the calls made, or to be made, upon the shareholders. This sum, as I have said, is specifically assigned by the debenture, and, though it may be that, under the Companies Clauses Act, 1845, s. 43, the company could, notwithstanding the assignment, receive and apply calls for the proper purposes of its undertaking, yet this provision can have no operation when the undertaking has been in effect abandoned. Thereupon the assignment must, in my judgment, be effective to give to the debenture holder the right which it purports to give him in respect of uncalled capital.

For these reasons, I shall declare that the debenture holders are entitled, in the liquidation of the company, to be paid in priority to the unsecured creditors. There was at one time some question raised as to how they, the debenture holders, ranked *inter se*. That has now gone; they rank *pari passu*, and will be dealt with accordingly.

Solicitors: *Lovell, Son & Pitfield*, agents for *Walker, Smith & Way*, Chester (for the liquidator); *Lee & Pembertons* (for Col. Middleton); *Hammond & Richards* (for the Eagle Star & British Dominions Insurance Co., Ltd.); *Rider, Heaton, Meredith & Mills*, agents for *Birch, Cullimore & Co.*, Chester (for the debenture holders).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BEAUCHAMP *v.* NATIONAL MUTUAL INDEMNITY INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Finlay, J.), **March 24, 1937.**]

Insurance—Accident—Liability to third parties—Demolition—Use of explosives—Warranty—Change of risk.

A builder who had not previously undertaken any demolition work took out a policy of insurance to cover the demolition of a mill. He was asked in the proposal form "are there any explosives used?" and answered "no": and agreed that his answer should form the basis of the contract between himself and the assurer. The policy of insurance contained a condition "the insured shall take reasonable precautions to prevent accidents." The plaintiff proceeded to demolish the mill, and in the course of such demolition used explosives. Three persons were killed by falling masonry and upon a claim being made under the policy, the insurance company repudiated liability:—

HELD: (i) the denial of the use of explosives amounted to a warranty that they would not be used.

(ii) even if it amounted to a mere description of the risk to be insured, the cause or contributing cause of the accident was the use of explosive.

(iii) there had been a change in the risk, for the company insured a non-explosive demolition.

[EDITORIAL NOTE. This case considers the application of well known principles of insurance law to insurance against accidents in the course of the demolition of a building. As an authority the judgment is not so conclusive as it might otherwise be, as the real decision is largely upon the facts, but the expression of opinion upon a field of insurance that has not previously been covered is of some interest.

As to Accident Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 542-544, paras. 862-865 ; and for Cases, see DIGEST, Vol. 29, pp. 403, 404, Nos. 3191-3194.]

Cases referred to :

(1) *Provincial Insurance Co.* v. *Morgan & Foxon*, [1933] A.C. 240 ; Digest Supp. ; 102 L.J.K.B. 164 ; 148 L.T. 385.

(2) *Dawsons, Ltd.* v. *Bonnin*, [1922] 2 A.C. 413 ; 29 Digest 309, *2553* ; 91 L.J.P.C. 210 ; 128 L.T. 1.

(3) *Thomson* v. *Weems* (1884), 9 App. Cas. 671 ; 29 Digest 356, *2871*.

(4) *Denison* v. *Modigliani* (1794), 5 Term Rep. 580 ; 29 Digest 155, *1105*.

Action upon a policy of insurance against liability to third parties arising out of accidents in the course of demolition work. The facts and arguments are fully stated in the judgment.

G. J. Lynskey, K.C., and *Denis Gerrard* for the plaintiff.

D. P. Maxwell Fyfe, K.C., and *Harold Rhodes* for the defendant company.

Finlay, J. : This action is one on a policy of insurance, and it has reference to a most disastrous accident, which occurred at Alexandra Mill, at Oldham, on July 15, 1936, whereby three persons lost their lives. The plaintiff is a builder, who had not previously carried out demolition work, but he acquired this mill and was minded to demolish it. A great deal turns on the proposal form. It refers to the particulars of the work, which was said to be " demolishing and building," and the building is set out as being " the Alexandra Mill at Oldham." The usual series of questions, more or less in the usual form, was put and answered, and the most important for the present purpose is No. 3 :

> Are any acids, gases, chemicals, explosives, or any other dangerous preparations used in your business ?

That was answered " No." The plaintiff signed the proposal form, and he said that he agreed that his declaration should be the basis of the contract between himself and the company. Upon that, a policy was issued by the company, and it contained a memorandum to this effect :

> It is hereby understood and agreed notwithstanding anything herein contained to the contrary, that the within insurance is only to indemnify the insured in respect of the work involved in the demolition of the building previously known as Alexandra Mill off Oldham Road, Oldham, and that such indemnity shall continue until the completion of such work or the date of expiry of this policy within-mentioned, whichever date shall precede the other.

The schedule shows that the insurance is in respect of employees engaged in demolition at Alexandra Mill. The date of the policy was Oct. 31, 1935.

The insurance policy is a policy indemnifying the insured in respect of injury by accident or disease, as described in Sched. 3 to the Workmen's Compensation Act, and it covers the Fatal Accidents Act, the

Employers' Liability Act, the Workmen's Compensation Acts and common law liability. One condition, and one condition only, it is convenient to read now, for something which will have to be said about it later. It is No. 4:

> The insured shall take reasonable precautions to prevent accidents, and to comply with all statutory obligations.

The defendant company repudiated liability, and four points were taken. The first was that the answer which I have already read as to the use of explosives was, in its nature, promissory, and was, therefore, a warranty. The second point taken was that, even if it was not regarded as a warranty, but merely as descriptive of the risk, the cause, or a contributing cause, of the disaster which happened was the use of explosives. The third point, and closely connected with the others, was that there was a change in the risk, and the fourth point (quite a different point) was that there was a breach of condition 4. These matters involve some examination of the evidence, and, though they rather run into each other, they are, no doubt, distinct points. The first is as to this answer as to the use of explosives. I have come to the conclusion (although I regard this point as not free from difficulty) that on that point the defendant company is right, though I do not think it essential to base my decision upon that, for, as I shall explain in a few moments, I think it is also right on the second point; but, as the first point was argued as a point of some importance, it is desirable that I express the view which I form on it.

As to the law, it is not necessary that I should say much. The latest case is the decision in the House of Lords in *Provincial Insurance Co.* v. *Morgan and Foxon* (1) which has a general statement of the law; I may read the passage in the opinion of LORD WRIGHT, at p. 253, because it really summarises the law on this matter. LORD WRIGHT says:

> Before examining these provisions in detail, certain principles laid down in the authorities may be referred to. It was decided by this House in *Dawsons, Ltd.* v. *Bonnin* (2) that words in a policy analogous to those in the present policy, stating that "the proposal shall be the basis of the contract and be held as incorporated therein," are words apt to convert answers to questions into conditions of the policy. The answer there in question was to the question "state full address at which the vehicle will usually be garaged." By a pure inadvertence a wrong address was given. Neither at the inception of the policy period, nor at any subsequent date, nor at the time of the loss had the vehicle been garaged at that address. It was held by this House that the assured could not recover because the assured had broken the condition in the policy as to the usual place where the car was garaged. It was held that the incorporation of the answer into the contract as its basis constituted it a condition: it was not relevant to consider whether the matter of question and answer was or was not material. That decision involved an extension of the earlier judgment of this House, in *Thomson* v. *Weems* (3), where the policy expressly provided that "if anything averred in the declaration . . . shall be untrue, this policy shall be void, and all moneys received by the said company in respect thereof shall belong to the said company for their own benefit." The later case held that the same effect resulted from the word "basis." On the other hand it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of sale of goods), though it must be strictly complied with, must be strictly though reasonably construed. In the present case the appellants do not allege that there was any concealment or misrepresentation

> nor do they complain of any of the other answers. The relevant answer, which I have quoted above, does, I think, refer to the future and is, in my opinion, of a promissory nature and is apt to create a warranty or condition.

That lays down in a convenient form the general law. It is necessary here to ascertain what was being insured and what was being referred to. The plaintiff, as I mentioned, was a builder. He was a person who was not doing any other demolition work. This insurance was solely in respect of the one isolated demolition job, so to speak, at this Alexandra Mill, at Oldham, and it seems to me, therefore, that the proposal form must inevitably have reference to the future, because, though, in fact, the plaintiff was in business, he was not insuring anything with regard to his general business, but was insuring in respect only of this special job in the future. Accordingly, it seems to me that the whole of the proposal must be regarded as having reference to a future event, and when, in these circumstances, he is asked, "Are any acids, gases, chemicals, explosives, or any other dangerous preparations used in your business," that does not, of course, mean his present business of a builder: it means the business on which he is going to embark, the business of demolition. Accordingly, it seems to me that it does have the nature of a warranty or a condition. I think that the true view to take is that he was insuring what I may conveniently call (the phrase is not elegant, but intelligible) a non-explosive demolition. I think the risk, where the demolition is an explosive one, is greater than where it is a non-explosive one, and what he was insuring was, I think, a non-explosive demolition. It is, perhaps, significant that Mr. Beauchamp made it quite clear to me that, but for one circumstance, as to which he was clearly mistaken, he would have thought it right to inform the insurance company with reference to the use of explosives. That point was this. He seemed to think that it was not necessary so to do because the explosives were not being used by him, but by a gentleman whom he had employed for the purpose. Quite clearly, that could make no difference. I cannot resist the view that, in the first place, this was, as I think, a warranty. If it is necessary to go into the matter—I do not think it is at this point, though I shall say something about it later—I should say that there was a change in the risk, and, as to what, the evidence of Mr. Beauchamp may usefully be looked at.

On the evidence I hold that this series of explosions caused, or contributed to cause, the disaster. That is sufficient to dispose of the case, but I am anxious to cover, though briefly, the whole of the ground. A point was raised which really, as I think, runs into the other matters; it is rather difficult to consider these things entirely separately, but a point was raised, to some extent at all events as a separate point, that there was a change in the risk, and on that my attention was called to a decision of *Denison* v. *Modigliani* (4), where the question which arose was this. A vessel was insured as a merchant vessel, and then she took on board a letter of marque, and the point was whether that avoided the insurance. The judgment was given by Lord Kenyon, C.J., and Grose, J., and it may be convenient to read a short passage from the judgment of Grose, J., who says at p. 582:

> The question turns on the intention of the parties to the contract; and therefore it is material to consider what was intended to be insured. The risk of insuring a mere trading ship, is very different from that of one carrying letters of marque: the premium is certainly higher in the latter than in the former case.

If I apply the language of Grose, J., to the present case, it appears to me to be certain that the risk of insuring a demolition where there is no explosion going on is entirely different from the risk of insuring a demolition where there is explosion. It is difficult, I think, to doubt that. It is, perhaps, worth, on this point, just referring to the evidence which was given by Mr. Coope, an agent of the insurance company, who was asked:

> This may or may not be important: if there had been explosives used, would you have recommended acceptance?
> (*A.*) I should definitely have turned it down.
> (*Q.*) Would you, or your company, have touched it?
> (*A.*) My company would not have entertained it at all.

Whether it would have entertained it or not, I cannot doubt that the view taken by an insurance company of a case where explosives were to be used would be widely different from that taken of a case where explosives were not to be used.

There remains another matter, which I do not propose to decide, for this reason, that, in my opinion, having heard Mr. Lynskey and Mr. Maxwell Fyfe upon it, it raises a question of much difficulty, and it is, I think, undesirable that I should, at the end of a judgment, deal with a matter which certainly is a matter of difficulty, and requires careful consideration, and which, if my answers to the earlier questions are, or if any of those answers is, correct, does not arise. The fourth condition I have already read, and it was said by Mr. Maxwell Fyfe that, on various grounds, there was a breach of that condition; that is to say, that the insured had failed to take reasonable precautions to prevent accidents. I was impressed by the argument of Mr. Lynskey, who pointed out to me that some, at least, of the matters insured against are matters involving negligence, and that, if condition 4 were construed without any limitation, it would, at all events as to that part of it which has reference to taking reasonable precautions to prevent accidents, be difficult to avoid the view that, wherever there was a liability established at common law, or under Lord Campbell's Act, it would inevitably follow that the policy could not attach. That is a matter, I repeat, to be fully considered in some future case, and I do not propose to decide it now but, as it was to some extent relied upon, it is perhaps proper that I should, although only in a sentence or two, indicate the view I have formed as to the four points which Mr. Maxwell Fyfe took. As to the first, McCormick, in my opinion, was not a qualified foreman. I think he was a very decent man, and that he was probably a very good and a very intelligent labourer, but he was a young man, and I am satisfied, on the evidence, that he had not gone through the training necessary to enable him to be a foreman responsible for work so anxious and difficult as the demolishing of a mill. The evidence was that a foreman required to have a knowledge of stresses, and things of that sort, the weight which a floor would bear, and so forth. I do not think that McCormick had that sort of A training, and, from that point of view, I should agree, on the second point, that insufficient precautions were taken.

On the third and fourth points, I think there was more débris than there ought to have been, and no doubt, so far as there was more débris than there ought to have been, that would be a cause contributing to the B accident. Naturally, a thing, if it were heavily weighted would tend to fall more readily than it would otherwise. The same conclusion applies to the withdrawal of support. I think that support was improperly withdrawn. With regard to 3 and 4 of these matters, I think Mr. Maxwell Fyfe really conceded that they would be purely matters of negligence, C and that he would be in considerable difficulty as regards those, and the question is not free from difficulty with regard to the first and second points, but, I repeat, I am not deciding the case upon that ground. I think the question of how to reconcile condition 4 with the risk insured against is a difficult matter, which may have to be raised in some future D case.

In this case, I decide, first, that the answer to question No. 3 was promissory, and was a warranty; secondly, that the risk was, in the events which happened, entirely changed and (and this is based upon the view which I take of the evidence) that the series of explosions did, E by their cumulative effect, contribute to causing the disaster which happened. Upon these grounds, I shall have to decide the case in favour of the defendant company.

Judgment for the defendant company with costs.

Solicitors: *J. Arnold Brierley & Robinson*, Oldham (for the plaintiff); F *Boote, Dutton & Whittaker*, Manchester (for the defendant company).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re SHUKER'S ESTATE, BROMLEY *v.* REED.

[CHANCERY DIVISION (Simonds, J.), **May 7, 1937.**]

Powers—Life interest with power to resort to capital—Power to convert to own use—Gift over—Declaration of conversion.

A A testator appointed his wife to be his sole executrix and trustee, and after her death his two nephews to be the executors and trustees of his will. He gave all his property, both real and personal, to his wife, her heirs, executors, administrators and assigns respectively, upon trust to deal with the same by way of conversion, realisation, investment or otherwise as she in her absolute discretion might think proper, and without regard to any restriction or limitation of law or otherwise imposed upon trustees or executors, and to retain the income thereof B for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she might think fit of the capital of the testator's real and personal estate, and after her death the testator gave all his said property, or so much thereof as should not have been converted by his wife to her own use, to his trustees upon trust for sale and conversion for the benefit of themselves and other C nephews and nieces. Upon the death of the testator, his widow caused a statement to be drawn up in which she set out the property and the terms of its administration, stated that the debts and funeral expenses had been paid and declared that she had converted the whole of the property to her own use:—

HELD: the will gave the widow a life interest in and a general power of appointment over the testator's estate. The declaration was a D sufficient exercise of this power, and the whole had become vested in the widow absolutely.

[**EDITORIAL NOTE.** The previous authorities upon this aspect of the law of wills have mostly arisen upon home-made wills. In the present case the will was professionally drawn and not only is the construction of the will of interest, but also E the manner in which the power of appointment was exercised. It becomes clear that if the power of the widow to appropriate the whole property to her own use is to be curtailed, it is in practice necessary to place the discretion to appropriate capital to the use of the widow in the hands of trustees.

AS TO LIFE INTEREST WITH POWER TO RESORT TO CAPITAL, see HALSBURY, Vol. 23, pp. 7, 8, para. 14; and FOR CASES, see DIGEST, Vol. 37, pp. 389-396, F Nos. 34-87.]

Cases referred to:

(1) *Re Richards, Uglow* v. *Richards,* [1902] 1 Ch. 76; 37 Digest 396, *86*; 71 L.J. Ch. 66; 85 L.T. 452.

(2) *Re Pedrotti's Will* (1859), 27 Beav. 583; 37 Digest 395, *81*; 29 L.J. Ch. 92; 1 L.T. 390.

G (3) *Re Ryder, Burton* v. *Kearsley,* [1914] 1 Ch. 865; 37 Digest 396, *87*; 83 L.J. Ch. 653; 110 L.T. 970.

(4) *Cuninghame* v. *Anstruther* (1872), L.R. 2 Sc. & Div. 223; 37 Digest 420, *303*.

(5) *Scrope's Case* (1612), 10 Co. Rep. 143 *b*; 40 Digest 549, *913*.

(6) *Scott* v. *Josselyn* (1859), 26 Beav. 174; 37 Digest 395, *80*; 28 L.J. Ch. 297; 32 L.T. O.S. 250.

H (7) *Pennock* v. *Pennock* (1871), L.R. 13 Eq. 144; 37 Digest 396, *84*; 41 L.J. Ch. 141; 25 L.T. 691.

(8) *Re Thomson's Estate, Herring* v. *Barrow* (1880), 14 Ch. D. 263; 37 Digest 396, *85*; 49 L.J. Ch. 622; 43 L.T. 35.

ORIGINATING SUMMONS. The plaintiffs were nephews of Charles Beddoes Shuker, being sons of a sister of his of the whole blood, and they were his two eldest nephews residing in England at the death of the widow of Charles Beddoes Shuker, and, as such nephews, they claimed to be the present trustees and executors appointed by the will of Charles Beddoes Shuker and entitled to or interested in the capital of his estate under the trusts of the will. The defendants were the executors of Jane Shuker, the widow, and the original executrix and trustee of the will of Charles Beddoes Shuker, and, as her executors, they claimed to be entitled to the whole of the capital of Charles Beddoes Shuker's estate, except certain named chattels.

The plaintiffs claimed a declaration that they were the present trustees of the will of Charles Beddoes Shuker, and that, as such, they were entitled to the whole of his residuary estate, except such part or parts (if any) as his widow was entitled to, and did convert to her own use under a power in that behalf conferred by her husband's will. Also, a declaration that the said widow had no power to appropriate any of the capital of the said estate to herself, and, in particular, that a document dated Dec. 22, 1921, by which she purported to appropriate or convert to herself the whole of her husband's residuary estate, and all the investments and other assets representing the same, and any acts purporting to give effect to such documents, were and are unauthorised and ineffectual, and that the defendants, as her executors, were bound to account for and to pay or transfer to the plaintiffs or other the trustees of the said will all the moneys, investments and other assets constituting or representing or which ought to constitute or represent such estate save only any part of the same which the widow was entitled to and did effectually convert to her own use under the said power. The plaintiffs also asked that it might be determined what was the effect of the provision in the will giving such power as aforesaid to the widow, and, in particular, whether (*a*) such power authorised her from time to time to expend such part (if any) of the capital of the estate as was then actually required for her reasonable maintenance and benefit so far as her income was insufficient for this purpose, and (*b*) such power authorised any further expenditure or appropriation of capital by her for any and what other purpose or to any and what extent. Also, that it might be determined what if any portions of the testator's estate the widow did effectually convert to her own use under the power aforesaid, and that the defendants deliver an account.

The document, dated Dec. 22, 1921, above mentioned concludes with the words :

> Mrs. Shuker hereby declares that she has converted the whole of the property to her own use and the necessary transfers of securities have been or are about to be completed.

Fergus Morton, K.C., and *Wilfrid Hunt* for the plaintiffs.

H. B. Vaisey, K.C., and *N. C. Armitage* for the defendants.

Morton, K.C. : The property was given to the wife as trustee free from legal limitations for the purpose of conversion as she should think fit. On the true construction of the will, the widow was given power to convert the property to her own use when she required any of the capital. She was given power to sell and use such parts of the estate as she from time to time might need. The other cases have not used the word "convert." In the present case, the will has evidently been carefully drawn, and there is a gift over of what she does not use. The testator did not intend to give his wife a general power of appointment. [Counsel referred to *Re Richards, Uglow* v. *Richards* (1), *Re Pedrotti's Will* (2), *Re Ryder, Burton* v. *Kearsley* (3), *Scott* v. *Josselyn* (6), *Pennock* v. *Pennock* (7), *Re Thomson's Estate, Herring* v. *Barrow* (8).]

Vaisey, K.C.: There is sufficient conversion of property by putting it at one's disposal. The measure of the depletion of the capital was to be the interests of the wife at her discretion. There was an intention to give her a general power of appointment or, alternatively, an absolute bequest. The widow had a power of disposition over this property, whether she exercised the power of appointment or not. [Counsel referred to *Re Richards, Uglow* v. *Richards* (1) and *Re Ryder, Burton* v. *Kearsley* (3).]

SIMONDS, J.: Mr. Charles Beddoes Shuker made his will on Feb. 27, 1919. He died on Jan. 17, 1921. By his will he appointed his wife, Jane Shuker, to be his sole executrix and trustee, and probate was duly granted to her on Apr. 19, 1921. A beneficial interest was given to her by the testator, and some difficulty arises, as, after having appointed his wife to be his sole "executor" and trustee, he went on to make this provision:

> and after her death I appoint to be executors and trustees of this my will (hereinafter referred to as my trustees) the two eldest nephews of mine residing in England at the time of the death of the survivor of myself and my said wife and being sons of any brother or sister but not of any half sister of mine.

The plaintiffs in these proceedings answer to the description of the two eldest nephews, as set out in the will. The testator then went on to give certain directions with regard to the sale of certain realty belonging to him at Launceston in Cornwall, and, subject to his wife's interest therein, bequeathed certain chattels to Vincent Bromley, who is one of the plaintiffs, free of duty. Then he made this bequest:

> Subject as aforesaid I give devise and bequeath all my property whatsoever and wheresoever both real and personal unto and to the use of my said wife her heirs executors administrators and assigns respectively upon trust to deal with the same by way of conversion realisation investment or otherwise as she in her absolute discretion may think proper and without regard to any restriction or limitation of law or otherwise imposed upon trustees or executors—

Let me pause there to say that no beneficial interest there passed, but the wife was given the entire powers of administration. The will goes on:

> and to retain the income thereof for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she may think fit of the capital of my said real and personal estate or the investments or sale proceeds thereof.

It is to the true meaning of these words that I have to give effect in my decision. The will goes on:

> If my said wife shall predecease me or if she shall survive me then from and after her death and subject to the foregoing provisions I give devise and bequeath all my property whatsoever and wheresoever both real and personal or so much thereof as shall not have been converted by my said wife to her own use unto and to the use of my trustees—

they would be the two nephews who satisfy the conditions to which I have referred, and the residue is given to them upon trust for sale and conversion; and the beneficial trust is in favour of:

> such one or more as shall be living at my death and shall have attained or shall thereafter attain the age of 21 years or in case of females marriage of the following persons that is to say my nephews and nieces children of any brother or sister of mine but not of any half sister of mine.

Those are the whole of the relevant provisions of the will. What took place was this. The widow, being the sole executor and trustee, as appears by the correspondence was minded to take complete possession of the whole of the estate. She considered the words of the will gave to her a general power of appointment, during her lifetime, over the whole of the residuary estate, and forthwith she took such steps as she was advised were necessary and adequate to effect her purpose. The first question is: Had she a general power of appointment, on the true construction of this will? Secondly, assuming that she had, did she exercise such power? Dealing with the first point, my own inclination was that this was not a general power of appointment, but I have been referred to authorities, and, although they are very different wills, and in different language, and differ to some extent from the will which I have to construe, they cannot be disregarded. It appears to me that in language so similar the decisions ought to be followed by me in this court. The first of the two cases to which I refer in particular is *Re Richards, Uglow* v. *Richards* (1). In that case, one regarding a home-made will, it is true, the testator gave the income of all his real and personal estate and his effects to his wife, and also directed that, in case the income was not sufficient, she was to use such portion of such real and personal estate as might be expedient. Then he went on to say that what was left should be divided amongst certain residuary legatees. Upon the construction of that will, Farwell, J., said this at p. 77:

> Unless I am bound by *Re Pedrotti's Will* (2), I have no doubt that the wife has a general power of appointment over the capital during her life.

If the words of that will are sufficient to confer upon the widow a general power of appointment I myself find it impossible to hold here, where the widow has power to convert to her use from time to time such part or parts of the capital as she may think fit, that these words are not adequate to confer a general power of appointment over the capital. Farwell, J., goes on to distinguish *Re Pedrotti's Will* (2), and it is an authority which I consider binding upon me in regard to the direction of the present will. A more important case is *Re Ryder, Burton* v.

Kearsley (3), which came before WARRINGTON, J. That case also is one of a home-made will. The testatrix made a residuary devise and bequest and she directed that her trustees should stand possessed of the residue upon trust, so far as it is here material to state the provisions of the will, and should pay two-thirds of the income to her husband for his own use and benefit until he should re-marry or die. The will proceeded :

> I authorise my husband so long as he is entitled to the income of part or of the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit.

Subject thereto her trustees should hold such estate for such charitable purposes as were indicated, contemplating that, after the death of the person to whom this estate was given, there would, or might be, an estate which could be subject to her disposition. Upon that will WARRINGTON, J., said at p. 868 :

> I do not think that it gave him any power of appointment by will, but in my opinion it did give him power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime.

That is, on the construction of that will, the judge found that there was a general power of appointment. Then the judge went on to deal with *Re Richards*, *Uglow* v. *Richards* (1), and other cases. The words in that case are so similar, and the context in that case is so similar, that I must regard it, if not as an authority binding upon me, at least as a guidepost. Accordingly, I must hold that the language of the will in the present case was sufficient to confer a general power of appointment, and not the less so because the widow was the "sole executor and trustee." It would be an undue refinement to distinguish this case from those I have cited because in this case the widow was the sole executor and trustee and in each of the other cases the person having the power was not the sole executor and trustee. In my judgment, the widow in this case had a general power of appointment. Did she exercise that power ? The evidence is that, being minded to make the property her own, she caused to be drawn up a statement in which the administration of the property is described. She states what the property is, and that the debts and funeral expenses have been paid, and, after some details, ends by saying :

> Mrs. Shuker hereby declares that she has converted the whole of the property to her own use.

The whole of the legal assets of the estate was already in her possession. She had taken or was about to take the necessary steps to perfect her title. It appears to me that, coupling this statement with her acts, I can come to no other conclusion than that she has exercised her general power, and done everything necessary to exert complete dominion over the estate, and, whether any act was necessary in her executorial capacity or not, she asserted, in language that was not ambiguous, that she had converted the property to her own use. It is not necessary, where no formality is prescribed in the document creating the power, that any formality should be observed: see Farwell on Powers, 3rd Edn., p. 201, where it is stated:

> No technical words, however, are necessary to render the execution of a power effectual, if the intention be clear.

The author then cites certain words from *Cuninghame* v. *Anstruther* (4), in which Lord Chelmsford said at p. 233:

> As Lord St. Leonards says in his book on powers, a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears. And the reason of this is given in *Scrope's Case* (5), to which he refers, *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*

Here, if there was anything lacking in the words, the deeds and acts of the appointor make it clear what her intention was. With regard to specific assets of the estate, with regard to stocks and shares, whether they remain the same now or whether they have been changed, she did all that was necessary to perfect her title, making it clear that she did so, and, with regard to certain other items of the property and certain mortgages, she transferred those assets to herself, it may be, by superfluous acts in law. But they were acts of law which made it clear beyond all doubt as to what was her intention. Accordingly, I must hold that upon the true construction of the will a general power of appointment was thereby given to the testator's widow, and she duly and validly exercised that power and made the property her own. I shall make no order except that the plaintiffs pay to the defendants the costs of these proceedings.

Solicitors: *Gibson & Weldon*, agents for *R. Gwynne & Sons*, Wellington, Shropshire (for the plaintiffs); *Ravenscroft, Woodward & Co.*, agents for *Woollcombe & Yonge*, Plymouth (for the defendants).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SAVAGE *v.* NIGHTINGALE.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **April 30, 1937.**]

Workmen's Compensation—Industrial disease—Date of beginning of disease—Finality of medical referee's certificate on certified matters.

From June, 1935, the appellant was working for H. K. & F., Ltd. In Mar., 1936, he developed a rash, but continued in that employment at full wages until May 2, when he began to work for the respondent. He worked for the respondent until May 9, when he felt too ill to continue. On June 4 he obtained a certificate from the certifying surgeon who certified that he was suffering from dermatitis and gave May 9 as the date of the beginning of the disablement. The respondent appealed to the medical referee who decided that the appellant was, when examined by the certifying surgeon, suffering from dermatitis, but fixed Apr. 6, 1936, as the date on which the disease began. At that date the appellant was, as stated, working for H. K. &

F., Ltd., and receiving full wages. The appellant sought to recover compensation from the respondent:—

HELD: the medical referee's certificate was final and conclusive as to the date of the beginning of the disease and the appellant was not entitled to endeavour to displace that certificate by showing that on a certified matter it was not in accordance with the facts.

[**EDITORIAL NOTE.** It was here sought to establish that there can be no disablement at a time when a workman is earning full wages. But even in such a case if the medical referee has certified as to the beginning of the disablement, the date given by him is conclusive and cannot be displaced.

AS TO CERTIFICATE OF MEDICAL REFEREE, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 167, para. 354; and FOR CASES, see DIGEST, Vol. 34, pp. 468, 469, Nos. 3830-3834; and see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 523-527.]

APPEAL by the workman from an award made by His Honour JUDGE AUSTIN JONES in the Brighton and Lewes (Brighton) county court of Sussex.

The facts, which were not in dispute, are as follows: From June, 1935, the workman was working for a company called Henry King & Feaist, Ltd., at St. Leonards-on-Sea. In Mar., 1936, he developed a rash, but continued working at full wages until, on May 2, he left the employment of Henry King & Feaist, Ltd., and began work as a baker for the respondent, Nightingale, on May 3. He worked for Nightingale until May 9, when he felt too ill to continue. On June 4, he obtained a certificate from the certifying surgeon for the district, who certified that he was suffering from dermatitis and gave May 9 as the date of the beginning of disablement. The respondent appealed to the medical referee, who decided that the workman was, when examined by the certifying surgeon, suffering from dermatitis, but fixed Apr. 6, 1936, as the date on which the disease began, on which date the workman was in fact working at full wages for Henry King & Feaist, Ltd.

The workman having applied for arbitration, the county court judge decided that the medical referee's certificate was final and conclusive as to the date of the beginning of the disablement, and made an award in favour of the respondent.

The workman appealed.

F. A. Sellers, K.C., and *James MacMillan* for the appellant workman.

J. Alun Pugh for the respondent employer.

Sellers, K.C.: The medical referee having fixed as the date of the beginning of the workman's disablement a day on which he was in fact working at full wages, his certificate is a nullity, and cannot be final and conclusive.

SIR WILFRID GREENE, M.R.: Is there any authority for the proposition that a medical referee's utterance on a matter on which he is competent to certify can be challenged?

Sellers, K.C.: No; but here, on the date said by the referee to be that of the beginning of the disablement, the two essential requirements were not present: the disease was present, but it was not disabling. If the workman cannot proceed on the certifying surgeon's certificate for an accident occurring on May 9, he has to fall back on the persons who were his employers on Apr. 6. Accordingly, he would have to claim against Henry King & Feaist, Ltd., and the answer which they would make, and which would be good, would be that they could not be liable for compensation because they could show that the workman was actually earning full wages from them on Apr. 6, and until May 2. There can be no compensation without incapacity.

Pugh was not called upon.

Sir Wilfrid Greene, M.R.: In this case the appellant workman obtained from the certifying surgeon on June 4, 1936, a certificate to the effect that he was suffering from dermatitis, an industrial disease within the Workmen's Compensation Act, 1925, and that the disablement began on May 9, 1936, when he was in the employment of the respondent, Nightingale. On that day, he left his employment, being unable to continue, owing to the onset of the complaint. Before that, he had been working for Henry King & Feaist, Ltd., in whose employment he had been as a foreman baker since June, 1935. The respondent employer being dissatisfied with the certifying surgeon's certificate appealed to the medical referee who, on Aug. 25, 1936, found that the appellant was at the time of his examination by the certifying surgeon suffering from dermatitis, and he fixed Apr. 6, 1936, as the date on which the disease began. The result of that is that, taking the medical referee's certificate as final, the workman's claim against the respondent would necessarily fail. The county court judge has so held, and, in my opinion, he was constrained so to hold by the imperative language of the Act itself.

It is said that, in point of fact, the workman was on Apr. 6 in work, and that he did not give up work until May 9. That is a matter into which, in view of the terms of the Act and of the medical referee's certificate, the court cannot inquire. The Act for obvious reasons of convenience, although in some cases it may entail anomalies and injurious results, has provided a short, sharp method for establishing the requisite matters of fact in cases of industrial diseases, those requisite matters being that the workman is suffering from the disease, that he is disabled by it, and the date on which the disablement began. Those are matters to be established in the first instance by the certifying surgeon, and then, on appeal, by the decision of the medical referee, and they are all matters in respect of which the medical referee's decision is by statute made final and conclusive.

In my opinion, no court can inquire into the correctness of that. The county court judge before whom the matter came was no more entitled to inquire into the correctness of the matters certified by the medical referee than the county court judge will be to do so when the appellant makes his claim against Henry King & Feaist, Ltd. The applicant is not entitled to endeavour to displace the medical referee's certificate by showing that on a certified matter it was not in accordance with the facts. The appeal must be dismissed.

SCOTT, L.J.: I agree.

MACKINNON, L.J.: I agree.

Solicitors: *C. Howe Browne* (for the appellant); *Ponsford & Devenish* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. *v.* COCKBURN

[CHANCERY DIVISION (Farwell, J.), **April 23, 27, 1937.**]

Gifts—Donatio mortis causa—Delivery—Power of attorney—Instructions to use power of attorney to transfer property into donee's name.

Wills—Settlement—Power of advancement—" Purchase of business or share in a business "—Whether deposit with Lloyd's trustees to become underwriter included—" Expediency "—Trustee Act, 1925 (*c.* 19), *s.* 57 (1).

A testatrix had given her son a power of attorney in very wide terms over certain shares and money standing in her name at a bank abroad. When about to undergo an operation she told the son to get such shares and money transferred into his own name as she wanted him to have them if anything should happen to her. The son accordingly, acting as her agent under the power of attorney, instructed the bank to transfer the shares and money into his name. The testatrix died a few days later. The question arose as to whether there had been a good *donatio mortis causa* of the shares and money or whether they formed part of the estate of the testatrix. By her will the testatrix gave her trustees a power of advancement in favour of the son, *inter alia*, for " the purchase of a business or a share in a business " :—

HELD: (i) the mere giving of the power of attorney was not in itself a sufficient parting by the testatrix with her dominion over the shares and money to make it a *donatio mortis causa*, but, when the testatrix instructed her son to transfer the shares and money into his own name, she parted with her dominion over the property, and there was a good *donatio mortis causa.*

(ii) the question was one which arose in the administration of the estate, and, as the estate was being administered in England according to English law, it was a question which ought to be determined according to the law of England, subject to the condition that, the property being situated abroad, that which was said to constitute the parting with dominion ought to be something which would be an effective parting with dominion in the place abroad where the property was situated.

(iii) the power of advancement did not extend to an advance of a sum to be applied and invested with the trustees of Lloyd's as a fund which would be available to meet the son's liabilities, so as to enable him to become an underwriter at Lloyd's.

(iv) as such an advance would not be expedient for the trust as a whole, the court could not sanction it under the Trustee Act, 1925, s. 57 (1).

[EDITORIAL NOTE. To effect a good *donatio mortis causa* there must be so far as is possible in the circumstances a transfer of the property to the donee. The transfer here was effected by the donee acting under a power of attorney, but he had the specific instructions of the donor to effect this particular transfer. The question of advancement is also of interest in that it decides that supplying a person with a sufficient deposit to secure his position as an underwriter at Lloyd's is not a "purchase of a business."

As to Donatio Mortis Causa, see HALSBURY, Hailsham Edn., Vol. 15, pp. 742, 743, para. 1283; and for Cases, see DIGEST, Vol. 25, pp. 552-554, Nos. 372-386.

As to Advancement, see HALSBURY, Hailsham Edn., Vol. 17, pp. 649, 650, para. 1365; and for Cases, see DIGEST, Vol. 28, pp. 251, 252, Nos. 1073-1083.] A

Cases referred to:

(1) *Re Johnson, Sandy* v. *Reilly* (1905), 92 L.T. 357; 25 Digest 553, *379*.

(2) *Re Korvine's Trust, Levashoff* v. *Block*, [1921] 1 Ch. 343; 25 Digest 543, *296*; 90 L.J. Ch. 192; 124 L.T. 500. B

(3) *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669; Digest Supp.; 96 L.J. K.B. 441; 136 L.T. 743.

Adjourned Summons asking (i) whether the testatrix, Edith Maude Craven, had made an effective gift or *donatio mortis causa* to the defendant, Major Gilbert Eric Graham Cockburn, of certain C securities and money stated by Lloyds and National Provincial Foreign Bank, Ltd., to have been placed in safe custody on his behalf in pursuance of directions contained in a letter dated July 16, 1935, addressed by him to the bank, he acting as the agent of the testatrix and on her instructions under a power of attorney dated Nov., 1934, or whether D those securities and money formed part of the estate of the testatrix, and (ii) whether, on the true construction of a power of advancement contained in the will of the testatrix the trustees of the will and codicils of the testatrix had power to apply the whole or any part of the share of the defendant, Major Cockburn, of the residuary estate of the testatrix E to forming trust funds to establish that defendant in business as an underwriting member of Lloyd's.

G. M. Parbury for the plaintiff company.

Fergus Morton, K.C., and *C. V. Rawlence* for Major Gilbert Eric Graham Cockburn. F

B. L. Bathurst for Guy Leslie Cockburn.

R. F. Roxburgh, K.C. and *J. H. Boraston* for the British Legion.

J. Pennycuick for an infant son of Major Cockburn.

Morton, K.C.: The two essential elements to be considered are the place of domicil of the donor and the place where the gift was made. G The testatrix was domiciled in England and resident in London. It may well be that, in considering whether effective dominion has been given to the donee, it is necessary to consider where the property is and what are the requisites to get possession of it. It is only necessary to consider English law. The funds are being administered in England. H There was in fact a delivery of the property before the death of the testatrix. It was the original intention that Major Cockburn should reduce the shares into his possession as is shown by the fact that he was given a power of attorney. It is followed by those definite words of gift on the Channel steamer. Nothing more is necessary to constitute a valid *donatio mortis causa.* [Counsel referred to *Re Korvine's Trust*, *Levashoff* v. *Block* (2), *Republica de Guatemala* v. *Nunez* (3).]

Roxburgh, K.C.: The law of Monaco applies, because delivery is an essential element of the transaction. A *donatio mortis causa* is a legal assignment of a property, and the general proposition of law is that the title to movables depends upon the law of the country in which the movable property is situated. The law under which the matter is to be judged is the law of the country in which it is purported to be given.

FARWELL, J.: The relevant facts, which are not in dispute, are these. The testatrix, Edith Maude Craven, who was a widow at the time of her death, made her will on July 8, 1933. She made two codicils to the will, one dated July 24, 1934, and one dated May 12, 1935. She died on July 20, 1935. To the exact terms of her will it is not necessary to refer in any detail, but she gave her residuary estate on trust as to one moiety to apply the income on protected trusts in favour of the defendant, Gilbert Eric Graham Cockburn, who was one of the sons of the testatrix, and after his death in trust for all his children other than one of his sons:

> who being sons attain the age of 21 years or being daughters attain that age or marry in equal shares and if there shall be but one such child the whole to be in trust for that one child and if there shall be no child of the said Gilbert Eric Graham Cockburn who being a son attains the age of 21 years or being a daughter attains that age or marries [then on trusts concerning the other half of the residuary trust fund].

The other half of the residuary estate was to be held on the like trusts for Guy Leslie Cockburn:

> and his wife and issue for the time being (if any) or if he shall for the time being have no wife or issue living then for the benefit of all or such one or more exclusively of the others or other of the said Guy Leslie Cockburn and his brother nephews and nieces for the time being in such manner in all respects as my trustees shall in their uncontrolled discretion think fit.

There was an ultimate trust in favour of the British Legion, Hampstead. The testatrix, when she died, left both her sons, Gilbert Eric Graham Cockburn and Guy Leslie Cockburn, surviving her. At present there are no children who have attained vested interests. It appears from the affidavit of Gilbert Eric Graham Cockburn, the son, that the following events happened, and no one disputes the truth of the statements contained in that affidavit:

> During the year 1932 or early in the year 1933 I had a conversation with the late General Craven, the then husband of my mother, and in the course thereof he told me that he had made a will leaving all his property in trust for my mother but that he was giving her the money and some securities in his bank so that she should have some capital on which to rely for emergencies. He also told me that he had given her a power of attorney to enable her to get the money and securities on his death.

When the General died, in Apr., 1933, he had not carried out those intentions with regard to his will. He had left the greater part of his estate to his wife. The deponent then goes on to say:

> To the best of my knowledge information and belief the shares and securities, particulars of which are set forth in the originating summons herein, are part of

> the shares and securities which were in General Craven's bank and formed part of his estate at the date of his death, and which were subsequently deposited by my mother in the care of Lloyds and National Provincial Foreign Bank, Ltd., Monte Carlo (hereinafter called "the Monte Carlo bank") to her order.

It appears that from that time onwards the testatrix always described those shares and securities as the "Monte Carlo shares." It also appears that the wife had not used the power of attorney given to her by General A Craven. After that, the deponent had a conversation with his mother, in the course of which she told him that she was contemplating making a new will, and providing that one half of the estate should go to the deponent and the income of the other half to his brother, Guy Leslie. There was some talk about that, and then she told the deponent that B she wanted him to have some capital on her death, and told him she would make arrangements with her bank for him to have the Monte Carlo shares, and would do the same as her late husband had done. In that way she would give him the Monte Carlo shares and any balance in the bank on her death, and she said that she would put the rest of her estate C in trust. The deponent saw his mother at various intervals in France, where she was then staying, and she told him that she had not had an opportunity of giving any instructions to the bank with regard to the Monte Carlo shares. At that time she was not in a very good state of health. In Nov., 1934, the testatrix expressed the wish that the Monte D Carlo shares and the balance at the Monte Carlo bank should be put into a joint account in the joint names of herself and her son, Eric Cockburn. That proved not to be possible, because of the local law, and the manager of the bank suggested to her the possibility of a power of attorney. The testatrix accepted that suggestion, and executed a E power of attorney in extremely wide terms, giving Major Cockburn a very wide power over the property.

In the spring of 1935, the testatrix became ill while in France. She was advised to have a serious operation, and she intended to undergo it. She told the deponent that she had herself given instructions to the F Monte Carlo bank to transfer the shares into his name, so that, if anything happened to her, he could make sure of getting the shares, and, by a letter dated May 14, 1935, the bank told her that it had done this. The operation was performed, and was successful. The testatrix did not die of it, and shortly afterwards she instructed the bank to transfer the G Monte Carlo shares back into her own name, on the footing that the power of attorney would remain in force, and that was duly done. Towards the end of June, the testatrix, who was still in France or at Monte Carlo, had a relapse. She went to London to consult her doctors, having, of course, in mind the probability of another operation, which H would be a serious matter for her. The son met her by arrangement in France, and accompanied her across the Channel. During the Channel crossing mother and son discussed various matters together, and, in the course of these discussions, she told him, in view of her pending second operation, to get the Monte Carlo shares and balance back into his own name, as she wanted him to have them in case anything happened to her. Later in conversation she told him not to forget to write to Lloyds, meaning the Monte Carlo bank. On July 16, 1935, the son, as agent for his mother, and acting on her instructions under the power of attorney, wrote to the Monte Carlo bank, instructing it to transfer the Monte Carlo shares and cash balance into his own name. On that day he had a telephone message from his brother, as the result of which he came to London from Paris at once. In the distress of his mother's illness, he did not actually post the letter until about July 18. The testatrix died, as the result of the second operation, on July 20, but meanwhile the Monte Carlo bank had received the letter from the son, and, before any notice of the death of the mother could be forwarded to it, had acted on it, and the shares and cash balance had been transferred into the son's name at the bank.

That was the position of affairs at and immediately after the death of the testatrix. The question is: Do those shares and that cash form part of the estate of the testatrix and pass under her will, or are they the property of the defendant, Gilbert Eric Graham Cockburn, so that he is entitled to retain them as the owner thereof ? Generally speaking, it is not permissible for a person to dispose of his or her property after his or her death except by an instrument executed in accordance with the provisions of the Wills Act, 1837. One exception to the general rule is the case of a *donatio mortis causa*, but, as it is an exception to the general rule, certain clear conditions must be complied with, and exactly complied with, that there may be a valid *donatio mortis causa*. Otherwise the attempted *donatio* is not effected, and the property remains part of the property of the testatrix at her death, and passes under her will in the way she has directed. The conditions essential to a *donatio mortis causa* are, first, a clear intention to give, but to give only if the donor dies, so that, if the donor does not die, the gift is not to be effective, and the donor is to have back the subject matter of the gift. The gift must be also a gift made in contemplation of death, by which is meant not the possibility of death at some time or other, but death within the near future—what may be called impending death for some reason or other. There is also the condition that the donor must give up dominion over the subject matter of the *donatio*. If authority for that is wanted, it may be found in a decision of FARWELL, J., in *Re Johnson, Sandy* v. *Reilly* (1). There the question was whether the handing over of a box and the retention of the key was a sufficient parting with dominion. FARWELL, J., held that it was not. He said, in a very short judgment, at p. 358:

> This is rather a curious point. The question is whether there was sufficient in the delivery of the box to enable me to hold that the testatrix parted with dominion over it. The argument against this is that she retained the key. . . Here there was only the retention of the key, and it is said that this fact alone should not prevent me from deciding that here there was a valid *donatio mortis causa*. Having regard to what the lady is reported to have said to her friend in reference to the key, " If I die, that will be sent to you," it seems clear that she did not intend to part with

> her dominion over it. If she had intended to part with her dominion, she would not have said this. It seems clear there was no question here of parting with the dominion, and, consequently, there is here no valid *donatio mortis causa.*

As this question of parting with dominion is really the crux of the whole case, apart from the question of foreign law, which I must deal with afterwards—I am now considering this from the point of view of English law—I have considered what was the reason which imposed as a condition that the donor should part with dominion over the subject matter of the *donatio*. It seems to me that the answer to that question must be that the subject matter of the *donatio* must be some clear, ascertained, or definable, property, that is to say, it is not open to a donor, between the date of the *donatio* and the date of the death, to alter the subject matter of the gift, and substitute other chattels or property for it. So long as the subject matter of the gift remains in the dominion of the donor, the donor may at any time between the *donatio* and his death deal with it as he pleases. Take for instance the case of a box. The donor says : " This box contains certain valuables. The contents of the box are to be for you, the donee, in the event of my death from the operation which I am going to undergo in a few days, but I propose to retain the box and the key of the box." If that were the position, it would be possible for the donor at any time to take out of the box whatever was in it and replace what was in it with other valuables, and it is that that should not be possible, that one of the requirements of a good *donatio* is that the donor should have parted with dominion, so that whatever the subject matter of the *donatio* was intended to be should remain that subject matter in the event of the death of the donor. In the case of a box, it is not necessary to hand over the box if the key is handed over, because it is assumed that if the key which unlocks the box is in the possession of the donee, the donor cannot have access to the contents of the box so as to deal with them in any way. I know of no decided case in which the question has arisen whether the handing over of a box and one key, it being proved that there was another key retained by the donor, would be sufficient, but, in the absence of authority, in my judgment, it would probably be held not to be a sufficient parting with dominion over the box, because the donor would have retained dominion over it and its contents by retaining the power to open the box, although it might be in the possession of the donee. However that may be, it seems to me that there must be such a parting with the dominion over the chattels or the property as to prevent the subject matter of the *donatio* being dealt with by the donor between the interval of the *donatio* and either his death or the return of the articles by the donee to the donor.

Having regard to those circumstances, I must consider what is the effect of the giving of a power of attorney in this case. I may say that that seems to be the only matter, looking at the question purely from the point of view of English law for the moment, which gives rise to any question, because the other conditions I think are clearly fulfilled. There was a clear intention to give, and there was a clear intention to give only in the event of death resulting from the impending operation. To that extent there is no doubt, but the question whether there was sufficient parting with dominion is one of some difficulty. In my judgment, the mere giving of a power of attorney by the donor to the donee is not in itself sufficient parting with dominion to satisfy the condition. The position of the donee of the power is merely to act as agent for the principal, and there is nothing to prevent the principal dealing with the property, notwithstanding the power of attorney. If the question in this case rested solely on the power of attorney, I should come to the conclusion that, even according to English law, there was no valid *donatio*. But the question does not rest on that, because there is the clear evidence that, during the Channel crossing on the English steamer, the testatrix instructed her agent, her son, to get the particular shares and money transferred into his own name in the bank abroad, and there is evidence that he acted on that. By so doing, and getting the shares transferred into her son's name, the testatrix did what was necessary to part with her dominion over the property. In my judgment, if this question is a question which has to be decided on English law, the necessary conditions for a valid *donatio mortis causa* have been fulfilled, and, accordingly, the defendant is now entitled beneficially to this particular property, which does not form part of the estate of the testatrix.

But there is a further question which I must consider, because it has been argued that this is not a case which falls to be decided in accordance with English law. It is said, and said truly, that the subject matter of this *donatio* consists of movables, which were situated at all material times in Monaco, that is to say, in a foreign country, and it is argued that the question of the ownership of those movables must be determined in accordance with the law of the place in which those movables were. This is a question which arises in the administration of the estate of the testatrix. She was an Englishwoman domiciled in England. Her estate is being administered in England, and being administered in England according to English law. No doubt the question whether this property was the property of the testatrix or belonged to her son is a question which might necessarily have to be decided in proceedings taken by the son against the executors, or by the executors against the son, and in that sense it is not quite strictly correct, perhaps, to say that it is purely a question of administration. But, in my judgment, it is quite correct to say it is a question of administration in one sense, as the executors are bound to get in the whole of the estate of their testatrix. When they find that part of her estate consists of these shares and money, they are bound to endeavour to get it in, and the question whether they can rightly claim it from the person who is in possession at the date of the death or not is a question which, to some extent, at any rate, is a question of administration. In my judgment, that question must be decided by the law of England. If the question of the title to the chattels had arisen in Monaco, the courts there would, in considering a question of this kind, have ascertained what the law of England was in the matter, and would have applied that law. In my opinion, the question is one which must be determined by English law, but subject to this—if it be necessary, according to English law, that there should be an effective parting with dominion over the property, the property being situated abroad, that which is said to constitute the parting with dominion must be something which would be effective in the place abroad where the property is situated, so as to constitute a sufficient parting with dominion within the meaning of that phrase as used in this connection. As I understand the evidence as to the law of the foreign country in the present case, there is nothing whatever which really prevents what was done from being a sufficient parting with dominion.

So far as the power of attorney alone is concerned, I think that there is no real difference between the law of Monaco and the law of this country. In both cases the donee of the power is a mere agent, and there is no question of the donor of the power parting with dominion to the agent at all, although the agent is clothed with authority to operate, so far as the power permits, in the same way as a principal could have operated it himself. As, in my judgment, the mere giving of the power of attorney here would be insufficient, it is immaterial really to consider what the foreign law might be with regard to that. I can find nothing whatever in the evidence of the foreign law to suggest, nor can I believe, that it would be right to say, once the property, shares and money be transferred into the sole name of the donee, that the donor or anyone else would be required to concur or could object to the donee dealing with that property as he pleased and without reference to the donor. That being the true view, then, whether you consider this question of parting with dominion from the point of view of the law of England or from that of the law of the place in which the movables were situated, the result is the same, namely, there was sufficient parting with the dominion to fulfil the conditions. The other conditions having been amply fulfilled, it follows that these shares and money were the subject matter of a valid *donatio mortis causa*, and the son of the testatrix is entitled to the property, which does not form part of the testatrix's estate.

The question I now have to determine is whether the trustees can, under a certain power of advancement in the will of the testatrix, make an advance for the benefit of the son, Major Eric Cockburn, to enable him to become a member of Lloyd's, or, if there is no power to do that, whether, under the Trustee Act, 1925, s. 57, the court will permit that to be done. There is, I think, no doubt that the testatrix in her lifetime realised that her son was anxious to become a member of Lloyd's, and she did offer to find the necessary fund, which amounts to about

£11,000, to enable him to do so, but the son, realising that it would mean a sacrifice of income to his mother, did not permit that to be done. His mother told him she would provide for him in her will. She made a codicil to her will after that conversation, but, of course, I cannot take into consideration, when it comes to construing the codicil to the will, evidence of what the intention of the testatrix was. I must construe the codicil having regard to the terms which the testatrix has used and see whether what is desired to be done comes within the language which has been used. The power to advance in the case of the shares of the two brothers is to be found in para. 6 of the first codicil:

> I also declare that notwithstanding the trusts declared in my said will of and concerning the residuary trust fund the bank may in its uncontrolled discretion at any time and from time to time at the request in writing of my son Gilbert Eric Graham Cockburn but subject nevertheless as hereinafter provided raise the whole or such part or parts as the bank shall think fit of the share of my said son Gilbert Eric Graham Cockburn (defined in my said will) and pay or apply the same for the advancement or benefit of my said son Gilbert Eric Graham Cockburn . . . provided nevertheless that no moneys shall be raised by the bank and paid or applied as aforesaid for the advancement or benefit of my said [son] except for one or more of the following purposes, namely (*a*) the purchase of a dwellinghouse; (*b*) the purchase of a business or a share in a business; (*c*) the purchase of an annuity; (*d*) the payment of the expenses of an illness or serious operation. And provided also that in the event of any moneys being raised in manner aforesaid for the purchase of a dwellinghouse or the purchase of an annuity such purchase shall be made in the name of the bank.

If one leaves out for a moment the proviso at the end of this clause, there is no doubt that the power would be a very wide power. It would be a power to apply the share "for the advancement or benefit of my son Gilbert Eric Graham Cockburn." I think that it would entitle the trustees to do that which they desire to do. Unfortunately, from the point of view of the son, the testatrix did not leave the power of advancement in that form, but she added the proviso, and this proviso obviously prohibits the exercise of what would otherwise be an extremely wide power of advancement except in certain particular directions, the only one of which that is material for the purpose I have to consider being the purchase of a business or a share in a business. What is intended is that almost the whole of the fund constituting Eric's share should be applied and be invested, as it were, with the trustees of Lloyd's, as a fund which would be available to meet his liabilities. Of course, if no calls were made on the fund, and no liabilities had to be paid out of it, then it would ultimately come back again into the trust. What the trustees are really being asked to do, in my judgment, is to invest almost the whole of the share of the son Eric, under the testatrix's will, in an investment which is not authorised by law, and obviously may be a risky form of investment, because, although no one desires that the fund, if it is paid to the trustees of Lloyd's, should be called on, the possibility cannot be overlooked, and, if the fund is called on, the whole fund, or a substantial part of it, may have to be used to discharge the liabilities of the son in connection with his business as an underwriter at Lloyd's. I cannot bring myself to think that such a transaction as that can be said to be the purchase of a business or a share in a business within the words of the will. If a man wants to become an underwriter at Lloyd's, he must deposit certain funds with the trustees of Lloyd's. To say that the investment of those funds so as to enable the son of the testatrix to become an underwriter at Lloyd's is the purchase of a business seems to be a misuse of language. It is not purchasing a business. It is enabling a man to carry on a profession which otherwise is not open to him.

It is, however, said that, if this matter does not fall within the power of advancement, the court ought to sanction the proposal under the Trustee Act, 1925, s. 57. Sect. 57 (1) is framed in very wide terms. It is undoubtedly intended, where the powers expressly given by the instrument creating the fund are insufficient, to enable to be done that which will be beneficial and expedient for the benefit of the trust which the trustees have to administer or manage. Sect. 57 (1) provides :

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument . . . [the court may authorise it to be done].

The word "expedient" there quite clearly must mean, in my judgment, expedient for the trust as a whole. It cannot mean that, however expedient it might be for one beneficiary, if it were extremely inexpedient from the point of view of other beneficiaries, the court could sanction such a transaction. That the matter should be one which is, in the opinion of the court, expedient it must, in my judgment, be expedient from the point of view of the trust as a whole. Obviously it may be very much for the benefit of the son himself that he should be able to become a member of Lloyd's. It may be desirable from the point of view of his child or children, if there are any, who live to attain a vested interest, but how that could be said to be expedient from the point of view of his brother, Guy, or any child of Guy's, or for the other beneficiary, the charity, I wholly fail to see. It cannot be said to be expedient that Guy and his children, who are the ultimate beneficiaries, should be put in the position that one-half of what they might ultimately be entitled to might be put in possible jeopardy. I cannot bring myself to think that sect. 57 means that the court can say that it is expedient to do something because it is for the benefit of one of the beneficiaries, although it is far from expedient from the point of view of other persons who may become interested in the trust fund.

I have come to the conclusion, with some little regret, that I cannot sanction what is sought to be done in this case. I am satisfied that it does not come within the express power of advancement given in the will and codicil, and, in my judgment, it is not a case in which the court ought to exercise the wide power given by sect. 57. I decide that this is a matter which cannot be effected under either sect. 57 or the power of advancement.

The costs of all parties as between solicitor and client will be paid out of the estate of the testatrix.

Solicitors: *Morris, Ward-Jones, Kennett & Co.* (for the plaintiff A company); *Gordon, Dadds & Co.* (for Major Cockburn, Guy Cockburn and an infant son of Major Cockburn); *Vizard, Oldham, Crowder & Cash* (for the British Legion).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

B

LITTLEJOHN *v.* LONDON COUNTY COUNCIL.

[Court of Appeal (Scott, L.J., and Finlay, J.), **April 15, 16, May 11, 1937.**]

C *Local Government—Poor law relieving officer—Contract of service—Clause relating to sick pay—Public Assistance Order*, 1930, *art.* 162.

The appellant had been a poor law relieving officer in the service of the Stepney Guardians, who, in 1927, had made a set of regulations governing, *inter alia*, payment of sick pay to their officers. By the Local Government Act, 1930, he was automatically transferred to the D service of the respondent council, and in 1932 entered into a new contract of service with it at a higher scale of pay. The contract included a clause concerning sick pay. In Dec., 1933, the appellant became wholly incapacitated through ill-health, and he was superannuated on Sept. 30, 1934. Until July he received full pay, and thereafter sick pay at a half rate scale. The appellant claimed the difference between this half rate and his full rate of salary. He contended that, by virtue of E arts. 172, 173 of the General Order of 1847, made under the Poor Law Amendment Act, 1834, and also by the Public Assistance Order, 1930, art. 162, the respondent council had no power to decrease his salary without the consent of the Minister of Health, which consent had not been obtained, and that therefore any regulation purporting to give the council such power was *ultra vires*. The respondent council contended that the regulations of 1927 had been imported into the appellant's F contract of service:—

Held: (i) the sick pay clause in the contract of service enabled the respondent council to put the appellant upon half-pay in July, 1934.

(ii) placing the appellant upon half-pay was not a reduction of remuneration within the meaning of art. 162, and the consent of the Minister of Health was not required. In deciding this the whole contract G made in 1932 had to be considered, and under it the appellant received an increase of remuneration and not a decrease.

[EDITORIAL NOTE. The real contention in this case is whether the council is prevented by the Public Assistance Order, 1930, art. 162, from placing an incapacitated officer upon half-pay. The article states the remuneration of an officer shall not be reduced without the consent of the Minister of Health. The Court of Appeal H has decided that in considering whether there has been a reduction of salary the whole contract of service must be considered, and therefore it was necessary to consider the whole contract under which half-pay during sickness became payable. The court being of opinion that this contract was substantially more favourable to the officer than were his previous terms of employment, the placing of the officer upon half-pay under the terms of that agreement was not a reduction of salary within the meaning of the article.

As to Public Assistance Officers, see HALSBURY, 1st Edn., Vol. 22, Poor Law, pp. 541-544, para. 1135; and for Cases, see DIGEST, Vol. 37, pp. 212, 213, Nos. 84-88.]

Cases referred to:

(1) *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; 12 Digest 378, *3122*; 86 L.J. K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93. A

(2) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; 12 Digest 377, *3115*; 28 L.J. Q.B. 25; 32 L.T. O.S. 242.

(3) *Storey* v. *Fulham Steel Works Co.* (1907), 24 T.L.R. 89; 12 Digest 377, *3121*.

(4) *Niblett* v. *Midland Ry. Co.* (1907), 96 L.T. 462; 34 Digest 86, *639*.

B

Appeal from a decision of His Honour Judge Bensley Wells, dated Oct. 19, 1936. The facts of the case are fully set out in the judgment.

E. G. Woodward for the appellant.

F. van den Berg, K.C., and *R. Moelwyn Hughes* for the respondent C council.

Woodward: A relieving officer cannot have his salary reduced without the consent of the Minister of Health; here, that consent was admittedly never given. It is submitted that the appellant signed the contract form only on the understanding that the terms of the regulations applied, D and that therefore any reduction in his pay would have to be approved by the Minister. Even if he had purported to contract out of the regulations, he could not do so, as the power given by Parliament to the Minister cannot be taken away from him by any act of the appellant.

van den Berg, K.C.: It is submitted that the appellant is bound by E his contract; but if, because of the Public Assistance Order, 1930, art. 162, this contract does not apply, it is necessary to consider the whole of the 1930 Order, and the appellant must go back to the 1927 regulations which provide for full pay for a maximum period of 6 months. He would then be in a worse position, for he had 8 months on full pay and F then 2 months on half-pay. It is submitted that the Minister's consent was not necessary. It is necessary to distinguish between a salary for services rendered and sick pay. Where there is a contract of service, the salary is paid for services rendered, but if the services cannot be rendered, the contract is frustrated, and the salary is not due. [Counsel referred to G *Warburton* v. *Co-operative Wholesale Society, Ltd.* (1), *Cuckson* v. *Stones* (2), *Storey* v. *Fulham Steel Works Co.* (3), and *Niblett* v. *Midland Ry. Co.* (4).] There is nothing in any order or regulation to prevent an officer from improving his position by entering a higher grade, and there is nothing in art. 162 to prevent him from making this contract. It is submitted H that there has not really been any reduction in the appellant's remuneration.

Woodward, in reply: Statutory provisions have qualified the ordinary law. When it is apparent that a servant is permanently incapacitated, the master can dismiss him. But the order says he must not reduce his payment; to pay him half his salary is a reduction. The doctrine of frustration does not apply to this type of contract.

Scott, L.J. [delivering the judgment of the court]: The appellant was plaintiff in the court below and sued the London County Council for £32 2*s.* 6*d.*, balance of salary alleged to be due to him in his capacity of a district relieving officer in the service of the council, in respect of a period when his pay was reduced for sickness. We were told by counsel for the appellant that the action is in the nature of a test action, brought at the instance of the Metropolitan Relieving Officers' Association, of which the appellant was a member, in order to obtain a binding decision on certain questions of interpretation of the relevant statutes and regulations and of a standard form of contract of service, into which transferred poor law officers were invited by the respondent council to enter in 1932.

The facts are simple and were not in dispute. From 1914 onwards to Sept. 30, 1934, the appellant was a poor law relieving officer. Until transferred to the London County Council, he was in the service of the Stepney Guardians. On the appointed day in 1930, he was, by force of the Local Government Act, 1929, s. 119, transferred automatically to the service of the respondent council. Before transfer, he had been entitled to an annual salary rising from £300 by £10 annual increments up to a maximum of £350. At the moment of transfer he was receiving £340 per annum. By letter dated Dec. 7, 1932, the respondent council offered him a new contract of service in the grade of district relieving officer at a commencing rate of £360 rising by £15 annual increments to £450. This offer he accepted by letter next day. It is on the interpretation of this contract, as affected by certain statutory provisions and rules, that the contest in the appeal turns. From Dec., 1932, to Dec., 1933, the appellant served the London County Council under this new contract as district relieving officer for Stepney, being paid salary in accordance with its terms, but in that month his eyes gave serious trouble, and from Dec. 8, 1933, until Sept. 30, 1934, when he left the council's service on superannuation, he was continuously and wholly incapacitated by illness of the eyes from performing any of the duties of his contract of service. The appropriate sub-committee of the public assistance committee of the council showed him great consideration, as appears from the correspondence passing whilst he was disabled, and in its discretion it decided that he should receive, and he did receive, full salary to the end of July, 1934, that is to say, for a period of nearly 8 months. No oral evidence having been given at the trial, we think it desirable to refer to these letters, as they contain all the evidence there is relating to the reduction in rate of payment and the retirement of the appellant (it having been agreed by counsel that the facts stated or implied in them should be regarded as in evidence). On Apr. 19, 1934, the respondent council's chief officer of public assistance wrote to the appellant a letter saying that the council's examining medical officer had certified him as permanently unfit to carry out his ordinary duties on the ground of ill-health. The letter was obviously in standard form for such cases. It offered a medical appeal within a week, and it ended :

> in the event of your not lodging an appeal within the time specified, the facts will be reported to the committee of the council concerned, with a view to your being retired from the service.

The appellant replied next day that he was going to be operated on in a fortnight, and three weeks after that would know whether his sight would be restored or not. He accordingly asked if sick leave could be extended to 6 months, and added that if this were possible he would be very grateful. The 6 months would run to July 8. On May 3, the chief officer replied :

> In view of the special circumstances of your case, it has been decided that consideration of the question of your retirement from the service of the council should be deferred for two months, and that you should then be again medically examined.

Nothing further appears till Aug. 11, when another standard form letter was sent to the appellant. From this it appears that he had again been medically examined, and again found permanently unfit. On Aug. 15, the appellant replied that he could not challenge the medical position, and thanked all concerned for the kindness he had received. On Aug. 27, the chief officer gave the appellant a provisional notice that :

> Arrangements are being made for you to be retired from the service on account of ill-health, Sept. 30, 1934, to be regarded as your last day of service. A further communication will be addressed to you when the question of your retirement has been considered by the appropriate committee of the council.

On Sept. 21, the chief officer sent this further intimation, viz., that the appropriate committee had definitely decided that Sept. 30 was to be his last day of service, and added that : " the comptroller of the council will communicate with you in due course in regard to your retiring allowance." It was agreed by counsel that the appellant did retire on Sept. 30, on superannuation.

It is pleaded, in para. 9 of the defence, that, on May 24, " the appropriate sub-committee " resolved in its discretion to pay the appellant full rate of salary to July 31, any payments thereafter to be at half rates. No statement to this effect was conveyed to the appellant in the letters, it was not proved orally, and it was not admitted by counsel for the appellant at the trial. It must therefore be disregarded. The appellant was, in fact, paid 10*s.* short of full pay in July, £16 10*s.* short in August, and £15 6*s.* 6*d.* in September—we presume at the end of each month. Counsel agreed to treat the figures as correct for the half-rate scale of sick pay.

In order even to state the rival contentions of the parties, and also to understand the judgment of the county court judge, it is necessary to refer to the statutory provisions and rules affecting the position. Indeed their bearing on the contract of Dec. 7-8, 1932, is the chief battleground in the case.

By the Poor Law Amendment Act, 1834, s. 46, the Poor Law Commissioners were given power to direct the overseers or guardians to appoint officers, to define the officers' duties, and to determine their remuneration. By sect. 15, they were empowered to make regulations by order. In the course of history, the Commissioners became the Poor Law Board, then the Local Government Board, then the Ministry of Health. By the General Order (Consolidated), 1847, art. 153, guardians were directed to appoint officers, including "relieving officers"; by arts. 172 and 173 to pay them such salary as the Commissioners might approve, payable so long as the officer might hold the office. Art. 187 provided for a life appointment, but this article was, by the Local Government Board's general order of 1879, replaced by the following provision:

> Every relieving officer appointed after 1879 shall continue to hold office until he shall die, or resign, or be dismissed by the guardians, subject to the consent of the Local Government Board.

The Local Government Act, 1929, provided for the transfer on the appointed day of the functions of poor law authorities (sect. 1) and of the services of poor law officers (sect. 119) to the county councils. Sect. 121 provided that, on transfer, such officers should hold office on the same terms and salary as if the Act had not been passed. In order to see what the relevant terms of the appellant's contract with the guardians were, it is again necessary to look back in history. In 1927, the Stepney Guardians, apparently acting in their administrative capacity, made a set of so-called "regulations" governing leave of absence of officers which included provision for sick pay to the class of "permanent officers and servants" of which the appellant was one, at full salary (less "emoluments" and national health insurance benefit), but for a period not longer than 26 weeks in any consecutive 12 months, and subject to the proviso that:

> the guardians may, at any time during the course of the absence from duty of any officer, or servant, owing to illness, consider the circumstances of such absence relative to the termination of services, or the continuance of sick pay on the same or different conditions.

This proviso would, we think, if enforceable as a term of an officer's contract, give the guardians power in a proper case to reduce the sick pay rate, and, in their discretion, even to terminate the engagement. The respondent council contended that this regulation had become operative in the appellant's case, presumably on the assumption that he had agreed to it. The 26 weeks' provision was pleaded by the respondent council in the defence, paras. 2 and 4, and also para. 5, where it is coupled with the Public Assistance Order, 1930. That order has statutory effect (see Poor Law Act, 1930, s. 136 (2)), and the reference in para. 5 of the defence is to the proviso to art. 8 of that order, which says, *inter alia*, that:

> the provisions of any regulations applicable to [an officer] in relation to his tenure of office, remuneration, and conditions of service shall continue to apply to him as if this order had not been made.

On this it was argued before us, for the respondent council, that the provisions we have quoted from the Stepney regulations became terms of the appellant's contract with the respondent council, when he was transferred, and gave the latter discretion, during the appellant's incapacity by sickness, to stop his full scale salary, and substitute sick pay at half rate ; and also, I may add parenthetically, to insist on the termination of the service on Sept. 30. In regard to this last point, no objection was at any time raised by the appellant ; he apparently did not dispute the council's right to terminate his employment on Sept. 30. To the argument for the respondent council that the Stepney Guardians' regulations of 1927 were thus imported by force of law into the contract of Dec., 1932, between the appellant and the respondent council, the appellant's counsel answered that those regulations never came into force at all, because, under arts. 172 and 173 of the General Order of 1847, which still had statutory effect when the Stepney Guardians tried to make their regulations, the guardians had no power to withhold from an officer, as long as he remained in their service, the full rate of salary directed or approved by the Minister of Health (as successor to the Poor Law Commissioners), and therefore could not by regulation give themselves power to make any alteration in it without the consent of the Minister to the alteration. It was in doubt in the court below whether the consent of the Minister had been obtained, and the judge presumed that it had, but we were definitely informed by counsel that it had not. We do not think it necessary to express any final opinion upon the question thus raised, as, in our view, the appeal can properly be decided without reference to the regulations of 1927. The decision of it will depend on the effect of the contract of Dec., 1932, in the light of the relevant articles of the Public Assistance Order, 1930, other than art. 8.

We now proceed to consider that written contract. Upon transfer to the London County Council in 1930, the appellant continued at his old work, receiving his old rate of pay. After an interval for reflection upon the appropriate arrangements for the due performance of their new poor law duties, the respondent council, on Dec. 7, 1932, addressed to the officers of its relief staff in the public assistance department a printed letter containing the offer of an " option of being placed on the revised grading and scales of salaries," with particular terms individually addressed to each recipient inserted in ink. In the case of the appellant, the written part offered a substantially increased scale of remuneration, with retrospective operation from Oct. 1, 1931. The printed paragraphs included these sentences (which I have lettered for convenience) :

> (A) : I attach for your information a statement of (i) the conditions governing your proposed transfer to the council's classification, and (ii) a summary of some of the principal provisions of the council's standing orders, regulations and rules applicable to the relief staff of the public assistance department. (B) : I shall be glad if you will inform me as soon as possible but not later than 14 days from the date of this letter, on the form of certificate appended, whether you desire to be placed on the council's classification in accordance with the terms set out in their letter and enclosure and agree to such modifications of your contract of service as

> are necessary to give effect thereto. The revised scales and conditions of service, if accepted, must be taken as a whole. (C): A transferred officer will be deemed to have waived the right (if any) to compensation under the Act (viz.: the Local Government Act, 1929) in respect of any pecuniary loss which might be involved by acceptance of the revised scale and conditions.

The letter was sent in duplicate, with the form of certificate of acceptance printed at the foot, on the back, one copy to be returned, signed and witnessed. This was duly done by the appellant, whose acceptance was unqualified. The document enclosed in the letter was also in print, except for references to the date of the letter and the name. Part I contained the "Conditions of Transfer" which the letter said were sent "for your information." It began with a sentence in brackets:

> (Subject, in any appropriate case, to the provisions of the Local Government Act, 1929, or the Public Assistance Order, 1930).

It then continued, so far as relevant to senior poor law officers (the appellant was one, as I will explain in a moment), "that the person transferred shall give his whole time to the duties of his office," and contained other terms which I need not quote. Part II was the summary of the council's orders, etc. Under that heading appeared a clause headed "sick pay":

> Full pay for a reasonable period at the discretion of the appropriate sub-committee of the public assistance committee.

There was also a clause providing an age limit for retirement. If the bracketed sentence at the beginning of the enclosed conditions of transfer be for the moment disregarded, it is difficult to see what argument could be open to the appellant. He deliberately accepted the offer made. Under that contract, permanent incapacity from ill-health would, after the lapse of a reasonable time to permit of the fact being really established, be a final disqualification for the office, for it would thenceforth be impossible for the officer to prove that he was ready and willing to perform his part of the contract, and the contract would be frustrated. The clause about sick pay provided for a reasonable length of test, but left the judgment of the matter to the absolute discretion of "the appropriate sub-committee." There is no possible doubt, on the finding of the county court judge, first, that a reasonable time was allowed, and, secondly, that the discretion of the sub-committee was exercised with sympathetic consideration. Instead of retiring the appellant, as we think it was entitled to do, when, in the course of July, the examining doctor again found his case hopeless, it gave him sick pay at half rate during a period of another two months, when he was still wholly unable to perform any part of his side of the contract, and was not entitled to claim any salary at all. If the appropriate sub-committee had said to him in words written or spoken: "The intimation we gave you in May must now be acted on, and we treat the contract as at an end, save that we will give you sick pay at half rate for another two months," the appellant would have had no ground for objecting. In the absence of

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any specified finding by the county court judge that some communication was made to the appellant to the above effect, we do not think it is open to us to infer it; and, if the case depended upon this question of fact, we think it would have to be sent back for further evidence. It is clear that the respondent council did not exercise the right of election which it had of treating the contract of employment as at an end at any date before Sept. 30, and the question for decision must therefore necessarily be, first, whether the sick pay clause in the contract entitled it, as from July 31, 1934, to give sick pay at a lower rate than full pay and, if it was so entitled on the clause, secondly, whether there is anything in the provisions of the Public Assistance Order, 1930, which prevented the clause from being applied in accordance with its natural meaning. On the construction of the clause, we are of opinion that it did confer upon the appropriate sub-committee a contractual right to do everything that was in fact done. Counsel for the appellant, however, argued that the Public Assistance Order overrode that clause, and prevented its operation in accordance with its natural meaning. His argument was as follows: By arts. 142 and 144, the appellant was a senior poor law officer. Art. 157 provides that:

> A senior poor law officer shall continue to hold office until he dies or resigns or retires on superannuation, or is dismissed by the council, subject to the consent of the Minister, or is removed by the Minister.

By art. 162 the council had no power without the consent of the Minister to reduce the remuneration of a senior poor law officer. On the basis of these two articles, it was argued that the appellant continued in his office on full pay until he retired on superannuation on Sept. 30, and that, when the council attempted to put him on sick pay at half rate, it did so without authority under art. 162, it being agreed that the consent of the Minister was not obtained, and therefore in breach of the contract. In our opinion, this argument is fallacious. Under the contract of Dec., 1932, the appellant obtained a new scale of remuneration, substantially more advantageous than he had had before, consisting partly of normal pay, partly of sick pay. When he was fully fit for his duties, the money rate was subtantially higher. When he was sick, he was to get the advantages of the sick pay rules. We do not think the appellant's remuneration was reduced within the meaning of art. 162. *Ex hypothesi*, the appellant had no sick pay rights when he made his new contract in Dec., 1932. To be employed on the terms of whole salary or dismissal is, in the case of prolonged illness, most disadvantageous to the servant. Getting sick pay rights, he got a new advantage which was part of his remuneration. In addition, the cash payment when in health was a considerable rise. The "remuneration" of the appellant must be looked at as a whole. We do not think that an application of the sick pay rule on the lines of the present case, namely, of allowing an officer, wholly incapacitated for duty, eight months on full pay, and an additional two months on half pay, is a reduction of his remuneration under the Dec., 1932, contract within the meaning of the Poor Law Assistance Order, art. 162. In our opinion, the appellant was not only treated with kindness, but also in strict accordance with his contract.

This interpretation of the contract, in the light of the statutory regulations bearing on it in a sense favourable to the respondent council, determines the appeal, and renders it unnecessary to consider the alternative answer submitted by Mr. van den Berg, on the respondent council's behalf, based upon *Warburton* v. *Co-operative Wholesale Society, Ltd.* (1), *Cuckson* v. *Stones* (2), *Storey* v. *Fulham Steel Works Co.* (3), and *Niblett* v. *Midland Ry. Co.* (4). We express no opinion upon that argument, beyond pointing out that, on the facts here in evidence, it seems difficult, if not impossible, to hold that the contract of service came to an end at any date before Sept. 30. The appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Edward Fail* (for the appellant); *J. R. Howard Roberts* (for the respondent council).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

McCALMONT *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Lawrence, J.), **May 3, 4, 1937.**]

Income Tax—Double taxation relief—Payment of income tax and super-tax in both United Kingdom and Irish Free State—Admissibility of claim for relief in respect of double super-tax—Finance Act, 1920 (*c.* 18), *s.* 27—*Relief in respect of Double Taxation* (*Irish Free State*) *Declaration*, 1923 (*S.R. & O.*, 1923, *No.* 406).

The appellant was resident in both the United Kingdom and the Irish Free State. For the year 1923-24 he paid United Kingdom and Irish Free State income tax, and a claim for relief under the Finance Act, 1920, s. 27, in respect of such double income tax was admitted. For the same year the appellant had also suffered double super-tax and he claimed relief in respect of such double super-tax:—

Held: although the "United Kingdom income tax," relief from which was granted under sect. 27, could not be interpreted to include super-tax, the effect of the arrangements contained in the Relief in respect of Double Taxation (Irish Free State) Declaration, 1923, was to allow relief from income tax including super-tax, and the appellant was entitled to the relief claimed.

[**EDITORIAL NOTE.** Relief from double taxation is the subject of a special order or "arrangement" in respect of the Irish Free State. Generally such relief does not extend to sur-tax, but, having regard to the terms of the "arrangement" and to the fact that it is reciprocal, such additional relief can be claimed in this case.

As to Relief from Double Taxation in Irish Free State, see HALSBURY, Hailsham Edn., Vol. 17, p. 327, para. 649; and for Cases, see DIGEST, Vol. 28, pp. 93, 94, Nos. 552-557.]

Case referred to:

(1) *Bowles* v. *A.-G.*, [1912] 1 Ch. 123; 28 Digest 96, *577*; 81 L.J. Ch. 155; 105 L.T. 870; 5 Tax Cas. 685.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing a claim by the appellant for relief in respect of dominion income tax under the Finance Act, 1920, s. 27, for the year ending Apr. 5, 1924.

For the year ending Apr. 5, 1924, the appellant was resident in both the United Kingdom and the Irish Free State. For the year 1923-24 he paid United Kingdom and Irish Free State income tax on the sum of £87,728, and a claim for relief under the provisions of the Finance Act, 1920, s. 27, in respect of such double income tax was admitted. For the same year the appellant had also suffered double super-tax upon £129,283, his total income in the previous year, and he claimed relief in respect of such double super-tax.

Raymond Needham, K.C., and *T. N. Donovan* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondents.

LAWRENCE, J.: In this case the appellant paid income tax and super-tax in Ireland and in England, and he claims relief in respect of double taxation, in respect of super-tax paid in Ireland, and from super-tax paid in England. The Commissioners have held that, under the Income Tax Acts, and the arrangement for relief in respect of double taxation which is applicable to Ireland, he is entitled to relief only from British income tax; that is to say, that the amount of the relief which is given in respect of the tax paid in Ireland cannot exceed the amount of income tax paid in England.

It is argued for the appellant that, on the true construction of the Income Tax Act, 1918, s. 55, and of the Finance Act, 1920, s. 27, and the arrangement in respect of double taxation, relief must be given, not only from the United Kingdom income tax, but also from United Kingdom super-tax. The argument is based in the first place upon sect. 4 of the Act of 1918, which imposes the charge to super-tax, and describes it as an additional duty of income tax. Reliance was placed upon this description of super-tax, and upon the decision in *Bowles* v. *Attorney-General* (1), where it was held that the Customs and Inland Revenue Act, 1890, s. 30, applied to super-tax so that a notice in respect of super-tax had to be given before the super-tax was actually imposed under sect. 30, which is in these terms:

> In order to ensure the collection in due time of any duties of income tax which may be granted for any year . . . all such provisions contained in any Act relating to income tax . . . shall have full force.

It was held there that the words in that section, "any duties of income tax," were apt to describe super-tax which was described by sect. 4 of the Act of 1918 and the preceding Acts dealing with super-tax as an additional duty of income tax; but, in my opinion, it does not follow that super-tax is included in the description "income tax" for all purposes, and particularly in the Income Tax Act, 1918, s. 55. In sect. 4, the super-tax is described as: "an additional duty of income tax (in this Act referred to as super-tax)." Therefore, one expects to find, and, in every place, so far as my attention has been called to the matter, except where the context is different, one does find, super-tax described in the Act of 1918 as super-tax. Sect. 55 reads in this way:

> If any person who has paid, by deduction or otherwise, United Kingdom income tax for any year of assessment as respects which this section is continued in force by any Act, on any part of his income, at a rate exceeding 3*s.* 6*d.*, proves to the satisfaction of the special commissioners that he has also paid any colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him, equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of 3*s.* 6*d.*, or, if that difference exceeds the amount of tax on that part of his income at the rate of the colonial income tax, equal to that amount.

It is argued that the words "income tax" in that section include super-tax," because super-tax is an additional duty of income tax. In my opinion, that is not the true construction of sect. 55, and I base my view upon the fact that, *prima facie*, super-tax is referred to as super-tax in the Act, and, secondly, upon the fact that the section speaks of "a rate exceeding 3*s.* 6*d.*," which seems to me to be a phrase which is *prima facie* inappropriate to apply to income tax and super-tax, which are imposed at different rates, and not at one rate.

The next section which was relied upon, and which, of course, is more material, is sect. 27 of the Act of 1920, but the argument for the appellant was based upon sect. 55, in this way, that it was said that, assuming sect. 55 meant to include super-tax in the words "income tax," one would have expected to find in sect. 27 of the Act of 1920 some more clear words indicating an intention to alter the law. As I have said, I do not take that view of sect. 55 of the Act of 1918, but, when I come to the Finance Act, 1920, s. 27, I think it is impossible to give to the section the interpretation contended for by the appellant. It is a long and difficult section, which undoubtedly takes into account super-tax for the purpose of calculating the rate at which the relief is to be given, but it contains a definition in subsect. (8) (*b*) of "United Kingdom income tax" and of "United Kingdom super-tax," saying that they mean:

> respectively income tax and super-tax chargeable in accordance with the provisions of the Income Tax Acts.

Contrasted with that is the definition of "Dominion income tax," which means:

> any income tax or super-tax charged under any law in force in any Dominion, if that tax appears to the special commissioners to correspond with United Kingdom income tax or super-tax.

In view of that contrast, and of that definition of "United Kingdom income tax," it seems to me to be quite impossible to give to the words "United Kingdom income tax," in sect. 27 (1) and elsewhere in the section, any meaning other than that which is given by the definition subsection.

But then I have to consider what is the effect of the arrangement which is contained in a statutory rule and order, 1923, No. 406, Mar. 29, 1923. The order in council is headed : " The Relief in respect of Double Taxation (Irish Free State) Declaration, 1923." The first thing I note is that, apart from the actual words of the arrangement, there seems to me to be no reason why relief should not be given from United Kingdom super-tax where there is double taxation. Secondly, in the case of the Irish Free State, the arrangement which was made was different from the plan of the Act of 1920, because it was reciprocal, and contained an undertaking by the Irish Free State to grant a similar relief from Irish Free State income tax. With those two observations, I look at the arrangement. It is contained in the schedule to the order in council, and it is headed :

> Arrangements for relief in respect of double taxation. Part I. Income tax (including super-tax).

Then there are three subsections, (*a*), (*b*) and (*c*). Subsect. (*a*) says :

> Relief shall be allowed from British income tax in accordance with and under the provisions of the Finance Act, 1920, s. 27, subject to the proviso that for the purpose of determining the Dominion rate of tax the first paragraph of subsect. (8) (*d*) of that section shall not apply, but the rates of Irish Free State income tax and super-tax respectively shall be ascertained in the same manner as the rates of British income tax and super-tax respectively are required to be ascertained by the second paragraph of subsect. (8) (*d*) of that section.

That is to say, it is to be on the amount of the income :

> before deduction of any relief granted in respect of life assurance premiums or any relief granted under the provisions of this section.

It is applying the rule which is contained in the second paragraph of subsect. (8) (*d*), and not applying the rule laid down in the first paragraph of that subsection. Then it goes on to provide the reciprocal provision that the Irish Free State government shall grant relief from Irish Free State income tax, and then subsect. (*c*) says :

> This arrangement applies to income tax (including super-tax) for the year of assessment commencing on Apr. 6, 1923, and subsequent years.

When one has the heading of the arrangement, " income tax (including super-tax)," and a categorical statement in subsect. (*c*) that it applies to income tax including super-tax, it seems to me that the ordinary meaning of that heading and that subsection is that the arrangement applies to income tax including super-tax, and that seems to me to differentiate this arrangement altogether from what I hold is the true interpretation of the Act of 1920 and the Act of 1918.

As I have said, I can see no reason why relief from British super-tax should not be given where there has been double taxation, and particularly when the super-tax is used for the purpose of calculating the rate of tax. In the Act of 1920 it seems to me that that interpretation is excluded by the express definition of the words " United Kingdom income tax," but in this arrangement, having regard to the heading of the arrangement and to subsect. (*c*), which is a separate subsection, and to the fact that the arrangement is reciprocal, it seems to me that a fair reading of that arrangement is to give relief from what it says, income tax (including super-tax). I must therefore allow the appeal, with costs.

Appeal allowed with costs.

Solicitors: *Wm. Easton & Sons* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

GOWERS AND OTHERS *v.* LLOYDS & NATIONAL PROVINCIAL FOREIGN BANK, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **April 28, 29, May 7, 1937.**]

Bankers—Payment of pension—Receipt and certificate—Forged receipt—Liability of bank.

G., a retired officer in the colonial customs service and in receipt of a pension, from 1916 to 1926 collected his pension from the defendant bank, with which he had an account, coming to the bank in person. In 1926 G. changed his place of residence and thereafter collected his pension by post through the defendant bank by means of receipt forms sent direct to him by the plaintiffs. The receipt form included a certificate that the pensioner was still alive. G. died in 1929 and from then up to 1935, when his widow died, the pension was collected by means of forged receipt forms, the certificates being duly filled up by an alleged medical practitioner. The certificate might be signed by the bank or by a person of certain named categories including medical practitioners. The plaintiffs, the Crown Agents for the Colonies, then sued to recover from the defendant bank the amount so paid since 1929:—

HELD: the certificate not being signed by the bank it did not amount to a warranty by the bank that G. was still alive, and the bank was, in the circumstances, entitled to rely upon the certificate as being true. The amount paid as pension was therefore not recoverable.

[EDITORIAL NOTE. For the convenience of all parties the payment of pensions was made through banks, the bank receiving from the pensioner a receipt and a certificate of his being still alive. A pension having by fraud been collected from the bank after the death of the pensioner, this case considers the liability of the bank to the government department from which it had received the pension. It would appear that there is no liability on the part of the bank so long as it does not itself give the certificate.

AS TO MONEY PAID TO BANK BY MISTAKE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 838-840, paras. 1361-1363; and FOR CASES, see DIGEST, Vol. 3, p. 179, Nos. 330-333.]

Cases referred to:

(1) *Collen* v. *Wright* (1857), 8 E. & B. 647; 1 Digest 665, *2795*; 27 L.J.Q.B. 215; 30 L.T.O.S. 209.

(2) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, *5048*; 58 L.J. P. 73; 60 L.T. 654.

(3) *Taylor* v. *Metropolitan Ry. Co.*, [1906] 2 K.B. 55; 1 Digest 672, *2837*; 75 L.J. K.B. 735; 95 L.T. 149.

(4) *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263; 1 Digest 678, *2888*.

Action to recover £3,502 8*s.* as money had and received to the plaintiffs' use or money paid under a mistake of fact. The facts are fully set out in the judgment and the form of receipt and certificate was as follows :—

Received of the Crown Agents for the Colonies the undermentioned amount, due to me, as pension for the period ending....................

One month's pension and increase as........................

Full Sum .. .. £
United Kingdom Income Tax .. .. £

Amount Payable .. £

Payee............................
Address ....

Certificate

I hereby certify that M......................., whose signature is affixed above, is living, and to the best of my knowledge and belief is the person entitled to the payment.

To be signed by a Justice of the Peace, Notary Public, Commissioner for Oaths, Minister of Religion, Medical Practitioner or British Consul or Vice-Consul before being passed for payment *or* by a Manager of a Bank or Branch Bank when passing for payment. } ....

Address ....
Qualification ....

F. P. M. Schiller, K.C., *F. R. Evershed, K.C.*, and *S. E. Pocock* for the plaintiffs.

Sir Walter Monckton, K.C., and *Hon. Cyril Asquith, K.C.*, for the defendant bank.

Lawrence, J. : The Crown Agents for the Colonies claim in this action the amount paid by them to the defendant bank in the following circumstances. Mr. F. A. Gibson was an officer in the customs service of the colony of Mauritius. In 1907 he retired on pension, and settled in France. From 1916 onwards he collected his pension from the plaintiffs through the defendant bank, with which he had an account, coming to the bank in person. In 1926 he went to Vichy, and, from that time till his death on Dec. 13, 1929, he collected his pension by post through the defendant bank by means of certain receipt forms which were sent direct to him by the plaintiffs, and collected by him through the defendant bank, the certificates being signed in every case after June 30, 1926, by one Michel Matteix, an alleged doctor of medicine. After the pensioner's death, which was unknown to the plaintiffs and to the defendant bank, similar receipt forms were sent to his address by the plaintiffs, and were collected through the defendant bank, the signature of the pensioner on the receipt form being forged, until 1935, when the pensioner's wife died, and the fraud was discovered. In these circumstances, it is contended for the plaintiffs that the defendant bank impliedly warranted that it had authority to collect the pension on behalf of Mr. F. A. Gibson, and is liable to the plaintiffs for the loss they sustained in paying a pension which was no longer due, or, alternatively, that the money is recoverable as money had and received, or as money paid under a mistake of fact. On behalf of the defendant bank, it is contended that the terms of the receipt forms exclude any such warranty, and that the money, having been paid over by it to a principal, cannot be recovered back.

The question appears to me to depend upon the terms of the receipt forms, having regard to the surrounding circumstances. There is no express warranty in the form, nor does it provide that it can be presented on behalf of a person having an account at the collecting bank; on the contrary, the method of obtaining payment through a collecting bank was devised partly to accommodate pensioners without banking-accounts. The document speaks of being presented through a bank, or passed through a bank for payment, or passed on for payment; it also provides that the certificate that the pensioner, whose signature is affixed above, is living, and is the person entitled to payment, must be signed, if the pensioner does not present it in person, either by a justice of the peace, or by some other named person before being passed for payment, or, in the alternative, by a manager of a bank or branch bank when passing for payment.

The plaintiffs contend that this certificate relates only to the facts that the signature is the signature of the pensioner that he is living, and that the certifying person believes him to be the person entitled to the pension, but does not relate to the fact that the pensioner authorises the collecting bank to collect; that, therefore, when the collecting bank does pass on the document for collection, it does so as agent for the pensioner, and impliedly asserts that it has his authority to do so, in accordance with the doctrine of *Collen* v. *Wright* (1). It is no doubt true that the certificate does not relate to the collecting bank's authority, but I do not think that concludes the matter. The question is whether a warranty of authority can be implied, where such a certificate is incorporated in the document. Is it obvious that such a warranty must have been intended by the parties, with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side (*The Moorcock* (2), at p. 68)? In my opinion, it is not. The suggested warranty makes the certificate, for all practical purposes, valueless. The certificate may be signed by the banker when he passes on the receipt for payment, but, if he does not sign it, in my opinion, the fair inference is that he, as well as the plaintiffs, is relying upon the certificate, and that the only representation or warranty he is making is that he is honestly passing on the receipt for payment on behalf of a person whose signature, whose existence, and whose title have been certified by one of the authorities designated. If, by passing on the document for payment, he is warranting that he has authority to do so on behalf of a living pensioner, whose signature is affixed, he is warranting, *inter alia*, the very things which he might have certified, but has not, and which someone else has certified. The express invitation by the plaintiffs to the bank to sign the certificate is, in my opinion, inconsistent with the implied warranty, which, though it applies to one further fact than the certificate, also applies to the facts A to be certified. The collection by a bank, under this arrangement, is obviously convenient, but it cannot, in my opinion, fairly be presumed that the parties had any intention beyond convenience.

If this is the true view of the position and implied representations of the collecting bank, I do not think the money can be recovered as money had B and received, or money paid under a mistake of fact. The bank has paid the money over to its supposed principal, and, upon the authority of such cases as *Taylor* v. *Metropolitan Ry. Co.* (3) and *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (4), the money cannot be recovered back.

Judgment for the defendant bank with costs. C

Solicitors: *Burchells* (for the plaintiffs); *Linklaters & Paines* (for the defendant bank.)

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

D

Re EDWARDS' WILL TRUSTS, BREWER *v.* GETHING.

[Chancery Division (Farwell, J.), **April 15, 1937.**]

Limitation of Actions—Acknowledgment—By agent of person by whom sums secured are payable—Mortgage of interest under will comprising realty and personalty—Estate accounts and distribution statement sent by trustees of will to mortgagee—Real Property Limitation Act, 1874 (*c.* 57), *s.* 8. E

In 1896 a beneficiary under a will mortgaged his interest in the estate. No payment of interest was made or acknowledgment given in respect of the mortgage. In 1935 the estate accounts and distribution statement were sent to the mortgagee by the trustees of the will. The mortgagee F contended that this was an acknowledgment of the right of the mortgagee to the moneys secured by the mortgage within the Real Property Limitation Act, 1874, s. 8:—

Held: as the trustees of the will were not bound as between themselves and the mortgagor to pay the principal moneys secured by the mortgage, the sending of the estate accounts and distribution statement was not an acknowledgment signed by the agent of the person by whom G the sums secured were payable within the Real Property Limitation Act, 1874, s. 8, and the mortgage so far as it comprised real estate was statute barred.

[**EDITORIAL NOTE.** An acknowledgment for the purposes of the statute must be made by the person liable to pay or his agent. An agent in this connection H means a person bound to pay as between himself and the debtor. Trustees winding up an estate who have had notice of the mortgage of a reversionary interest are not persons bound as between themselves and the mortgagor to pay the debt and therefore cannot make an acknowledgment of the debt.

As to Acknowledgments, see HALSBURY, Hailsham Edn., Vol. 20, p. 651, para. 830; and for Cases, see DIGEST, Vol. 32, pp. 397, 398, Nos. 766-776.]

Cases referred to:

(1) *Toft* v. *Stephenson* (*or Stevenson*) (1851), 1 De G. M. & G. 28; 32 Digest 411, *901*; 21 L.J. Ch. 129; 18 L.T.O.S. 114; *subsequent proceedings* (1854), 5 De G.M. & G. 735.

(2) *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430; 32 Digest 415, *925*; 71 L.J. Ch. 627; 86 L.T. 726.

(3) *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539; 32 Digest 473, *1379*; 51 L.J. Ch. 394; 46 L.T. 356.

(4) *Chinnery* v. *Evans* (1864), 11 H.L. Cas. 115; 32 Digest 413, *912*; 11 L.T. 68.

ADJOURNED SUMMONS to determine *inter alia* whether and to what extent the debts secured by mortgages dated June 5, 1895, and Feb. 25, 1896, respectively, were barred by any statute of limitations.

Subject to life interests in favour of his wife, of Eliza Gething, the wife of his grandson James Gething, and of James Gething, the trustees of the will of Lewis Edwards, who died on Feb. 25, 1865, were to hold his real and personal estate in trust for the children of Eliza Gething and James Gething, who being sons should attain the age of 21 years or being daughters should attain that age or marry, in equal shares. Frederick Gething, one of the children of Eliza and James Gething, by a mortgage dated June 5, 1895, conveyed to James Gething his share in the freehold and leasehold properties to which he was entitled under the testator's will as security for the payment of a principal sum of £150 and interest thereon. By a mortgage dated Feb. 28, 1896, Frederick Gething assigned to Isaiah Blaiberg all his interest under the testator's will in consideration of his discounting a promissory note for £300. Isaiah Blaiberg died on Oct. 27, 1914. James Gething died on Oct. 3, 1919, whereupon the trust in favour of his children took effect. Three children, including Frederick Gething, attained a vested interest in the testator's residuary estate. No payment of interest had been made or acknowledgment given by Frederick Gething in respect of either mortgage. Frederick Gething was adjudicated bankrupt on Feb. 5, 1897, and the Official Receiver, his trustee in bankruptcy, had given no acknowledgment and made no payment on account. In 1935 on the instructions of the solicitors to the trustees of the testator's will, the estate accounts of the testator and the distribution statement were prepared and were sent to the trustees of the will of James Gething and to the executor of Isaiah Blaiberg, who contended that such account and statement were acknowledgments of the right of the mortgagees to the principal moneys secured and interest thereon within the Real Property Limitation Act, 1874, s. 8. The trustees of the testator's will accordingly took out the present summons.

The Real Property Limitation Act, 1874, s. 8, provides:

> No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some

acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent. . . .

G. E. Timins for the plaintiffs.

W. F. Waite for the trustees of the will of James Gething.

C. V. Rawlence for the executor of the will of Isaiah Blaiberg.

L. W. Byrne for the Official Receiver. A

FARWELL, J.: [His Lordship referred to the facts]. Twelve years have elapsed next after a present right to receive the money secured by the mortgages accrued to some person capable of giving a discharge for or release of the same, and, so far as the money is secured by a charge B on real estate, recovery must be barred:

> unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent. C

Those last words give rise to the present question, which is not wholly free from difficulty, whether the communications sent on behalf of the trustees of the testator's will were acknowledgments of the right of the mortgagees given by the person by whom the debt was payable or his agent within the section. Certain authorities are said to establish that D these documents do amount to an acknowledgment. The first of these cases was *Toft* v. *Stephenson* (1). The side note is as follows:

> On Mar. 4, 1811, an agreement was entered into for the purchase of freehold land for £6,300 to be paid on May, 13, 1811, and the purchasers were immediately put into possession. In 1827, the purchaser, before any conveyance was made to him, E and before he had paid any part of the purchase-money, died, having devised the lands to trustees. The trustees disclaimed, and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien, to which the Statute of Limitations, 3 and 4 Will. IV, c. 27, was set up as a defence by answer: Held: 1st. That the trustees were persons by whom the purchase-money was payable within the meaning of the Statute of F Limitations, 3 and 4 Will. IV, c. 27, s. 40. 2nd. That the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the Act to withdraw the case from its operation, and, for this purpose, to bind the *cestuis que trustent*, although the trustees were appointed not by or under any powers contained in the will, but by the Court of Chancery. 3rd. That the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable, or his agent; and that, therefore, although the bill did not allege any acknowledg- G ment to have been made, the plaintiffs were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing. 4th. That this only applied to the trustees who had admitted the agency of the attorney, but that, as against other defendants who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given.

That was a decision of the Court of Appeal. LORD CRANWORTH, L.J., H referring to the letter relied on, said, at p. 40:

> Now this letter appears to us to come precisely within the very terms of sect. 40, and to be a document taking the case out of the operation of the statute. It is an acknowledgment in writing of the right to the money in question, signed by the agent of the persons by whom it was payable, and given to the agent of the person

entitled thereto, and so within the express words of the clause. It was indeed attempted to be contended before us, though but faintly, that Read and Stephenson were not persons by whom the money was payable, for that no one was liable to pay the money, but the legal personal representatives of Stephenson, the purchaser. Read and Stephenson, it was said, though entitled to the land upon which the plaintiffs sought to enforce a lien, were not personally liable to anything. But this argument evidently proceeds on an erroneous interpretation of the statute. The A person designated in sect. 40 as the person by whom the money is payable must evidently mean, in the case of a claim by way of equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him, in the only sense in which it is payable by anyone. Unless he pays it, he will lose his land ; and it is obviously in that sense that the statute in such a case speaks of the money as payable.

B That case is quite different from the present. The acknowledgment was given by persons who were in truth agents of the persons liable to pay, and the mere fact that they were trustees did not prevent their being agents. It follows that the case was rightly held to come within the saving portion of the section, and that, therefore, the claim was not barred by statute. That case does not help the mortgagees here, because C I cannot say that the acknowledgment was in fact made by the person by whom the sum was payable or his agent. I was also referred to *Bradshaw* v. *Widdrington* (2). In that case the headnote reads :

> The solicitor who acted for a mortgagor and after his death for his executors, and also for the mortgagees, paid the interest upon the mortgage debt to the mortgagees D regularly up to a period within twelve years before the commencement of an action to enforce the mortgage : Held, that this was *prima facie* a payment, within the Real Property Limitation Act, 1874, s. 8, " by the person by whom the same shall be payable," so as to throw on the representatives of the mortgagor the onus of proving that the statute had run and the mortgage debt had not been kept alive : Held, also, that the payment of interest by a person who, as between himself and the mortgagor, was bound to pay it, though he was under no contract with the mortgagee to do so, E was a payment " by the person by whom the same shall be payable " within the meaning of sect. 8, so as to prevent the statute from running.

It is not necessary to read the whole of the judgment of BUCKLEY, J., but the judge dealt with the decision of the Court of Appeal in *Harlock* v. *Ashberry* (3), and said at pp. 438, 439 :

> F That was the question which the court had to decide ; but in delivering judgment upon that I find that JESSEL, M.R. [in *Harlock* v. *Ashberry* (3), at p. 546], read the passage from *Chinnery* v. *Evans* (4) which I have just quoted, and then went on to say : " Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment." Now what did JESSEL, M.R., there mean by " bound " ? Did he mean " bound towards G the mortgagee " ? I think not, because he had just read language in which LORD CRANWORTH had commented upon the fact that the receiver was no stranger—not to the mortgagee, but to the mortgagor—and I think he meant a payment by a person who is bound as between himself and the mortgagor to pay the interest upon the mortgage money. Then, when I come to the judgment of BRETT, L.J., it seems to me that this is more plain. He said [at p. 547] : " Then the question arises whether payment of rent by a tenant to a mortgagee who has exercised the right to demand the rent, is a payment of principal and interest within that section. I H come to the conclusion that it is not, for three reasons " ; and the third reason is this : " But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans* (4). The question may be asked, Why must this payment be by the mortgagor or his agent, or at least by a person bound or entitled to make

> a payment of principal or interest on his behalf ? It seems to me the reason is that in all Statutes of Limitations the principle on which they are founded is that in those cases in which a payment is allowed to take the case out of the operation of the Statute of Limitations it must be such a payment as amounts to an acknowledgment of liability." Now, what did the Lord Justice mean there by " bound " ? Bound, I conceive, as between that person and the mortgagor—" bound," he says, " to make a payment for the mortgagor." And, again, he said, [at p. 549] : " On the ordinary rules of construction, and on the authority of *Chinnery* v. *Evans* (4), I feel bound to say that a payment, to come within 1 Vict. c. 28, must be a payment by a person liable as mortgagor or some person on his behalf, or such a person as was the receiver—a person entitled to pay on his behalf," that is, a person entitled by reason of the relations between himself and the mortgagor to pay money on his behalf. It seems to me, therefore, that the whole of the language of those judgments is in favour of the view which I take, and that the principle is that the person bound to pay, and whose payment is material for the purposes of the statute, is—not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor.

Adopting the words in the judgment of Buckley, J., I must consider whether there has been an acknowledgment made by " a person bound as between himself and the mortgagor " to pay. It may be said that " bound " should be read as " bound or entitled." I do not think that I can so extend it, but, whichever way it be read, I cannot treat this case as coming within the definition. The trustees had notice of these two charges, and, when they came to the distribution of the estate, they were bound to see that provision was made for the persons entitled to the money. It may be that they would have run a certain risk if they had paid over the money to the mortgagor disregarding the mortgagees, but that is different from saying that, as between the mortgagor and themselves, the trustees were bound to pay the mortgagees. An acknowledgment to the mortgagees by the trustees was not an acknowledgment by the person by whom the debt was payable or his agent. I cannot treat the trustees as agents for the mortgagor to make these payments, and it follows that they are not persons who can give an acknowledgment within the section so as to protect the mortgagees.

The recovery of the debt secured by the first mortgage is, therefore, barred inasmuch as it was a mortgage of realty. As to the other mortgage so far as it comprised real estate at the date of the mortgage, that also is statute-barred. So far as the mortgage was one of personalty, there is no statute preventing recovery by the mortgagee. I direct an inquiry as to what the property included in that mortgage consisted of at the date of the mortgage and as to what property now represents the personal property and the land then included in the mortgage.

Solicitors : *Kinch & Richardson*, agents for *Davis, Lloyds & Wilson*, Newport, Mon. (for the plaintiffs and the trustees of the will of James Gething) ; *Harold E. Blaiberg* (for the the executor of the will of Isaiah Blaiberg) ; *Tarry, Sherlock & King* (for the Official Receiver).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

GREENWOOD *v.* GREENWOOD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **April 29, 1937.**]

Divorce—Unreasonable delay—Knowledge of guilty association for 30 *years—Separation deed—Agreement not to take legal proceedings in respect of previous matrimonial offences—Whether bar to defence of unreasonable delay—Connivance.*

The parties were married in 1901. There was a deed of separation between the parties in 1907, replaced by others in 1915, 1921, and 1933 respectively. By the final deed the wife agreed, in consideration of the payment of £1,000, to discharge the husband from all claims for maintenance. In addition it was agreed that neither party should take steps to compel cohabitation or institute legal proceedings on the ground of matrimonial offences theretofore committed. Subsequently the wife became destitute and filed a petition for divorce, based on adultery committed subsequent to the deed, but admittedly with the object of obtaining monetary provision for herself. The husband defended the suit on the ground that the wife had been guilty of unreasonable delay. For the wife it was contended that, as the deed of 1933 had created a position of artificial innocence, the date of the wife's acquiescence in her husband's position, i.e., the date from which delay ought to be reckoned was the date of that deed. The husband had been living in adultery with the same woman since 1907, and from 1920 the wife knew that he intended to continue to do so, and the subsequent deeds were entered into upon that footing:—

HELD: (i) the deed of 1933 did not contain any reference to defence or bar of any proceedings, but dealt only with the commencement or initiation of proceedings, and it could not be argued that the date of that deed was the earliest date from which delay could be reckoned.

(ii) there was unreasonable delay in bringing the petition, and the petition ought not to be granted.

(iii) the wife's conduct in entering into separation deeds with full knowledge of the husband's position amounted to connivance.

[EDITORIAL NOTE. This case considers the question whether the execution of a separation deed provides a new commencement to the period of delay to constitute the discretionary bar of undue delay. It also considers the position arising from such deeds as constituting connivance. Though not actually necessary to the decision in this case it would appear from this case that, where a woman with full knowledge of her husband's past adultery and of his intention to continue it makes a bargain merely to secure her financial position, she is guilty of connivance.

AS TO UNREASONABLE DELAY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 682-684, paras. 1010-1014; and FOR CASES, see DIGEST, Vol. 27, pp. 349, 350, Nos. 3316-3328.

AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 330, 331, Nos. 3088-3095.]

Cases referred to:

(1) *Binney* v. *Binney & Hill*, [1936] P. 178; [1936] 2 All E.R. 409; Digest Supp.; 105 L.J. P. 81; 155 L.T. 144.

(2) *Thomas* v. *Thomas* (1860), 2 Sw. & Tr. 113; 27 Digest 330, *3093*; 3 L.T. 180.

PETITION for divorce by a wife. The parties were married in 1901. Unhappy differences arose in 1907, by reason of the husband's association with the woman named, and, in consequence, there was a deed of separation between the parties in that year, replaced by others in 1915, 1921 and 1933 respectively. By the final deed, the wife agreed, in consideration of the payment to her of the sum of £1,000, to discharge the husband from all claims for maintenance. Subsequently, the wife became destitute, and filed the present petition, based on adultery committed subsequent to the deed (admittedly with the object of obtaining monetary provision for herself). The husband defended the suit, on the ground that the wife had been guilty of unreasonable delay.

William Latey for the petitioner.

H. W. Barnard for the respondent.

Langton, J.: The parties have been separated for approximately 30 years. Throughout those 30 years, Mrs. Greenwood has been actively aware, or passively conscious in the sense that she took no kind of step to discover whether it was so or not, of the fact that her husband has been living in adultery with Miss Martha Wall. She has, at various stages by a series of deeds, attempted to secure for herself what she thought was a fair provision. I can pass over the three earlier deeds, and come to the final deed of June 23, 1933. In that deed there was a provision, cl. 4:

> Neither the husband nor the wife shall require or compel or endeavour to compel the other of them to cohabit or dwell with him or her by any legal proceeding for restitution of conjugal rights or otherwise howsoever or to take any proceeding against the other of them to obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place, or is alleged to have heretofore taken place, on the part of the other of them.

Now, on the strength of that provision, Mr. Latey argued that the date of Mrs. Greenwood's acquiescence in the position of her husband, that is to say, the date from which one should reckon any delay, was the date of this deed, June 23, 1933. He said that, if that was an agreement to wipe out marital offences up to that date, Mr. Greenwood could not be heard to approbate or reprobate the same deed, and, therefore, having created a position of artificial innocence by this clause, he could not afterwards plead in bar his own continued turpitude. It became necessary, therefore, to examine this clause with some care. Mr. Latey was immediately driven to agree that no such phraseology could be found in the deed. The clause did not contain any actual reference to defence or bar of any proceedings. It dealt only with the commencement or initiation of proceedings. It provided in terms only that neither the husband nor the wife should take proceedings to obtain a divorce in respect of anything that had theretofore been done. He does have to rely upon implication, and to say that there was something implied in these words, that, if two parties agree not to begin proceedings, they impliedly agree not to defend them. That position Mr. Latey ultimately abandoned. He based a stronger argument upon the matter of discretion. This question of unreasonable delay is a matter which is, by the Judicature Act, 1925, s. 178 (3), left in the discretion of the court. The court is not bound to dismiss a petition merely because there has been a degree of delay. It is left in this position, that the court is not bound to pronounce a decree if it finds a petitioner has, during the marriage, been guilty of adultery, or, in the opinion of the court, has been guilty of delay in presenting or prosecuting the petition. BUCKNILL, J., quite recently pointed out, in 1936, in *Binney* v. *Binney & Hill* (1), that this discretion, like other discretions, must be judicially exercised. Because the matter is left in the discretion of the court, it does not mean that the court is free to do exactly what it chooses, to indulge in sympathies, or to invent some new equitable doctrine between the parties. It means that discretion is to be exercised upon judicial grounds, in accordance with the principles that have been recognised in this court. I have, therefore, to approach this case from the point of view of judicial discretion, and see whether it is right that judicial discretion should be exercised in favour of Mrs. Greenwood against her husband after 30 years delay.

It occurred to me, on examining various authorities, that Mrs. Greenwood's action after a certain point, not before 1915, not, I think, before 1920, but after a certain point, might well be classed as connivance. She knew, in 1920, with plenty of skilled advice, exactly what she was doing. She knew, as perhaps her legal advisers did, that her husband was living with this woman, and was quite certain that he would continue, as far as she knew, to live with her. Nevertheless, she, with her eyes open to the position, made her bargain. As I have said before in argument, it is not for me to express any opinion on the morality of such a bargain. She had a hard life, she was placed in a very hard position, but I am concerned only with the legal side. Legally, did she connive or did she not? I have considerable guidance from the old case of *Thomas* v. *Thomas* (2), a decision in the year 1860. True, that is a long time ago. The circumstances are not really very dissimilar. The husband and the wife in that case had executed a deed of separation, and had executed it with full knowledge of the facts. It was recited in the deed that the husband was living in adultery with another woman. Having executed this deed, and having taken benefits under it, the lady came, some six years afterwards, and claimed a divorce on the ground of her husband's adultery during the two preceding years. The court, however, held that the execution of that deed was in fact an approval or a consent to the adultery, and refused the lady relief. Now, I agree that none of these cases where the court was exercising a judicial discretion is likely to be a complete precedent for the case in hand. In these matters, the variety of detail is most important, and may make the whole difference. I do not know just what was the situation of Mrs. Thomas. She may have been in a more or less independent position, whereas Mrs. Greenwood, the lady in this case, certainly was not. Taking that case as a guide to the manner in which discretion should be exercised, I must say, for my part, I have the gravest difficulty with Mrs. Greenwood's position after 1920. Up to that time, for a certain period at least, she certainly entertained hopes that her husband might return to her. She wrote him letters urging him to do so. After that date she clearly had no kind of hope at all, and, as she quite frankly said, did not mind in the least whether he did or not. She had lost interest in him, and was interested only in her own position. Whatever one may think of it, one way or the other, morally, legally that seems to me to be connivance. I hold that after 1920 this lady connived at her husband's adultery. As Mr. Barnard pointed out very fairly in his speech, it is not pleaded by him, but it emerges from the lady's own evidence, and, to my thinking, that in law amounts to connivance. Now, if that is so, of course there is no question of the exercise of discretion at all, because connivance is a bar, not a discretionary bar.

The other matter, the question of undue delay, is, to my mind, clearer still. I can well imagine that there might be two opinions about the question of the lady's connivance, especially as she was placed in a situation of very great difficulty ; but as to the delay, I find it difficult to imagine that there can be two opinions at all. Once in 1920, and once again in 1933, with the fullest knowledge of all the circumstances, with every expectation that her husband would continue to live in adultery with this woman, Mrs. Greenwood, quite calmly, quite deliberately, came to the conclusion that she would prefer that things should remain as they were, so long as she was properly provided for. With every sympathy for her position, I cannot imagine, in those circumstances, that she could be allowed now to change her mind, in the face of the provision that she would take £1,000 in full discharge of all her husband's liabilities towards her. It would be odd indeed if she were allowed then to turn round and say : " Well, my speculation or my investment having gone against me, my judgment having been proved to be wrong, I will now change my position ; I will shake my husband from the position which I have allowed him to occupy, a position in which I have acquiesced so long, and I will now come and ask the court to grant me a divorce in respect of adultery which has continued for 30 years to my knowledge, without any action on my part save the petition which I compromised in the year 1921." To my thinking, in those circumstances, it is possible to exercise judicial discretion in only one way, and that is against her.

Solicitors : *F. G. Huggett*, Maidenhead (for the petitioner) ; *Kimber Bull, Howland, Clappé & Co.* (for the respondent).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

JUPITER GENERAL INSURANCE CO., LTD. *v.* ARDESHIR BOMANJI SHROFF.

[PRIVY COUNCIL (Lord Maugham, Sir Shadi Lal, Sir George Rankin), **March 11, 12, 15, April 15, 1937.**]

Privy Council—Bombay—Master and servant—Wrongful dismissal—Departmental manager of life insurance company—Summary dismissal—One act of misconduct.

The manager of the life insurance department of an insurance company recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to re-insure. He was thereupon dismissed, being given his current month's salary and a month's salary in lieu of notice :—

HELD : (i) upon the facts the manager was entitled to more than one month's notice, and the dismissal must be treated as a summary dismissal.

(ii) the one act of misconduct of the manager justified a summary dismissal.

Per CUR. The immediate dismissal of an employee is a strong measure, and it can be only in exceptional circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence.

[**EDITORIAL NOTE.** There is good ground for the dismissal of a servant if he habitually neglects his duties, but an isolated act of neglect or misconduct will not justify summary dismissal unless attended by serious consequences. This aspect of the law of master and servant is not well covered by authority, and the considered statement of the principles governing it by the Privy Council is of interest and importance.

AS TO DISMISSAL FOR ISOLATED ACTS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 153, 154, para. 254 ; and FOR CASES, see DIGEST, Vol. 34, pp. 78, 79, Nos. 551-564.]

Cases referred to :

(1) *Baster* v. *London & County Printing Works*, [1899] 1 Q.B. 901 ; 34 Digest 79, *563* ; 68 L.J. Q.B. 622 ; 80 L.T. 757.

(2) *Bombay Cotton Manufacturing Co., Ltd.* v. *Motilal Shivlal* (1915), L.R. 42 Ind. App. 110.

(3) *Clouston & Co., Ltd.* v. *Corry*, [1906] A.C. 122 ; 34 Digest 74, *509* ; 75 L.J. P.C. 20 ; 93 L.T. 706.

(4) *Edwards* v. *Levy* (1860), 2 F. & F. 94 ; 34 Digest 78, *553*.

APPEAL from a judgment of the High Court of Judicature at Bombay in its appellate jurisdiction (SIR JOHN BEAUMONT, C.J., RANGNEKAR, J.), dated Mar. 19, 1935, allowing (in part) the respondent's appeal from the decree of that court in its ordinary original civil jurisdiction (DAVAR, J.), dated Aug. 23, 1934, and awarding him the sum of Rs.17,000 as damages for wrongful dismissal from the service of the appellant company. The facts of the case are set out in the judgment of their Lordships, delivered by LORD MAUGHAM.

R. P. Croom-Johnson, K.C., and *C. P. Harvey*, for the appellant company, referred to *Baster* v. *London & County Printing Works* (1), *Bombay*

Cotton Manufacturing Co., Ltd. v. *Motilal Shivlal* (2), *Clouston & Co. Ltd.* v. *Corry* (3).

A. M. Dunne, K.C., Sir Thomas J. Strangman, K.C., and *S. P. Khambatta* for the respondent, referred to *Edwards* v. *Levy* (4).

Lord Maugham: Various questions were argued in the courts below, but the only question with which their Lordships find it necessary to deal is whether, assuming that, upon the true construction of the contract of service between the parties, the respondent's employment was not terminable on one month's notice, the appellant company was entitled summarily to dismiss the respondent from its service. In the view their Lordships take of the appeal, it is unnecessary to express an opinion upon the true construction of the contract of service, or on the question as to the proper measure of damages, if any were recoverable.

The appellant company carries on a large insurance business in Bombay. A firm called Lalji Naranji & Co. were the managing agents, and Mr. Lalji Naranji is, or was, the chairman of the board of directors of the appellant company. A Mr. Mody was the managing governor, and was authorised to do all the business of the company, subject to the control of the managing agents. The respondent was at first in the service of the appellant company from June 1, 1925, until June 1, 1926, as a canvasser. In May, 1928, the appellant company opened a life insurance department, and in that month the respondent re-entered its service as manager of that department. His salary began at Rs.200 a month. On Jan. 24, 1930, after some other increases, it was raised to Rs.400 a month, as from Jan. 1, and, by a letter of Jan. 24, it was agreed that, in the event of the life department showing certain annual increases in the business, his salary would be gradually increased up to a maximum of Rs.700 a month. The letter concluded by saying: "In the event of your not being able to fulfil the guarantee mentioned above we have the right to terminate your engagement at any time thereafter by one month's prior notice of our intention to do so." The letter contained no other statement as to the notice to which the respondent was to be entitled if he was dismissed. It was contended on behalf of the respondent that, upon the true construction of the letter, he was entitled to continue in his employment for at least 3½ years (afterwards extended to 4½ years) subject only to the right to terminate under the concluding paragraph of the letter, in the event of the so-called guarantee as to increase of business not being fulfilled. Their Lordships do not think it necessary to express any opinion on this part of the case. The respondent was in fact dismissed from his employment on Dec. 21, 1931, by a letter stating that his services were no longer required, and that the cashier had been instructed to pay him his salary for the current month, and also one month's salary in lieu of notice. The letter was signed by Mr. Mody as managing governor of the company, and both he and the secretary of the company deposed to the fact that the letter was written in that form out of consideration for the respondent, and in order that he should not find it difficult to obtain service elsewhere. Their Lordships were not persuaded that one month's notice was sufficient unless the clause at the end of the letter of Jan. 24, 1930, could be relied on, a question which depends on facts on which there have been findings in favour of the respondent. Their Lordships, therefore, must approach the matter as if the case was one of summary dismissal without notice, though clearly the position of the appellant company is not worse than it would have been if no salary in lieu of notice had been paid. The respondent, at the trial, and before their Lordships, has placed much reliance on a circular bearing date Oct. 31, 1929, and circulated among the superior officials of the company. It was prepared by Mr. Mody, who was therein described as the "managing governor," for the guidance of the office establishment, and it stated that it had been found that no responsibility was fixed on any of the officers for any work, and it had therefore been decided to divide the work in the manner mentioned. To the managing governor was allocated the business of fire, marine and accident (foreign and up-country). To the secretary was allocated the business of fire, marine and accident (local business). There followed the words: "the life department, both local and up-country, will be looked after by the secretary entirely." The circular stated that the company had two officers, namely, the managing governor and the secretary, and that the work of both these officers was supervised by the managing agents, and there was a number of other references to the duties of the managing governor. The respondent was not mentioned in the circular, nor was his position therein defined. The respondent has contended that the managing governor had no concern with the life insurance department, and that he was entitled to resent any action by the managing governor in supervising that department as being officious and intermeddling. The trial judge, however, refused to accept this view. The respondent was driven to admit, in the course of cross-examination, that the secretary, a Mr. Iyer, had to be in constant consultation with Mr. Mody about the details of the proposals for life insurance. Further, a number of documents was produced in court which showed Mr. Mody's habitual supervision of the life insurance business. Not only were the respondent's statements with reference to this matter thus proved to be ill-founded, but, according to the judge, he was driven to invent falsehoods in order to get over the effect of the documents. Moreover, in addition to the evidence given by Mr. Mody and Mr. Iyer, which, according to the judge, stood unchallenged, there was evidence given by a Mr. Shangji Narsingh Nagarmutt, the managing agent of several Indian insurance companies, who had been in constant touch with Mr. Mody, and that evidence satisfied the judge beyond a doubt that the respondent's story that Mr. Mody was a figure-head in the office, so far as the life department was concerned, was a tissue of falsehood. Their Lordships have thought it right to mention these facts because so much reliance has been placed on the circular and its effect, both by the respondent and by the judges in the appellate court, but, for reasons which will appear later, they attribute a minor importance only to this matter.

The material circumstances are as follows. On Dec. 10, 1931, the appellant company received by letter from the Bombay Mutual Life Assurance Society, Ltd., an advice that it had received a proposal for life insurance from one Keshavji Manekchand, and the appellant company was requested to re-insure the risk up to Rs.10,000. This letter was immediately placed before Mr. Iyer, the secretary of the appellant company, and was passed on by him in the ordinary course to Mr. Mody, who occupied the same room in the office as Mr. Iyer. It so happened that Mr. Mody was well acquainted with the life proposed to be insured, he having been a neighbour of his for 10 years. Taking the view that Keshavji's life was not a good one, and that the re-insurance was not in the interest of the appellant company, he wrote the word " declined " on the letter of Dec. 9, and initialled it. The letter and papers went back to the respondent as the branch manager of the life department. On Dec. 11 or Dec. 12, the respondent (in accordance with the usual practice) had an interview with Mr. Mody with reference to other life business, and he asked Mr. Mody what objection there was to the acceptance of the proposal of re-insurance on the life of Keshavji. Mr. Mody told him that Keshavji was his next-door neighbour and a friend, and that he knew more about him than anyone in the office did, and he did not want to entertain the proposal. The respondent started grumbling by saying that, if they refused proposals of that kind, they could not be expected to do a large business, to which Mr. Mody replied that he did not want his company to get into trouble by accepting such risks, and that he would not change his decision. Accordingly, on Dec. 15, a letter was written to the Bombay Mutual Life Assurance Society declining the re-insurance proposition. It was prepared under the directions of the respondent, who initialled it, and it was signed on behalf of the appellant company by Mr. Iyer.

On Dec. 19, there was laid before Mr. Iyer a proposal for the direct life assurance of the same Keshavji for the sum of Rs.50,000. The accompanying papers included a note, initialled by the respondent, recommending the issue of a 10 years' endowment policy. Mr. Iyer, who habitually signed the appellant company's letters on many subjects, dealing sometimes with as many as 300 in a day, had no recollection of having signed the letter of Dec. 15, refusing the proposal of re-insurance, and the note initialled by the respondent recommending the acceptance of the risk did not contain any reference to this refusal, nor to Mr. Mody's personal doubts as to the life proposed to be insured. On Dec. 21, the respondent again brought the papers to Mr. Iyer, and pointed out that Mr. Lalji Naranji, who was said to have been a friend of Keshavji, had written the word " accept " on the office note. The papers were left on Mr. Iyer's table, and the latter mentioned casually to Mr. Mody, who was in the office, that the appellant company had accepted a direct insurance proposal for Rs.50,000 on the life of Keshavji. Mr. Mody, who was surprised to find that Mr. Iyer had not been informed of the refusal by himself of the re-insurance proposal, wrote the words " I am against this acceptance " on a slip which he attached to the papers, and he sent them back to the respondent's department.

Mr. Mody then sent for the respondent, Mr. Iyer remaining in the room. Mr. Mody reminded the respondent of the previous re-insurance proposal, and asked him why he had not made any reference to this fact in the note submitted to Mr. Iyer on Dec. 19. Thereupon the respondent became very angry, and told Mr. Mody that he had no business to ask him any question, and added that Mr. Mody did not know how to behave himself. He then said: " I do not care for this job, and I can find such jobs anywhere." Mr. Iyer, who had kept silent, made a gesture suggesting that the respondent should be sent out of the room. Mr. Mody asked the respondent to leave but he declined. Mr. Mody then said, " All right, stand," and on that the respondent left the room. Mr. Mody and Mr. Iyer held a short consultation, which resulted in the letter of dismissal being sent to the respondent. In considering the importance of the incident, it should be added that the proposed risk was of an exceptional character, both as to amount and as to the age of the proposer. The practice of the office was not to insure persons above the age of 50, and Keshavji was 52 at this time. Further, the practice was not to remain liable on any life in respect of a sum exceeding Rs.10,000, and it would therefore be necessary to re-insure for no less than Rs.40,000. Having regard, however, to the fact that Keshavji was insuring his life for a large sum with the Bombay Mutual Life Assurance Society, and that that society had been unsuccessfully seeking to re-insure with the company, it was obvious that a re-insurance to the amount of Rs.40,000 in respect of such a life might be very difficult to obtain on satisfactory terms.

The trial judge, as already stated, found that the respondent in his evidence had invented false incidents, imagined interviews which never took place, placed falsehoods into the mouths of people whom he did not venture to call as witnesses, and had put forward a fraudulent document. With regard to the proposals for re-insurance and for direct insurance on the life of Keshavji Manekchand, the respondent gave evidence that the proposal for direct insurance was received before the proposal for re-insurance, and that the reason why the latter proposal was refused was that Mr. Iyer and the respondent, having discussed the matter together, agreed that there was no object in accepting a re-insurance proposal when the appellant company had already got a direct proposal for a larger amount. The judge, however, wholly disbelieved this story, and found that the facts were as set out above. The respondent went so far as to suggest in his evidence that the word " Decline " and the initials of Mr. Mody on the re-insurance proposal dated Dec. 9, 1931, from the Bombay Mutual Society were not in fact written on the document at any time before the respondent's dismissal, but were added by Mr. Mody at some subsequent date, for the purpose of supporting the appellant company's defence to the action. These suggestions also were wholly rejected by the trial judge. As regards the interview of Dec. 21, 1931, which resulted in the respondent's dismissal, it may be noted here as a remarkable fact that from first to last the respondent has given no intelligible explanation, apart from the false one above mentioned, of his conduct in recommending the risk (in the form of a 10 years' endowment policy) without any reference to the fact that Mr. Mody had, to his knowledge, and for a good reason, declined the re-insurance on the same life. It is not in dispute that, at the interview of Dec. 21, Mr. Mody, with the consent of Mr. Iyer, who was present throughout, began by asking for an explanation of the respondent's conduct. It cannot be doubted that his conduct called for explanation. He, in fact, gave none. His own account of the interview at the trial, even if it could be believed, is wholly unsatisfactory. According to him, when he came into the room Mr. Mody was very angry, and banged his fist on the table and asked in a loud tone why he had recommended Keshavji Manekchand's proposal to the directors, and he said that he himself said that since the proposal had been received in the office it ought to be put before the directors, that Mr. Mody thereupon said in a very loud tone, "I do not want this business to be accepted," to which the respondent replied that it was his duty to put forward the papers, and that he was not taking any instructions from Mr. Mody. The evidence of Mr. Mody and Mr. Iyer, which the judge accepted, was as set out above. The main point of difference between their version and the respondent's was that they denied that Mr. Mody had spoken angrily, and they spoke of the rudeness and violent manner displayed by the respondent.

Even if their Lordships could accept the view that the respondent was entitled to conduct the life insurance business without question or interference from Mr. Mody, as to which they have above expressed their opinion, the respondent's behaviour, according to his own statement, was intolerable. It is important to remember that, on the one hand, Mr. Mody had, only a week before, told the respondent that Keshavji was his next-door neighbour, and that he did not approve of the risk. It could not be in any way proper to approve the risk and to forward it to the directors without a statement of these facts. Even if Mr. Mody had no authority in the matter his view, founded on special knowledge, ought not to have been in effect suppressed. In the second place, Mr. Iyer, who was admittedly the official in charge of the life department, and the respondent's superior, was present, and, if the latter really doubted the authority of Mr. Mody to require an explanation, what could be easier than to ask Mr. Iyer if he authorised the question and desired an answer? According to his own account, the respondent refused to explain his conduct, and Mr. Mody and Mr. Iyer might very well come to the conclusion that it was not capable of any proper or satisfactory explanation. As regards the explanation which Mr. Mody asked for, it should be added that he was clearly in a position which required him to make inquiries as to every matter touching discipline and the rightful conduct of business. To take a strong illustration, suppose that there was ground for thinking that an official had been bribed in relation to the acceptance of a risk, could anyone doubt that it would be the duty of the managing governor to make inquiries, and to submit the result of them to the managing agent? The notion that the circular (or any possible construction of it) furnishes an excuse for the respondent's refusal to explain or to defend his action and omission, in relation to the risk, to both Mr. Mody and Mr. Iyer seems to them to be without foundation.

Their Lordships do not take the view that the outrageous conduct of the respondent at the trial, including his inventions of interviews, his false charges, and the tissues of falsehoods of which the trial judge has found him guilty, has any direct bearing, other than an evidential one on the question whether he was properly dismissed, but they must observe that, in so far as anything turns on the correctness of the view formed by Mr. Mody and Mr. Iyer as to whether it was reasonably possible for the company any longer to employ the respondent, his behaviour in the witness-box makes it exceedingly difficult to conclude that their view was a wrong one. If there were any doubt as to the real meaning of the respondent's conduct at the interview, it would be removed by the letter written by his attorneys (on Jan. 13, 1932), after his dismissal. They state their client's view as follows:

> On the 21st ultimo Mr. Mody tried to interfere with our client's work and to dictate to him certain things which he had no right to do and which in our client's opinion was a most improper thing to do. Our client naturally did not agree with Mr. Mody's instructions. . . . Our client rightly resented this interference from Mr. Mody and stated to him that he was not prepared to take any instructions from him in the matter.

Their Lordships find it impossible to understand how the managing governor of the company could properly supervise the business if a subordinate officer chose, not only to adopt this attitude, but in effect to overrule the decision of his superior, in a case in which the latter had peculiar means of knowledge as to the danger of accepting a risk. Nor did the respondent improve matters by instructing his solicitors, on Feb. 1, 1932, to write a letter containing serious charges against Mr. Mody of giving "improper instructions" to the respondent—charges which there was no attempt whatever to justify at the trial.

Their Lordships recognise that the immediate dismissal of an employee is a strong measure, and they have anxiously considered the evidence with a view to determine the question whether the trial judge was right in his finding that the respondent was guilty of gross negligence, which, coupled with his conduct at the interview of Dec. 21, was sufficient to justify his dismissal. On the one hand, it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence ; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, C.J., was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded. Placing, however, all proper weight on these considerations, their Lordships have yet to determine, in view of the facts found by the trial judge, apart, of course, from the vital finding that the circumstances justified dismissal, whether the misconduct of the respondent was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and therefore to justify immediate dismissal. It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee, and that decisions in other cases are of little value. We have here to deal with the business of life insurance. A mistake in accepting a risk may lead to a very considerable loss, and repetition of such mistakes may lead to disaster. The undertaking is one in which the undertaking of each individual risk is necessarily hazardous, and it is only by unremitting care and prudence that the business can profitably be carried on. If an officer of a life insurance company, whatever his motive may be, withholds from his superiors information which will in all probability lead them to refuse a risk, and *a fortiori* if it is one of exceptional character and magnitude, it would seem to be very difficult for his superiors to be confident that he will, in the future, properly carry out the important duties entrusted to him. In other words, if a person in charge of the life assurance department, subject to the supervision of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if, when an explanation is called for, he refuses apology or amendment, it seems to their Lordships that his immediate dismissal is justifiable.

Some, at least, of the above considerations seem not to have been present to the minds of the judges on the appeal to the High Court. In particular, their Lordships cannot agree that the respondent was guilty of a mere error of judgment. They are satisfied, from the evidence given at the trial, that the respondent recommended the issue of the endowment policy, well knowing that the managing governor would have rejected it, and in the hope or the expectation that Mr. Iyer would not remember the facts as to the re-insurance proposal. They take a serious view as to the interview of Dec. 21, and they draw a different inference from that of the judges as to the true meaning of the respondent's behaviour. Further, and with all respect to the judges in the Appeal Court, they are of opinion that it is a mistake to consider the action of the respondent in approving the risk, and his conduct at the interview, as if these two matters could separately be excused or explained. They are in truth inseparable from the point of view of the action of Mr. Mody and Mr. Iyer in giving the notice of dismissal. On a review of the whole case, their Lordships must come to the conclusion that the trial judge was justified in his view of the facts, and in the conclusion at which he arrived.

For the reasons above stated, their Lordships are of opinion that the appeal should be allowed, the decree of the Division Bench set aside, and the decree of the trial judge restored. The respondent will pay to the appellant company its costs of the appeal to the Division Bench and of this appeal, in addition to the costs awarded by the trial court. They will humbly advise His Majesty accordingly.

Appeal allowed with costs.

Solicitors: *E. F. Turner & Sons* (for the appellant company); *T. L. Wilson & Co.* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

TOMLEY *v.* SHREEVE.

[CHANCERY DIVISION (Luxmoore, J.), **May 26, 1937.**]

Friendly Societies—Parent society—Alleged improper purchase of property by local branch—Right of parent society to sue for a declaration—Friendly Societies Act, 1896 (c. 25), *s.* 94 (1).

It was alleged that a local branch of a friendly society had improperly purchased certain freehold property, and the parent society sued for a declaration that the purchase was an improper one, in breach of the rules and a breach of trust, and that the defendants were to make good to the lodge the money spent upon the purchase:—

HELD: the parent society had a vested interest in the fund of the local lodge, although the amount of such interest could be ascertained only upon a proper valuation in accordance with the rules, and was entitled to maintain the action under the Friendly Societies Act, 1896, s. 94.

[**EDITORIAL NOTE.** It might be thought that the terms of the Friendly Societies Act, 1896, s. 94, are sufficient in themselves to support these proceedings by the parent society, without showing that it, as the parent society, had, under the rules, any interest in the fund of the local branch; but it is here held that the parent society had such an interest, and that seems an essential part of the decision.

AS TO LEGAL PROCEEDINGS BY SOCIETIES OR BRANCHES, see HALSBURY, Hailsham Edn., Vol. 15, p. 390, para. 732; and FOR CASES, see DIGEST, Vol. 25, pp. 334, 335, Nos. 354-371.]

PROCEDURE SUMMONS, by which the defendants applied that the point of law raised by the defendants in para. 16 of the defence, namely, that this action is bad in law, and that the statement of claim discloses no cause of action against the defendants, in that neither the plaintiff trustees as trustees of the society nor the plaintiff Meadmore as a director of the society have any right or title to sue the present defendants or any of them in respect of the funds or property of a registered branch of the society. The summons was taken out under R.S.C., Ord. 25, r. 2. The claim in the action was for a declaration that an investment made in July, 1935, by the defendants was bad, in that it was an investment of £625, moneys of the lodge, in the purchase of a certain property, and that such investment was unauthorised by the rules of the lodge, and constituted a breach of trust, and a declaration was sought that the defendants were jointly and severally liable to make good to the lodge the money expended in the purchase of the property. The Friendly Societies Act, 1896, s. 94 (1), provides:

> The trustees of a registered society or branch, or any other officers authorised by the rules thereof, may bring or defend, or cause to be brought or defended, any action or other legal proceeding in any court whatsoever, touching or concerning any property, right, or claim of the society or branch, and may sue and be sued in their proper names, without other description than the title of their office.

Cyril Radcliffe, K.C., and *F. Baden Fuller* for the plaintiffs.

W. P. Spens, K.C., and *J. F. Bowyer* for the defendants.

Spens, K.C.: There is authority for saying that the court will not allow a beneficiary to bring an action without first having alleged that the trustees have refused to do their duty. There is no allegation that the trustees of the local lodge have refused to sue, and they are the proper persons to do so. The plaintiff Meadmore is suing on behalf of himself as a director, and on behalf of all the other directors of the society, but there is no equity which entitles him so to sue.

Radcliffe, K.C.: The trustees are the proper persons to take proceedings in a court. The trustees are acting on behalf of the parent society, which is a contingent beneficiary, and can, therefore, bring an action, because of its expectation under r. 29 of the society. As a beneficiary, the parent society has a contingent right in property, which has been affected by a breach of trust causing damage. There is a danger to the funds of the central authority.

Spens, K.C., in reply: If the statement of claim shows an equity, the trustees can succeed. There is no doubt about the general principle. The real question is whether the parent society has a beneficial interest, and such a beneficial interest as will entitle it to maintain this action. The trustees must allege sufficient to show what their equity is, and, secondly, they must show how it is likely to be damaged. That is what the plaintiffs have not done in this case. The allegation that they have suffered may turn out to be entirely wrong.

Luxmoore, J.: The question which I have to determine arises out of a summons which was taken out on Apr. 10, 1937, asking that a point of law raised by the defendants in their defence should be set down for hearing. I understand that the master, before whom the summons came in the first instance, directed that the point of law should be set down, and that there was no appeal from that order, but an application was made to Farwell, J., who, in order to save expense, and so that the matter might be disposed of speedily, directed that the point of law

should be set down as a procedure summons. The point of law is in
substance this: Have the plaintiffs any cause of action against the
defendants? I do not mean any cause of action by reason of non-
disclosure in the statement of claim, but have they in law any cause
of action at all? The action is brought by the trustees of the Independent
A Order of Oddfellows Manchester Unity Friendly Society and by another
gentleman who has taken action on behalf of himself and all other
directors of the society. The defendants are the three present trustees
of a local branch of the parent society, the trustees at the time of the
investment and purchase complained of, and three gentlemen who are
B sued in their personal capacity, I think also as being members, with one
of the other defendants, of the committee of management of the local
lodge. The action has been brought to establish that there has been a
breach of trust in connection with a particular investment made in
respect of the funds of the local branch. The question, which I under-
C stand is the only question, that I have to determine is whether the
plaintiffs have such a beneficial interest in the fund of the local branch
as would entitle them to bring an action for breach of trust. The
question whether the plaintiffs have such a beneficial interest depends
upon the rules of the society, and, in particular, I think, upon a number
D of other rules which refer to r. 29 of the society's general rules. It is,
I think, quite clear that each local branch of the society has funds of
its own, derived from entrance fees, contributions, fines, donations,
levies, and so on, and, generally speaking, the local branch has custody
of these funds, through its trustees, and in accordance with the provisions
E of the rules of the local branch. But the local society is, under the
general rules of the parent society, bound to contribute certain moneys
to what is called the Unity Reserve Fund, and there is some liability
to make contributions to the general funds of the parent society. Rule 29,
which is the material rule, deals with the Unity Reserve Fund. It says:

> F (1) A fund shall be established to be called the Unity Reserve Fund to which
> every lodge in Great Britain, Northern Ireland, the Isle of Man and the Channel
> Islands shall contribute from its sick and funeral fund, one penny per member per
> quinquennium and for which lodges shall also set aside in trust for the Unity such
> proportion of their surpluses as is hereinafter specified.
>
> (2) For the purposes of this rule there shall be a standard valuation of every lodge
> prepared at the same time as its statutory valuation and such standard valuation
> G shall be made upon the basis of its benefits and contributions and of interest at
> 4 per cent. or such other rate [determined in the manner therein stated].
>
> (3) Every lodge which upon its standard valuation is declared to have a surplus
> of assets over liabilities shall set aside in trust for the Unity Reserve Fund 5 per
> cent. of the surplus disclosed by such valuation provided that the amount to be
> so set aside shall not in any case exceed 15 per cent. of the surplus disclosed by the
> statutory valuation.

H I do not think I need explain the difference between the statutory and
the standard valuation. It is enough to say that the parent society
has an interest in the surplus of the fund, as valued under r. 29, of every
local branch. Obviously, if a breach of trust is committed, there may
be serious damage done to the amount of the surplus funds. In all
actions for breach of trust, it is, of course, necessary that the persons

who are complaining of the breach of trust shall be persons who are beneficially interested in the fund out of which the investment objected to has been made, and to maintain such an action it is necessary to show an interest in the property affected by the breach of trust. The interest may be ascertainable at some future time. In some circumstances it is sufficient to prove nothing more than a breach of trust, but in the present A
case I think it is plain that the parent society is a *cestui que trust* in respect of the fund of the local society, in that the parent society has an interest in the local fund, and it is none the less a vested interest in the fund because the actual amount to be paid to them is to be ascertained only after a proper valuation, in accordance with the rules, has B
been made at periodical times. In my judgment, it would be impossible to say that the plaintiff trustees had no cause of action in this case against the trustees of the local society. The trustees of the parent society are entitled, by the Friendly Societies Act, 1896, s. 94, to bring any action or other legal proceedings in any court whatsoever touching or concerning C
any property, right, or claim of the society or branch, and may sue and be sued in their proper names. At any rate, so far as these proceedings are concerned, the plaintiff trustees are entitled, under sect. 94, to bring this action. Of course, the question whether a breach of trust has been committed or not is a matter not before me now. So far as the point D
of law is concerned, I answer it in the negative. I think, in the circumstances, the right order would be to make the costs of this summons costs in the action.

Solicitors: *J. C. Brookhouse* (for the plaintiffs); *Owen White & Catlin* (for the defendants). E

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

IZZARD *v.* UNIVERSAL INSURANCE CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Roche), **May 3, 4, June 1, 1937.**]

Insurance—Third party risks—Passenger carried "by reason of or in pursuance of a contract of employment"—Road Traffic Act, 1930 (*c.* 43), *s.* 36 (1) (*b*) (ii).

The assured owned a motor vehicle, which was insured, under a policy of insurance, against commercial risks, but not against passenger risks. The policy provided that the company would indemnify the assured against liability in respect of the death of any person arising out of or caused by the use of the vehicle, but excepting any person in the employment of the assured whose death arose out of and in the course of such employment, and any person whose death arose from an accident while he was being carried in or upon such vehicle "other than a passenger carried by reason of or in pursuance of a contract of employment," which proviso substantially followed the wording of the Road Traffic Act, 1930, s. 36 (1) (*b*) (ii). The assured agreed to do haulage work for a company of builders, and to put a lorry at the company's disposal for the conveyance of workmen employed by the company to and from the workmen's homes at the week-ends, on the condition that the assured was to be paid for every journey, whether workmen were carried on the lorry or not. On one of these journeys, an accident occurred, and a workman was killed. His widow was awarded damages against the assured, who was subsequently adjudicated bankrupt. She thereafter claimed against the insurance company under the Third Parties (Rights against Insurers) Act, 1930:—

HELD: as the words "contract of employment" were to be construed as including a contract with a third party, and were not subject to specific limitation by insertion of the words "with the insured person," which were not inferred from the general tenor of the Act of 1930 or the policy, the appellant was entitled to recover damages under the policy of insurance.

Decision of Court of Appeal ([1936] 2 All E.R. 1565) *reversed.*

Decision of MACKINNON, J. ([1936] 1 All E.R. 738), *restored.*

[**EDITORIAL NOTE.** In this construction of a clause in a policy of insurance against third party risks, the construction is really that of the Road Traffic Act, 1930, s. 36, since the relevant clause in the policy was copied from that section. The point is whether it is possible to imply in the section the words "with the insured person" after the words, "by reason of a contract of employment," and the difference of opinion among the judges in the lower courts is now resolved by the House of Lords against such implication.

AS TO THE ROAD TRAFFIC ACT, 1930, s. 36, see HALSBURY, Hailsham Edn., Vol. 18, p. 561, para. 909; and FOR THE SECTION ITSELF, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 637.]

APPEAL from an order of the Court of Appeal (SLESSER and SCOTT, L.JJ., GREER, L.J., dissenting) reported in [1936] 2 All E.R. 1565, reversing the judgment of MACKINNON, J., reported in [1936] 1 All E.R. 738, whereby he affirmed an award made in the form of a special case by J. D. CASSELS, K.C., in favour of the appellant. The facts and the arguments are set out in the judgment of LORD WRIGHT.

H. D. Samuels, K.C., and *Frank Soskice* for the appellant.

A. T. Miller, K.C., *Tristram Beresford, K.C.*, and *C. N. Shawcross* for the respondent company.

Lord Wright: My Lords, the claim out of which this appeal arises is against the respondent company under a policy of insurance dated Nov. 30, 1933, issued by it to William Druce on a commercial motor vehicle against various risks, including liability to third parties. The appellant is a widow, whose husband had been killed by the negligence of a servant of Druce. She recovered damages on that ground against Druce under Lord Campbell's Act. Druce having become bankrupt, the appellant sued the respondent company, on the ground that Druce was entitled under the policy to be indemnified by it in respect of the third party liability, and that the appellant had now a direct claim against the respondent company vested in her in virtue of the Third Parties (Rights against Insurers) Act, 1930, s. 1. The respondent company disputes the claim, contending that, under the policy, the particular liability is not covered.

Druce had been in business as, *inter alia*, a haulage contractor at Didcot. The policy in question was described as a commercial motor vehicle policy, and was on a Fordson truck, warranted used only for general haulage and other trades. It incorporated a proposal that was declared to be the basis of the contract. This proposal, so far as it is here material to refer to it, stated that the vehicle would be used in connection with the assured's general business, including general haulage. While it specified third party risk as one of the benefits to be covered, it expressly negatived that passenger risk was to be covered. I shall refer in more detail to the proposal and policy when I have stated the relevant facts, which are to be found in the award stated in the form of a special case for the opinion of the court. The arbitrator found in favour of the appellant, and his decision was affirmed by the judgment of MacKinnon, J., but that judgment was reversed in the Court of Appeal by Slesser and Scott, L.JJ., Greer, L.J., dissenting, and agreeing with MacKinnon, J. Hence this appeal.

The deceased man, Bernard George Izzard, was employed at the time of the fatal accident by Industrial Builders, Ltd., which was engaged in building operations at Coventry. It had entered into a verbal contract with Druce that he should do haulage work for it between Didcot and Coventry and at Coventry, and should also put a lorry at its disposal every week-end for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry. Izzard lived near Didcot, and agreed to work at Coventry on the terms of being paid increased pay while at Coventry as compared with his pay while working at Didcot, and of having a lorry at his disposal if he desired to go home to Didcot at week-ends. Accordingly, he went home to Didcot every Saturday and returned to Coventry every Monday. In that state of affairs, on Saturday, July 21, 1934, he met his death while being carried back to Didcot on the insured vehicle. The arbitrator, in these circumstances, found that Izzard was being carried as a passenger on the vehicle by reason of and in pursuance of a contract of employment, that his death was caused by and arose out of the use of the vehicle, and that, at the time the death was caused, the commercial motor vehicle was being used for a purpose mentioned in the schedule to the policy—that is to say, general haulage and other trades. On these findings, the question was whether the respondent company was liable to the appellant. To answer the A question, it is necessary to refer in more detail to the proposal and policy. The proposal is on a form which is adapted to be used in reference to two classes of cars, private hire cars and commercial (goods carrying) vehicles. There is a separate schedule for each class. Both schedules cover risks such as accidental damage, fire, theft. But, in respect of the B private hire cars, that is, cars other than taxi cabs, which are hired out by previous orders, liability to passengers, as might be expected, as well as third party liability, is included. In the commercial vehicles, there is no head of liability to passengers, but there is a head of third party liability. It is this omission of liability to passengers which, in my C opinion, is indicated by the words on the face of the proposal "Is passenger risk required to be covered? No." But the scope of the third party liability intended thereby to be covered is shown by the terms of the policy, as contained in sect. II, headed "Liability to Third Parties." That section provides that the company will indemnify the D insured against liability, *inter alia*, in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle, including the loading and unloading of it. This indemnity is subject to certain exceptions or provisos, of which it is here necessary to particularise two:

> (*b*) Death of or bodily injury to any person in the employment of the insured E arising out of and in the course of such employment, (*c*) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.

It is clear that, though passenger risk in the full sense of the term is F excluded, a certain limited class of passenger risk is specifically covered, viz., that described in the words in brackets in (*c*) quoted above, which is in the form of an exception to an exception, and thus constitutes a positive cover. The crucial question is whether these words cover the particular liability which is claimed to exist in this case.

G It will be convenient, before seeking to answer the question, to dispose of certain difficulties which have been raised. It was contended, on behalf of the respondent company, that the express negation of passenger risk on the face of the proposal made it impossible to bring in the limited passenger risk specified in (*c*) quoted above. I think there are at least H two sufficient answers to this objection. The first is that, though the warranties and conditions expressed in the proposal are declared to be basic conditions of the policy, that must be subject to their being overridden by any express terms to the contrary effect in the actual policy. No doubt the proposal conditions and the express conditions of the policy must be read together, and, as far as may be, reconciled, so that every part of the contract may receive effect, but, if there is a final and direct inconsistency, the positive and express terms of the policy must prevail. If the proposal by itself is read as negativing absolutely any cover of passenger risk, the policy which incorporates the proposal must be construed as limiting that generality to the extent expressly provided by (*c*), which must *pro tanto* prevail. But there is a second answer to the objection, which is that, in my opinion, it is based on a misunderstanding of the proposal. What is negatived under the head of passenger risk is the full passenger risk required in the case of " private hire cars," but not required in the case of commercial vehicles. The limited passenger risk now in question, whatever its extent, is merely part of the third party liability which the proposal requires. The respondent company's contention, if accepted, would have the effect of excluding the risk altogether. It seemed to be suggested that, if it had not that effect, it might somehow modify the construction of (*c*). No such middle view is, however, in my opinion, tenable.

I may note, in passing, that the arbitrator's findings of fact quoted above show that the conditions have been satisfied that the death should arise out of the use of the insured vehicle, and that, at the time of the accident, the vehicle should not be used otherwise than for the purposes mentioned in the policy.

The substantial objection which was raised on behalf of the respondent company, and which found favour with the majority of the Court of Appeal, though rejected by the arbitrator, MacKinnon, J., and Greer, L.J., was that the bracketed words in (*c*) must be limited by reading " by reason of and in pursuance of a contract of employment " as meaning " a contract of employment with the insured." The contract of employment which the arbitrator found was a contract not between Izzard and Druce, the insured, but between Izzard and Industrial Builders, Ltd., for which company he was working under a contract, which included, as one of its terms, the option of being conveyed between his home at Didcot and the work at Coventry at week-ends. If correctly construed, the policy did not, it was said, cover the risk, because the only contract of employment that could have been relevant was one between Izzard and Druce.

I must now refer to the Road Traffic Act, 1930, s. 36 (1) (*b*) (ii), the requirements of which the arbitrator holds were complied with by the policy. By sect. 35 (1) of the Act, it was made unlawful to use a motor vehicle on the road unless there is in force in relation to that user such a policy as the Act requires. Sect. 36 provides in general terms for an insurance in respect of liability for death or bodily injury to any person arising out of the use of the vehicle on the road. Then come provisos, of which (i) and (ii) are relevant in this connection. The section says, by way of proviso to the general requirement that there should be a policy :

> Provided that such a policy shall not be required to cover—(i) liability in respect

of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise.

A It seems clear that provisos (*b*) and (*c*) of the policy are intended to reproduce and follow the statutory terms. The former of these provisos seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that
B these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary, or otherwise, was outside the provisions of the Acts. It may be that, for some reason, the legislature thought that these cases
C were infrequent, and might be disregarded. But the second proviso is on a different footing. The general purpose of that statutory provision is to exclude from the compulsory insurance passenger risk in general with the exception in the first place of passengers carried for hire or reward. This is the form of passenger risk which, as already explained,
D is offered in the respondent company's proposal form under the heading of passenger risk. It need not be further discussed here. But the meaning of the other head is that on which the dispute here has turned.

I cannot accept the respondent company's contention that "contract of employment" should be construed in the Act as subject to the implied
E limitation "with the person insured by the policy." Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as an adequate criterion of such reasons.
F But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (i), though I am not prepared to say that there might not be, in certain events, an employee of the assured who could claim as a passenger. But such cases
G must be rare. The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract, not with the owner of the vehicle, but with someone else, for instance, with the person whose goods were being carried on the vehicle: thus, a commercial vehicle, carrying a contractor's or merchant's goods, would frequently, and,
H perhaps, even normally, have on it an employee of the goods' owner, to see to loading or unloading or delivering the goods, or caring for them in transit. For these purposes, such a man may be carried as a passenger. The insured person may come under third party liability to such a man, who may be described as being in the position of an invitee in the legal sense, *vis-à-vis* the insured person. A further illustration, which comes

under the same category, is that of an employee or employees of the owner of the goods which are being carried, who go out on the lorry with the goods and return home in the lorry after the goods are delivered. Such employees may properly be regarded as passengers carried in pursuance of a contract with someone other than the insured person. A further illustration is afforded by the facts like those of the present case. A
Izzard and his mates were being carried, so the arbitrator has found, for purposes of the trade in which the truck was engaged, and as an incident of the haulage, so far as Druce was concerned. The arbitrator has found that the vehicle was being used for haulage purposes, and I see no reason in law for doubting this finding. Similar instances could be multiplied. B

I see every practical reason for construing the phrase in the Act " contract of employment " as including a contract with a third party. This does not exclude a contract with the insured person. The words used are apt to include both cases. As a matter of words, I think the plain meaning is the true meaning. The words of the statute are general C
and unlimited. To insert the words " with the insured person " would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words had been intended, they could and should have been expressed, as was done in the previous para. (i). They are not expressed, and, in my opinion, ought not to be, D
and cannot properly be, implied.

In arriving at this conclusion, I have been discussing the construction of the statute. But the same reasoning applies to the construction of the policy. The latter is admittedly intended to comply with the former. From this point of view, I find no material difference of construction E
between them, and need not repeat, in regard to the policy, what I have said in regard to the statute. It is true that the policy is to be construed independently. It might have been expressed so as by inadvertence to involve a different interpretation. But I find nothing of the sort.

In my opinion, the liability which the appellant seeks to enforce is F
covered by the policy. I think the appeal should be allowed, the order of the Court of Appeal set aside, and the order of MacKinnon, J., restored. The respondent company will pay the appellant's costs in the Court of Appeal and in this House.

G

Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Roche concurred.

Appeal allowed with costs.

Solicitors: *L. Bingham & Co.* (for the appellant); *A. D. Vandamm & Co.* (for the respondent company). H

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

OFFICIAL TRUSTEE OF CHARITY LANDS AND ANOTHER *v.* FERRIMAN TRUST, LTD.

[KING'S BENCH DIVISION (T. Eastham, K.C., Official Referee), **April 29, 30, May 11, 1937.**]

Landlord and Tenant—Lease—Assignee—Underlessee in possession and paying rent to head lessor—Estoppel—Liability on covenant in head lease.

The plaintiffs, as owners of the fee simple of land subject to a lease, in an action to recover possession of a number of houses on the ground of forfeiture for breach of covenant to repair, alleged that the defendant company held the premises as assignees of the lease. The defendant company denied that the lease was vested in it, and averred that it held the land referred to in the lease as underlessee and by virtue of an underlease for the term of the lease less 3 days, that there was no privity between it and the plaintiffs, and that it could not be sued upon the covenants in the lease. The plaintiffs contended that the defendant company was estopped from denying that it was the assignee of the lease, as the defendant company and its predecessor in title had, since 1888, paid to the plaintiffs and their predecessors in title the rent reserved by the lease and remained in possession, whereby the plaintiffs were induced to believe that the defendant company and its predecessors were assignees of the lease :—

HELD : (i) mere payment of rent and possession did not amount to a representation by the defendant company that it intended to induce the plaintiffs to believe that it was the assignee of the head lease.

(ii) as the payment of rent could be made by the defendant company either as lessees' agent or as underlessee or as assignee, the landlords were not entitled to abstain from inquring and to assume for their own benefit that the defendant company was making the payments of rent as the assignee.

(iii) the defendant company, therefore, was not estopped from denying that it was the assignee, although it was estopped from denying the plaintiffs' title to the land.

[EDITORIAL NOTE. The mere fact that a person is in possession of leasehold premises and pays rent to the head lessor is not sufficient to show that he is in possession as an assignee of the lease. He may show that he is in possession as an underlessee or as the assignee of an underlessee, and without some proof of some further facts there is no estoppel preventing him from setting up that he is in possession under such underlease and not liable to the head lessor on the covenants in the lease.

AS TO WHO ARE LIABLE AS ASSIGNEES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 360, 361, para. 435 ; and FOR CASES, see DIGEST, Vol. 31, pp. 403-409, Nos. 5493-5547.]

Cases referred to :

(1) *Greenwood* v. *Martins Bank, Ltd.*, [1933] A.C. 51 ; Digest Supp. ; 101 L.J.K.B. 623 ; 147 L.T. 441.

(2) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469 ; 21 Digest 290, *1032*.

(3) *Freeman* v. *Cooke* (1848), 2 Exch. 654 ; 21 Digest 287, *1019* ; 18 L.J.Ex. 114 ; 12 L.T.O.S. 66.

(4) *Tichborne* v. *Weir* (1892), 67 L.T. 735 ; 30 Digest 356, *182*.

(5) *Rodenhurst Estates, Ltd.* v. *W. H. Barnes, Ltd.*, [1936] 2 All E.R. 3 ; Digest Supp.

(6) *Williams* v. *Heales* (1874), L.R. 9 C.P. 177 ; 30 Digest 361, *232* ; 43 L.J.C.P. 80 ; 30 L.T. 20.

(7) *Stratford-upon-Avon Corpn.* v. *Parker*, [1914] 2 K.B. 562; 30 Digest 358, *204*; 83 L.J.K.B. 1309; 110 L.T. 1004.

(8) *Cadle* v. *Moody* (1861), 30 L.J.Ex. 385; 21 Digest 139, *34*.

(9) *Farrow* v. *Orttewell*, [1933] 1 Ch. 480; Digest Supp.; 102 L.J.Ch. 133; 149 L.T. 101.

Action to recover possession of a number of houses on the ground of A breach of covenant to repair, and also to recover damages for such breaches and mesne profits. The facts are fully set out in the judgment. By consent between the parties, it was ordered that the issue, whether the defendant company was estopped from denying that it was an assignee of the lease, should be tried as a preliminary point B of law under R.S.C., Ord. 25, r. 2, and disposed of before the trial of the issues of fact in the action.

A. F. Topham, K.C., and *S. P. J. Merlin* for the plaintiffs.

David Weitzman for the defendant company.

Weitzman: It is essential that, before an assignee can sue or be sued C upon covenants in a lease he should have the whole of the term. The defendant company never had the whole of the term granted by the head lease and, unless the reversion to the underlease was vested in the plaintiffs, or was merged in the freehold reversion by forfeiture or surrender, the defendant company is the underlessee and not the assignee. D There is no privity between the parties, and the defendant company is not liable on the covenants in the head lease. Payment of rent and possession is not sufficient to make the defendant company liable; *Tichborne* v. *Weir* (4); and such long-continued payment and possession cannot estop the defendant company from denying that it is the assignee. The E defendant company acknowledges the plaintiffs' title to the said land, and concedes that the payment of rent establishes the relationship of landlord and tenant between the parties, but no further. The defendant company is in possession by virtue of an underlease, and it was the rent reserved in that underlease which was paid to the defendant company. F The payment of that rent was no representation by the defendant company that it was in possession, or paid the rent otherwise than in accordance with the underlease vested in it. There was no wilful intent to make the plaintiffs believe in any other state of affairs, and to raise estoppel it must be shown that the defendant company wilfully G caused the plaintiffs to believe that it was in possession under the head lease: *Pickard* v. *Sears* (2). There must be reciprocity or mutuality in estoppel: *Cadle* v. *Moody* (8). If there had been any breach of the covenants in the underlease by the defendant company's immediate lessor, the defendant company could not have enforced a claim against H the plaintiffs, who would deny their liability as lessors of the defendant company.

Topham, K.C.: By paying a rent which was of the amount reserved in the lease, and remaining in possession, the defendant company became the assignee: *Williams* v. *Heales* (6), *Stratford-upon-Avon*

Corpn. v. *Parker* (7), *Rodenhurst Estates, Ltd.* v. *W. H. Barnes, Ltd.* (5). In the last-named case there were analogous facts—payment of rent and possession. The payment of rent could only have been taken to have been paid by the defendant company as the assignee and received by the plaintiffs on the footing that the defendant company was the assignee, A and as such was in possession. [Counsel also referred to *Farrow* v. *Orttewell* (9)].

Weitzman, in reply: The case of *Rodenhurst Estates, Ltd.* v. *W. H. Barnes, Ltd.* (5) was on different facts. There the defendants intended to take as assignees, and asked for a licence for an assignment to them. B They took possession without taking up the licence, and intended to be, and were, regarded as assignees. The facts in *Tichborne* v. *Weir* (4) were parallel to the facts in this case. The defendants there were in possession, and paid rent for a considerable period to the plaintiffs, but these two facts alone do not show that the defendant company in- C tended to step into the shoes of the original lessees.

T. EASTHAM, K.C., OFFICIAL REFEREE: The plaintiffs, the Official Trustee of Charity Lands and Herbert Arthur Judge (on behalf of himself and the other members of the committee of management of the Lancelot D Hasluck Trust, County Hertford Ancient Parish, East Barnet) claim to recover possession of a large number of houses, on the ground of forfeiture for breach of covenant to repair. The defendant company is the Ferriman Trust, Ltd.

The point I have to determine, namely, whether the defendant company E is estopped from denying that it is the assignee of a head lease, arises in the following manner: By an indenture of lease dated Nov. 20, 1847, and made between Samuel Pedley, of the one part, and John Otway of the other part, a portion of land of about three acres in Essex was demised unto the said Otway for a term of 99 years from Sept. 29, 1847, subject F to the payment of the yearly rent of £33, and to the performance and observance of the covenants on the part of the lessee. The said lease contained a covenant that he, the said lessee, his executors, administrators and assigns would within two years erect houses on the said land and would well and sufficiently repair the said houses. The lessee erected the said G houses on the said land. The said lease contained a proviso for re-entry in case of breach of any of the said covenants. Afterwards the plaintiffs became entitled to the fee simple in the said land, and of all the interest in the same, and to and in the reversions dependent on the said term, and the same are now vested in the plaintiffs.

H The plaintiffs allege that, during the term, the term became vested in the defendant company as assignee of the said term, and it took and held possession thereof. The plaintiffs further allege that afterwards, and whilst the defendant company was still the assignee, it committed a breach of the said covenants in that it did not repair the houses and keep them in repair in accordance with the said covenants. On Feb. 18, 1936, the plaintiffs served on the defendant company a notice in writing specifying the breaches of the said covenants complained of, and requiring the company to remedy the same, and to make compensation in money therefor. The plaintiffs allege that the defendant company failed within a reasonable time to remedy the said breaches, or to make compensation to the plaintiffs therefor; that, by reason of such failure, the plaintiffs became and are entitled to re-enter and to recover possession of the said premises, and to recover damages for the aforesaid breaches of covenant; that the defendant company retained possession of the said premises, and the plaintiffs claim possession. The defendant company, in para. 7 of its defence, denies that the term granted by the said indenture of lease dated Nov. 20, 1847, has become vested in it as assignee, or that it took or now holds possession of the said term. The defendant company alleges that it is in possession of the said premises under an indenture of lease made Apr. 3, 1848, between John Otway of the one part and Burgess Little of the other part, for the term of 99 years less three days from Sept. 29, 1847, subject to the yearly rent of £33, which term has become vested in the defendant company as assignee. The plaintiffs, in para. 1 of their reply, allege that, as to para. 7 of the defence, the defendant company is estopped from denying that it is the assignee of the lease dated Nov. 20, 1847, referred to in para. 2 of the statement of claim, inasmuch as, since the year 1888, the defendant company or its predecessor in title has paid to the plaintiffs, or their predecessors in title, the rent stipulated and reserved by the said lease; that the plaintiffs were induced by the long-continued payments of rent to believe that the defendant company and its predecessor in title were assignees of the lease. At the request of both parties, I ordered that the point of law raised by the plaintiffs in para. 1 of the reply and defence to counterclaim be set down for hearing, and disposed of forthwith, and before the trial of the issues of fact in this action. This preliminary point came before me for trial on Apr. 29, 1937. The parties agreed to call no evidence, and, by consent, para. 1 of the reply was amended so as to read as follows:

> As to para. 7 of the defence the plaintiffs say that the defendants are estopped from denying that they are assignees of the lease referred to in para. 2 of the statement of claim inasmuch as since the year 1888 the defendants and/or their predecessors in title have paid to the plaintiffs and/or their predecessors in title the said rent stipulated and reserved by the said lease. The plaintiffs were induced by the said long-continued payments of rent and by their being in possession since the year 1888 to believe that the defendants and their predecessors in title were assignees of the said lease, and the plaintiffs acted upon the said belief by serving the said notice and after waiting a reasonable time for the defendants to repair by issuing the writ in these proceedings.

In considering whether, in the circumstances of this case, the plaintiffs are entitled to set up an estoppel, I have paid attention to the opinion of Lord Tomlin in *Greenwood* v. *Martins Bank, Ltd.* (1), at p. 57, where his Lordship sets out the essential factors of estoppel. The material one in this case is the first, and it is a representation of conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made, and I stress the word "intended." In *Pickard* v. *Sears* (2), at p. 474, LORD DENMAN, C.J., dealing with the same point, used these words :

> where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief.

A In *Freeman* v. *Cooke* (3), at p. 663, PARKE, B., said :

> By the term "wilfully," however, in that rule [the rule in *Pickard* v. *Sears* (2)] we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly ; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act B upon it as true, the party making the representation would be equally precluded from contesting its truth.

It is important to note that this is not a case of a mere stranger being in possession and paying rent to the landlord. The defendant company was in possession as underlessee. An underlessee has no object in C representing that he is an assignee. It is against his interest to do so. Did the defendant company, by payment of rent and by being in possession, make a representation intending to induce the plaintiffs to believe that it was the assignee of the head lease ? The defendant company knew that it was the underlessee, and was in possession as such, and D I must assume that the defendant company knew the law, and that it knew that, if the rent was not paid by its lessor—that is, the lessee of the head lease—the plaintiffs would be able to distrain upon the defendant company's goods, and after 1908, subject to the modifications made in the law, by the Law of Distress Amendment Act, 1908. In E those circumstances, mere payment of rent and possession was not a representation made by the defendant company that it intended to induce the plaintiffs to believe that it was the assignee of the head lease.

Next I must consider this point : has the defendant company so conducted itself that a reasonable man would take the representation to be F true, and believe that it was meant that he should act upon it as true ? It seems to me that, when the defendant company paid the rent to the plaintiffs, it was possible it was paying the rent as the lessees' agent, that is to say, the lessee of the head lease ; or that it was paying it as underlessee to prevent the plaintiffs, as landlord, from distraining ; G or that it was paying it as the assignee of the head lease. As the rent could be paid to the plaintiffs in these various capacities, it seems to me that any reasonable man in the position of the plaintiffs would inquire from the defendant company in what capacity it paid the rent. There is no evidence that the rent was not paid by the defendant company as the H lessees' agent, or to protect the defendant company, as underlessee, from a distress. It seems to me that the plaintiffs are not entitled to set up the estoppel, as there is no evidence that the defendant company intended the plaintiffs to represent that it was the assignee of the head lease, and no reasonable man would believe that payment of the rent by some person other than the lessees meant, or was intended to mean, that such person was representing that he was the assignee of the lessees of the head lease. At the most, the payment put the landlord on inquiry, and, as the payment could be made by the defendant company in various capacities, it seems to me that the landlord is not entitled to abstain from inquiry, and assume for his own benefit that the defendant company is making the payments of rent as assignee of the head lease. A

I can find no authority that concludes this case. *Tichborne* v. *Weir* (4) supports my view that mere payment of rent and possession are not sufficient to create an estoppel to prevent a defendant denying he is an assignee. I refer particularly to the following passages in the judgment of BOWEN, L.J., at p. 737: B

> It was said that the defendant had estopped himself, by paying the rent agreed upon in the lease to Baxter, from saying that he had not accepted the term. If a man pays rent to the landlord on the footing of accepting a term and the liabilities under it, and the landlord accepts the rent on those conditions, then such a person might be estopped from denying that he has become tenant to the landlord on those conditions. But the terms of payment of the rent in this case fall short of showing that the defendant meant to stand for all purposes in the shoes of the original C lessee. The landlord has his rights against Baxter on his covenants, but not against the defendant, unless the defendant has taken the lease by assignment or has estopped himself from denying that he is assignee of the term. There is nothing here to show any such estoppel.

I have paid attention to his Lordship's words when he said "pays rent to the landlord on the footing of accepting a term and the liabilities D under it, and the landlord accepts the rent on those conditions," and to the words "to stand for all purposes in the shoes of the original lessee," in the sentence "But the terms of payment of the rent in this case fall short of showing that the defendant meant to stand for all purposes in the shoes of the original lessee." I refer also to the judgment of E KAY, L.J., at p. 738, where his Lordship said:

> There is another point as to whether the defendant is estopped from denying that he was in possession of Baxter's lease. He admits he is in possession of the land, he and Giraud have paid the rent agreed on in the lease of 1802, and they have claimed possession for the rest of the term. The landlord's title to the land has been completely admitted, but there is no other evidence of the defendant's being bound F by all the terms of the lease, or of his holding all Baxter's estate. There being no such admission, either express or implied, we must hold that there is no evidence of such an extensive estoppel as that which has been contended for.

In the present case, it seems to me, to use the words of BOWEN, L.J., that the payments of rent fall short of showing that the defendant company meant to stand for all purposes in the shoes of the original lessee, G and likewise, to use the words of KAY, L.J., the defendant company's title to the land has been completely admitted, but there is no evidence of the defendant company's being bound by all the terms of the lease; there is no evidence of such an extensive estoppel as that which has been contended for. H

Rodenhurst Estates, Ltd. v. *W. H. Barnes, Ltd.* (5) is quite a different case. The plaintiffs leased the premises to Barnes. Barnes formed a limited company, Barnes, Ltd. The limited company agreed to take over Barnes' business, and to take over the lease. Barnes then applied to the plaintiffs for permission to assign, and the plaintiffs gave a licence to assign the lease to the limited company. No formal assignment was made. The company entered into possession of the premises, carried on business, paid rent direct to the plaintiffs, and then refused to pay rent and certain insurance in respect of the premises. Here an estoppel was held to arise. The defendant company went into possession as assignee, and not otherwise. The plaintiffs allowed it to go into possession as assignee, and the defendant company had agreed to take over the lease. It entered into possession and paid rent as the equitable assignee, and it seems to me to be a clear case of estoppel.

The best case for the plaintiffs is *Williams* v. *Heales* (6), which was referred to in the case of *Stratford-upon-Avon Corpn.* v. *Parker* (7), pp. 562, 567, 568. In *Williams* v. *Heales* (6) there was more than mere payment of rent and possession. In that case, Heales was not in possession as an underlessee; he was entitled to be in possession only if he was the assignee of the lease. He received the rents, paid the ground rent, and let the premises in his own name to sub-tenants: see para. 13, p. 180 of the report. It seems clear that, on the facts of that case, the defendant had acted, and had intended to act, and represent to the landlord that he was acting, as tenant under the terms of the lease. It was held that he was estopped from denying he was assignee. KEATING, J., at p. 184, said:

> I think he is properly charged as assignee in respect of both. To hold otherwise would create an unjust state of things: the landlord can know but little of the way in which the estate devolves; and the defendant might take the profits and escape liability for the head rent.

BRETT, J., as he then was, at p. 185, said:

> But, however that may be, after his mother's death, he, intending to act for himself, continued to receive the rents and to pay the ground-rent. It is impossible that he can after that deny that he held as tenant under the terms of the lease. It is said that he cannot be chargeable as executor *de son tort*, because both his father and mother were executor and executrix *de son tort*. But, if a mere stranger acting as the defendant did would be chargeable as assignee, that circumstance could not prevent him from being liable in the same way.

I observe the judge compares him to a mere stranger, and not to a person in the position of an underlessee, as in this case.

Giving the best consideration I can to the authorities, I think the defendant company, being an underlessee, by the payment of rent direct to the plaintiffs and possession in this case, is estopped from denying the plaintiffs' title to the land, but not from denying that it is the assignee of the head lease. That being so, I hold that the defendant company is not estopped from denying, as pleaded in para. 1 of the reply, that it is the assignee of the lease referred to in para. 2 of the statement of claim.

There must therefore be judgment for the defendant company, with costs of the trial of the preliminary issue which was ordered to be tried by me by the order of Mar. 12, 1937.

Judgment for the defendant company with costs of trial of preliminary issue.

Solicitors: *Pedley, May & Fletcher* (for the plaintiffs); *Gale & Phelps* (for the defendant company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

MORGAN *v.* ASHCROFT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., and Scott, L.J.), **April 8, 9, May 11, 1937.**]

Gaming and Wagering—Gaming contract—Bets—Alleged overpayment of winnings—Recovery—Gaming Act, 1845 (*c.* 109), *s.* 18—*Gaming Act,* 1892 (*c.* 9), *s.* 1.

Mistake—Money paid under mistake of fact—Overpayment of betting winnings—Recovery.

A bookmaker brought an action for money had and received in order to recover a sum of money which he had accidentally overpaid the defendant, one of his clients, in respect of wagering transactions :—

HELD : (i) as the court could determine the amount of overpayment only by examining accounts of gaming transactions, which it was forbidden to do by the Gaming Act, 1845, the action could not be entertained.

(ii) a payment made under a mistake of fact, which, if true, would not have rendered the payer liable, cannot be recovered in law.

[**EDITORIAL NOTE.** The principles upon which LORD MANSFIELD based the action of money had and received in *Moses* v. *Macferlan* (11) have been again and again considered by the courts, and it is generally agreed that they have not been accepted in full. The question here is confined to the recovery of money paid under a mistake of fact, and the dictum of BRAMWELL, B., in *Aiken* v. *Short* (2) is adopted and applied. In order that the money shall be recoverable there must be a mistake as to a fact, which, if true, would make the person paying legally liable to pay the money. If there is, upon the assumption that the fact is true, no legal liability to pay, there can be no recovery upon the footing that the money was paid under a mistake of fact. In particular it is not sufficient in ordinary cases that, the assumption as to the truth of the fact being made, it should be desirable or equitable that the money should be paid. This point is fully discussed in the judgments herein, but the case is primarily decided upon the grounds that the court cannot reopen accounts of betting transactions.

AS TO MONEY PAID BY MISTAKE, see HALSBURY, Hailsham Edn., Vol. 7, p. 293, para. 405 ; and FOR CASES, see DIGEST, Vol. 35, pp. 147, 148, Nos. 456-465.]

Cases referred to :

(1) *Sinclair* v. *Brougham*, [1914] A.C. 398 ; 12 Digest 540, *4487* ; 83 L.J. Ch. 465 ; 111 L.T. 1.

(2) *Aiken* v. *Short* (1856), 1 H. & N. 210 ; 35 Digest 148, *461* ; 25 L.J. Ex. 321 ; 27 L.T. O.S. 188.

(3) *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276 ; 35 Digest 147, *457* ; 73 L.J. Ch. 198 ; 89 L.T. 694.

(4) *Maskell* v. *Horner*, [1915] 3 K.B. 106 ; 35 Digest 148, *465* ; 84 L.J. K.B. 1752 ; 113 L.T. 126.

(5) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1925] 2 K.B. 612 ; [1926] A.C. 670 ; 35 Digest 149, *470* ; 95 L.J. K.B. 913 ; 135 L.T. 548.

(6) *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*, [1934] A.C. 455 ; Digest Supp. ; 103 L.J. P.C. 115 ; 151 L.T. 309.

(7) *Gasson* v. *Cole* (1910), 26 T.L.R. 468 ; 35 Digest 148, *462*.

(8) *Kelly* v. *Solari* (1841), 9 M. & W. 54 ; 35 Digest 151, *487* ; 11 L.J. Ex. 10.

(9) *Steam Saw Mills Co., Ltd.* v. *Baring Brothers & Co., Archangel Saw Mills Co.* v. *Baring Brothers & Co.*, [1922] 1 Ch. 244 ; 35 Digest 147, *458* ; 91 L.J. Ch. 325 ; 126 L.T. 403.

(10) *Kerrison* v. *Glyn, Mills, Currie & Co.* (1911), 81 L.J. K.B. 465 ; 1 Digest 670, *2826* ; 105 L.T. 721.

(11) *Moses* v. *Macferlan* (1760), 2 Burr. 1005; 35 Digest 154, *511.*
(12) *Baylis* v. *London* (*Bp.*), [1913] 1 Ch. 127; 35 Digest 156, *526*; 82 L.J. Ch. 61; 107 L.T. 730.
(13) *Holt* v. *Markham*, [1923] 1 K.B. 504; 35 Digest 157, *533*; 92 L.J. K.B. 406; 128 L.T. 719.
(14) *Luckett* v. *Wood* (1908), 24 T.L.R. 617; 12 Digest 303, *2498.*
(15) *Re Thellusson, Ex p. Abdy*, [1919] 2 K.B. 735; 35 Digest 148, *463*; 88 L.J. K.B. 1210; 122 L.T. 35.
(16) *Home & Colonial Insurance Co., Ltd.* v. *London Guarantee & Accident Co., Ltd.* (1928), 45 T.L.R. 134; Digest Supp.
(17) *Butts* v. *Eldred* (1896), 12 T.L.R. 624; 25 Digest 411, *147.*
(18) *Shoolbred* v. *Roberts*, [1900] 2 Q.B. 497; 25 Digest 407, *107*; 69 L.J. Q.B. 800; 83 L.T. 37.
(19) *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; 35 Digest 159, *545.*
(20) *Ogilvie* v. *Littleboy* (1897), 13 T.L.R. 399; 25 Digest 521, *148*; *affd. sub nom. Ogilvie* v. *Allen* (1899), 15 T.L.R. 294.

APPEAL from a judgment of His Honour JUDGE THOMAS at the Abergavenny County Court, dated July 30, 1936. The facts are fully set out in the judgments.

R. G. Micklethwait for the appellant.

Carey Evans for the respondent.

Micklethwait: In order that the plaintiff should be able to recover an amount wrongly paid, there must have been a mistake in fact which led him to suppose that the money was legally payable, and not merely morally payable. [Counsel referred to *Luckett* v. *Wood* (14), *Gasson* v. *Cole* (7), *Holt* v. *Markham* (13), *Aiken* v. *Short* (2), *Re Bodega Co., Ltd.* (3), *Maskell* v. *Horner* (4), *Re Thellusson, Ex p. Abdy* (15), *Jones* (*R. E.*), *Ltd.* v. *Waring and Gillow, Ltd.* (5), *Home & Colonial Insurance Co., Ltd.* v. *London Guarantee & Accident Co., Ltd.* (16), *Steam Saw Mills Co., Ltd.* v. *Baring Brothers & Co.* (9), *Butts* v. *Eldred* (17), and *Shoolbred* v. *Roberts* (18).]

Carey Evans: The plaintiff paid one sum twice; this was purely an arithmetical error and entirely disconnected with any betting transactions. There is no decision suggesting that a voluntary payment made twice over cannot be recovered. The case is well within the broad principles laid down by LORD MANSFIELD in *Moses* v. *Macferlan* (11). [Counsel also referred to *Aiken* v. *Short* (2), *Gasson* v. *Cole* (7), *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow, Ltd.* (5), *Sinclair* v. *Brougham* (1), *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.* (6), *Brisbane* v. *Dacres* (19), *Holt* v. *Markham* (13), *Re Bodega Co., Ltd.* (3), *Maskell* v. *Horner* (4), and *Kerrison* v. *Glyn, Mills, Currie & Co.* (10).]

Micklethwait, in reply: Voluntary gifts to a charity cannot be recovered: *Ogilvie* v. *Littleboy* (20). The judge has dealt with various gambling transactions, which he was not entitled to do.

SIR WILFRID GREENE, M.R.: The plaintiff is a bookmaker, and he claims to recover from the defendant, a licensed victualler, who had been in the habit of making bets with him, a sum of £24 2*s.* 1*d.*, being the amount of an alleged overpayment made by the plaintiff to the defendant in settling bets. The claim arises in the following circumstances. According to the plaintiff's case, the defendant won from the plaintiff on balance a sum of £24 2*s*. 1*d*. in respect of bets made by the defendant with the plaintiff on June 4, and this amount was credited to him for that day's transactions. On June 5, the defendant made further bets with the plaintiff, as the result of which, according to the plaintiff's case, the defendant lost £23 and won £21 13*s*. 9*d*., leaving him a loser on balance of £1 6*s*. 3*d*. By a mistake on the part of the plaintiff's clerk in making out the account, the sum of £24 2*s*. 1*d*. was carried forward into the account for June 5, with the result that this account showed the defendant to be a winner to the extent of £22 15*s*. 10*d*., instead of showing him (as it ought to have done) to be a loser to the extent of £1 6*s*. 3*d*. This sum of £22 15*s*. 10*d*., together with the sum of £24 2*s*. 1*d*., making together £46 17*s*. 11*d*., was paid to the defendant by the plaintiff's clerk, with the result that, upon the account put forward by the plaintiff, the defendant has been overpaid to the extent of £24 2*s*. 1*d*., the sum which the plaintiff seeks to recover in this action. The defendant made a counterclaim in which he alleged that he had made other bets with the plaintiff, not shown in the plaintiff's accounts, as a result of which the plaintiff owed him £9 13*s*. 4*d*., after taking into account the sum of £46 17*s*. 11*d*. paid to him by the plaintiff as hereinbefore mentioned.

The county court judge found as a fact that the defendant had been overpaid to the extent of £24 2*s*. 1*d*., and that the overpayment was made under a mistake of fact, namely, the mistake of the plaintiff's clerk in not noticing that the £24 2*s*. 1*d*. due on the first day's transactions had been credited twice, and he gave judgment for the plaintiff for this amount. He entertained doubts as to the maintainability of the counterclaim, but he found as a fact that the defendant did not make the additional bets in question, with the result that the counterclaim in any event failed. The decision of the county court judge on the counterclaim being, as it was, a pure decision on fact, it was not, and could not have been challenged before us, and the only question which falls for decision is whether or not the county court judge was right in holding that the plaintiff is entitled to recover the £24 2*s*. 1*d*. which, upon the account, must be taken to have been an unintentional overpayment. But, although the counterclaim was dismissed, the fact that it was made—and there is nothing to suggest that it was not made *bona fide*—does, I think, throw a light upon the essential character of the claim. In substance, the dispute between the parties is a dispute between a backer and a bookmaker as to the state of the account between them. The fact that the defendant's crossclaim is raised by way of counterclaim, and not by way of set-off, does not, in my view, affect the substantial point that, in order to ascertain whether or not an overpayment had been made, which the plaintiff was entitled to recover, it was necessary for the court to examine the state of the account between the parties. Now, this, in my opinion, is a thing which the court is not entitled to do, since by merely taking the account the court would necessarily be recognising wagering transactions as producing legal obligations, and therefore doing the very thing which the Gaming Act, 1845, does not permit to be done. In truth, a claim such as the present, to recover an overpayment in respect of wagering transactions, must, in my view, inevitably be founded upon an account between the parties. It would plainly not be possible for a bookmaker to bring an action for an account of the wagering transactions between himself and a client, and repayment of any amount found, upon the taking of the account, to have been overpaid. The bookmaker, in my opinion, cannot put himself in a better position if, instead of asking for relief of that character, he asks for repayment of a specified sum alleged by him to have been overpaid. In each case, the fact and the amount of overpayment can be ascertained only through what is, in reality (though, in the latter case, not necessarily in form), the taking of an account. The contrary view would produce a remarkable result. If one party to wagering transactions alleges that he has overpaid the other party, and claims the amount overpaid as money had and received to his use, it would be open to the defendant, on principle, and apart from the Gaming Acts, to deny the over-payment, and to adduce evidence of further wagering transactions, as the result of which, at the date of the alleged overpayment, he was on balance a winner by an amount greater than that claimed. But, having regard to the Gaming Acts, the court, in my opinion, could not listen to such a defence. The claim for money had and received is a claim to recover money which, in the eye of the law, the defendant is liable to repay to the plaintiff. Such a claim, if otherwise maintainable, could not be defeated by setting up as a defence to it a crossclaim based upon no recognisable legal obligation. In other words, the court could not examine the state of account between the parties; and, as the plaintiff's claim could not be dealt with in the absence of an examination of the whole account, it must of necessity fail. As I have already pointed out, this is the substance of the position in the present case, and the appeal succeeds upon this ground.

But there is another ground, upon which the action ought, in my opinion, to have been dismissed, and, as we have had the benefit of a full argument upon it, I think it right to express my views upon it. The plaintiff's claim is for money had and received, and it is based upon what the county court judge found to be a mistake of fact. The question which arises is, can such a claim succeed in the circumstances of this case? In my opinion, it cannot. The nature of the claim to recover money paid under a mistake, and the limits within which it can be made, have been the subject of much controversy, and the difficulties involved in providing a comprehensive solution to these problems have not as yet been overcome. Two propositions can, I think, be put forward with certainty. The first is that the claim cannot now be said to be based on some rule of *æquum et bonum* by virtue of which a man must not be allowed to enrich himself unjustly at the expense of another. The views of LORD MANSFIELD upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim. The second proposition is that the claim is based upon an imputed promise A to repay. LORD SUMNER, in *Sinclair* v. *Brougham* (1), at p. 452, said:

> All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay.

So much is, I think, clear. But the question still remains, in what circumstances will the law impute a promise to repay where the payment B was made under a mistake? That it will not do so in all circumstances is manifest. In general, no such promise can be imputed where the payment is made under a mistake of law. Nor can a promise to repay be imputed which, to quote again the words of LORD SUMNER in *Sinclair* v. *Brougham* (1) at p. 452: C

> if made *de facto* [the law] would inexorably avoid.

In *Sinclair* v. *Brougham* (1), the promise, if made *de facto*, would have been *ultra vires* the society concerned; it could not therefore be imputed, and the claim, so far as it was for money had and received, necessarily D failed for that reason.

In the light of these observations, it is convenient at this point to examine the present claim in relation to the provisions of the Gaming Act, 1892. Sect. 1 of that Act provides that:

> E any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

It is said that the sum overpaid was, within the meaning of this section, a sum paid by the plaintiff in respect of a wagering transaction and F that the promise to repay which it is desired to impute is an implied promise to pay the plaintiff that sum. I cannot accept this argument. In the first place, the section is concerned with promises to "pay." This appears to me to contemplate an initial payment, to be made in the future by the promisor, not a repayment under a promise, imputed G by law, of money already paid to the promisor, to which he had no claim. This construction is in accordance with the recognised mischief which the Act was designed to remedy. In the next place, the payment by the promisee, in relation to which the promise to pay must be given, in order that it may be avoided by the section, is a payment of money H paid by the promisee "under or in respect of" a gaming contract. In my opinion, these words are not apt to include the case where the payment, although connected historically with a gaming contract, is in fact an overpayment made in the mistaken belief that it was due under such a contract.

I now return to the point at which I left the main question. A great part of the argument was concentrated on the words used by BRAMWELL, B., in *Aiken* v. *Short* (2), at p. 215. He said:

> In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact, which, if true, would make the person paying A liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

In that case, the plaintiff bank had acquired, as it thought, certain property which was subject to an equitable charge, and had agreed with its supposed grantor (who, with others, was personally liable for the B amount secured by the charge) to pay it off. This it did. It was afterwards discovered that the grantor had no title to the property, and the bank sued the defendant, to whom the charge had belonged, to recover the money which it had paid. Now, it is to be observed that in that case the bank, although contractually bound to its supposed grantor C to pay off the charge, was under no such liability towards the holder of the charge herself; and, although the payment was thought by the bank to be beneficial to itself, in that it was, as it thought, discharging a contractual obligation, and freeing its property from an incumbrance, yet it was not under any mistaken belief that the payee could demand D payment. In other words, the payment was, in any event, whether or not the supposed facts were true, a voluntary payment as between payer and payee. The passage which I have quoted from the judgment of BRAMWELL, B., has been referred to with approval by several judges, but always, I think, by way of *dictum*. References of this kind were E made by FARWELL, J., in *Re Bodega Co., Ltd.* (3), at p. 286; by ROWLATT, J., in *Maskell* v. *Horner* (4), at p. 109; and by POLLOCK, M.R., in *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.* (5), at p. 631. But, before considering further this statement of the law, it is convenient to examine some more modern decisions, in which the character of the mistake F required to found the action has been considered. In *Sinclair* v. *Brougham* (1) LORD DUNEDIN compares the cases of delivery of a chattel and delivery of money with reference to the "intention" of the deliverer. In *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.* (5), LORD SUMNER, at p. 696, elaborates this comparison. He points out that, if a tradesman G delivers goods to the wrong person, the absence of any real intention prevents the property from passing. Cases where money paid under a mistake of fact is recoverable he founds upon lack of real intention on the part of the payer, although he appears to say, or to imply, that, in order to prevent there being any real intention, the facts must be H such that the payee knows, or must be deemed to know, of the mistake, a limitation which, I must confess, I find a little difficulty to appreciate, if it is intended to be of general application. The last case in which the matter was considered was *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.* (6), decided by the Privy Council, and I will quote two passages from the judgment of the Judicial Committee in that case, which was delivered by LORD WRIGHT. LORD WRIGHT says, at pp. 461, 462:

> The facts which were misconceived were those which were essential to liability and were of such a nature that on well established principles any agreement concluded under such mistake was void in law, so that any payment made under such mistake was recoverable. The mistake, being of the character that it was, prevented there being that intention which the common law regards as essential A to the making of an agreement or the transfer of money or property.

At p. 463, he said:

> It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, B however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.

The view of the law developed in the judgments to which I have just referred affords an additional guide. It is, I think, instructive to consider the words of BRAMWELL, B., referred to above, in the light of these C authorities. In the first case which he mentions, namely, that where the supposed fact, if true, would have made the person paying liable to pay the money, the mistake is a mistake as to the nature of the transaction. The payer thinks that he is discharging a legal obligation, whereas in truth and in fact he is making a purely voluntary payment. D Such a mistake is, to my mind, unquestionably fundamental, or basic, and may be compared, at least by way of analogy, with the class of case in which mistake as to the nature of the transaction negatives intention in the case of contract. But the second case which he mentions, namely, that where the supposed fact would, if true, merely make the payment E desirable from the point of view of the payer, is very different. In that case, the payment is intended to be a voluntary one, and a voluntary payment it is, whether the supposed fact be true or not. It appears to me that a person who intends to make a voluntary payment, and thinks that he is making one kind of voluntary payment, whereas, upon F the true facts, he is making another kind of voluntary payment, does not make the payment under a mistake of fact which can be described as fundamental or basic. The essential quality of the payment, namely, its voluntary character, is the same in each case. If a father, believing that his son has suffered a financial loss, gives him a sum of money, he G surely could not claim repayment if he afterwards discovered that no such loss had occurred; and, to take the analogous case of contract, if, instead of giving him money, he entered into a contract with his son, he surely could not claim that the contract was void. To hold the contrary would almost amount to saying that motive, and not mistake, H was the decisive matter.

I come, therefore, to the conclusion that the observations of BRAMWELL, B., supported, as they are, by much weight of judicial opinion, are, so far as regards the class of mistake with which he was dealing, in agreement with the more recent authorities, and I propose to follow them. It was said, on behalf of the respondent, that these observations do not correctly state the law. I do not agree, although I am disposed to think that they cannot be taken as an exhaustive statement of the law, but must be confined to cases where the only mistake is as to the nature of the transaction. For example, if A. makes a voluntary payment of money to B., under the mistaken belief that he is C., it may well be that A. can recover it. BRAMWELL, B., was not dealing with a case such as that, since he was assuming that there was no such error *in persona*. If we are to be guided by the analogous case of contract, where mistake as to the person contracted with negatives the intention to contract, the mistake in the case which I have mentioned ought to be held to negative the intention to pay the money, and the money should be recoverable. But it is not necessary to pursue this matter further. It is sufficient to say that, in my opinion, the present case falls within principles laid down by BRAMWELL, B., and in the more recent authorities. In making the payment, the respondent was, it is true, under a mistake as to the nature of the transaction. He thought that a wagering debt was due from himself to the appellant, whereas in fact it was not. But, if the supposed fact had been true, the respondent would have been under no liability to make the payment, which, therefore, was intended to be a voluntary payment. Upon the true facts, the payment was still a voluntary payment; and there is, in my opinion, no such fundamental or basic distinction between the one voluntary payment and the other that the law can, for present purposes, differentiate between them, and say that there was no intention to make the one because the intention was to make the other.

For these reasons, I am of opinion that the appeal must be allowed, with costs here and below. I should add that it follows, from what I have said, that I am unable to agree with the *dictum* of CHANNELL, J., in *Gasson* v. *Cole* (7), at p. 469, upon which reliance was placed by the respondent.

SCOTT, L.J.: The argument for the appellant fell into two broad divisions. The first was that it was impossible for the judge to give judgment for the amount claimed without in effect enforcing claims for gaming debts, and thus transgressing the Gaming Act, 1845, s. 18. I think the appellant was right on this first ground. The second was that there was no such mistake of fact proved, or capable of being proved, as is necessary to found the old common law action for money had and received. This second submission was based mainly on a ground which I think insufficient by itself to entitle the appellant to our judgment; but there are, in my opinion, two other grounds for holding that this second submission also must succeed. I will deal with the first submission first.

In order to establish the facts, and thereby to prove his mistake, the appellant was compelled to put the whole account before the court, and invite the court to ascertain what was the true balance figure of bets lost and won, on each of the two days. There was, of course, no legal obstacle to the court's taking cognizance of the fact that the respondent was voluntarily giving the appellant credit for the appellant's winnings, and thus paying them in account; but to ask the court to recognise the respondent's winnings from the appellant, and to set them off against his losses, was, in effect, to ask the court to enforce those winnings against the appellant. It was impossible for the court to verify either the fact or the amount of the respondent's alleged mistake without going through the above process, and thus in effect enforcing the respondent's claims to set off his winnings against his losses. In the same way, it was impossible to ascertain whether the sum of £24 2*s.* 1*d.*, which appeared to have been an overpayment, was in truth what it appeared to be, without investigating the appellant's counterclaim, and enforcing the various items, pro and con, which might thereby be established. Until that was done, the court could not be satisfied as to what was the final position, on the issue of overpayment by the respondent to the appellant. Both investigations by the court, on the claim and the counterclaim, were, in my view, equally forbidden by sect. 18 of the Act, for taking an account, whether at common law or in equity, is just as much enforcing a claim as is giving judgment for a liquidated claim. Where the mistake upon which a plaintiff relies, to justify a claim for money had and received to his use, is one that can be ascertained only by investigating betting accounts, the court cannot lend its aid without transgressing the statute. It follows that the court ought to have refused to look at the accounts, and to have dismissed the action, on the ground that it was being asked to enforce gaming contracts contrary to sect. 18 of the Act of 1845.

I now deal with the second submission, namely, that, even assuming the first objection to be insufficient, there was here no such mistake of fact as is essential to the rule of the common law that money paid in mistake of fact may be recovered. The county court judge relied upon a *dictum* of CHANNELL, J., in *Gasson* v. *Cole* (7), at p. 469, a case where the plaintiff was suing for money had and received in connection with bets on horse-racing. In that case, the plaintiff, acting as agent for the defendant, a bookmaker, had placed a bet for the defendant on a horse which had come in second, but which, on the first horse being held by the stewards to be disqualified, was declared the winner. The plaintiff collected the amount won on the bet, £275, and, believing that the defendant had really won, paid it over to him. After that, the Jockey Club Committee reversed the steward's decision, and the plaintiff sought to recover the £275 from the defendant as money had and received, on the ground that he had paid it in mistake of fact. There were other complications of fact in the case, but the above is a sufficient statement to explain the *dictum*, which is reported as follows:

> During the argument he (the learned judge) had asked Mr. Colam whether the rule

that money paid under a mistake of fact should be paid back applied in a betting transaction. If it was a clear mistake of fact, he thought that the person would be entitled to recover the money back.

The case was decided against the plaintiff on other grounds, and thus the opinion of CHANNELL, J., never became the basis of decision. But the *dictum* embodies the legal basis of the county court judge's A decision in favour of the respondent, and we have therefore to decide whether it is right or wrong. In my opinion, it is wrong.

The main ground on which Mr. Micklethwait, for the appellant, sought to attack the *dictum* was that the action for money had and received founded on mistake of fact can never lie, unless the mistake is one which B induces in the plaintiff's mind a belief that he is under some legal liability to the defendant from which the payment will wholly or in part discharge him. For reasons which I will give presently, I do not think that he is entitled to succeed on this particular ground. But, in my opinion, there are two other grounds upon which his submission ought to succeed. C In the first place, there is the broad ground, explained by SIR WILFRID GREENE, M.R., that the mistake inducing the payment here had not that fundamental character which is necessary to establish a cause of action for money had and received by reason of a mistake of fact. The second is that, even if the mistake was sufficiently fundamental, the D Gaming Act, 1845, s. 18, affords what may be called a special defence where the mistake is about betting transactions. I will deal with this ground first. It is really only another aspect of the first ground of appeal.

Where the mistake relates to the amount of an honour credit for E bets, the statutory veto upon the reception of evidence about gaming transactions, which I have discussed upon the first argument for the appellant, creates a special impediment, and in effect constitutes a special defence to the action for money had and received, by making it impossible to prove the mistake upon which the plaintiff is basing his F claim. The position thus created is closely analogous to that which arose through the doctrine of *ultra vires* in *Sinclair* v. *Brougham* (1), where LORD SUMNER, at p. 452, used the expression already quoted by SIR WILFRID GREENE, M.R., to the effect that a promise to repay will not be implied in law if an actual promise would in law be void. This G special defence is, in itself, a sufficient reason for allowing the appeal.

Before adding what little I have to add to the discussion of SIR WILFRID GREENE, M.R., upon the essential nature of the action for money had and received when based on a mistake of fact, I will consider the particular argument advanced by Mr. Micklethwait. The well known H passage in the judgment of BRAMWELL, B., in *Aiken* v. *Short* (2) is perhaps the strongest statement of the proposition upon which he relied, but I agree with SIR WILFRID GREENE, M.R., that the facts of that case were not such as to make what BRAMWELL, B., there said the necessary basis of decision in that case. Indeed, I do not think that this limiting proposition of the law about mistake of fact as one basis of the action for money had and received has ever been the direct subject of decision, although it has been frequently stated almost as if it were an accepted rule of law. I venture to think that the mind of the court was, in all the cases where the statement has been made, concentrated on the particular circumstances under discussion, and was expressing a conclusion appropriate to the facts before it, rather than attempting to lay down any absolute or general rule of law. But, as counsel for the appellant in the present appeal contended that there is such a rule of law, it is desirable to quote some of the leading expressions of judicial opinion upon which he relies, and all the more so as they are expressed in rather definite language. In *Kelly* v. *Solari* (8), PARKE, B., said, at p. 58:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back.

In *Aiken* v. *Short* (2), BRAMWELL, B., says at p. 324:

> It seems to me that the right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money; and it never can be applicable to a case where the fact mistaken is a fact which would merely have made it desirable for the person paying it to pay to the person receiving it. I do not know whether that is a sufficiently comprehensive principle, but it is one which has existed throughout in my mind.

In *Re Bodega Co., Ltd.* (3), at p. 286, FARWELL, J., said of the passage last quoted:

> That, I apprehend, means this. If you are claiming to have money repaid on the ground of mistake, you must show the mistake is one which led you to suppose you were legally liable to pay.

In *Maskell* v. *Horner* (4), at pp. 108, 109, ROWLATT, J., said:

> The plaintiff claims to recover these sums as paid under a mistake of fact, or, alternatively, as paid not voluntarily, but to prevent his goods being seized and under protest. I think it is necessary to state two principles of law to which he appeals and then to see if the circumstances bring him within either. To recover under the first principle there must be a mistake of fact and a fact going to the supposed liability. That is laid down in *Kelly* v. *Solari* (8) and *Aiken* v. *Short* (2). An action on this ground, therefore, can only be brought by one who pays, believing in his liability, because by mistake he believes a fact upon which his liability depends.

The case was decided in the Court of Appeal upon the ground that the payments were recoverable, as having been made under protest to prevent seizure of the plaintiff's goods, and the above statement by ROWLATT, J., remains a *dictum*. The last citation I want to make is from *Steam Saw Mills Co., Ltd.* v. *Baring Brothers & Co.* (9), where LORD STERNDALE, M.R., at p. 250, said:

> There seems to be ample authority for this, that if a person, under a mistake of fact, pays money, which he is not liable to pay, he may recover it back; but it makes all the difference in the world whether the fact of which he was ignorant would have discharged him from the liability to pay.

In none of the above cases, as I have already said, not even in *Aiken* v. *Short* (2), was there a decision of the court that the action failed simply because the mistake did not induce a belief of liability. Indeed, in

Kerrison v. *Glyn, Mills, Currie & Co.* (10), both in the decision of HAMILTON, J., and in the decision of the House of Lords, it was definitely decided that the plaintiff was entitled to recover a payment made to the defendants for the purpose of meeting an anticipated liability, although he then knew that no actual liability had yet attached to him.
A The decision of the House of Lords seems to me conclusive that the rule as stated in *Aiken* v. *Short* (2) cannot be regarded as final and exhaustive in the sense that no mistake, which does not induce in the mind of the payer a belief that payment will discharge or reduce his liability, can ground an action for money had and received. It is, of course, obvious
B that such a belief must in fact have been induced in a very high percentage of mistaken payments giving rise to a dispute; in human affairs, the vast majority of payments made without any fresh consideration are made to perform an obligation or discharge a liability, and I doubt not that performance of an obligation would be accounted discharge of a
C liability for the purpose of the *Aiken* v. *Short* (2) proposition. For this reason of human nature, that proposition is very often—and perhaps usually—a crucial test of the question whether the payment was in truth made by reason of a mistake, or was merely voluntary and therefore irrecoverable. But I agree with the view of SIR WILFRID
D GREENE, M.R., that the final demarcation of the boundaries of the old action of money had and received has not yet been achieved, and that their final delineation can be worked out only as concrete cases arise and bring up new points for decision. In refusing assent to the appellant's argument that the *Aiken* v. *Short* (2) proposition is of
E itself necessarily sufficient to fix the boundary, I desire to keep clearly open the possibility of the common law treating other types of payment in mistake as falling within the scope of the action for money had and received. Without expressing any opinion, I recognise, for instance, the possibility that there may be cases of charitable payments
F or other gifts made under a definite mistake of person to be benefited, or of the substantial nature of the transaction, where, on consideration, the old principles of the action might still, in spite of limiting decisions, be held to cover such circumstances.

This whole group of common law actions known as "implied
G assumpsit" or "implied contract" permits the redress of so many widely different types of grievance, and thus is so useful in our jurisprudence, that it seems to me just as important not to cut them down as it is not to enlarge them beyond their true legal boundaries. Of them all the action for money had and received has the greatest variety
H of application and is perhaps the most useful. The name "implied contracts" is ambiguous, as it is often used of true consensual contracts, which are not wholly expressed in writing or orally, and have to be inferred in greater or lesser degree from the conduct of the parties. The implied contract for money had and received has no element of agreement about it; it is implied in law, the name being a misnomer. The

history of implied contracts in the non-consensual sense has passed through two stages—the first during the seventeenth and eighteenth centuries, when it was being invented by the courts and its range was ever expanding, the second from the middle of the nineteenth century, since when the pendulum has swung the other way, and our common law courts have tended to restrict it. It is not relevant to the present case to consider that history in detail, but the fourteenth lecture by the late Professor Ames upon implied assumpsit printed in his Lectures on Legal History, p. 149, is full of illumination. He brings out clearly the complete absence of any consensual element. There is no doubt that the moral principle of " unjust enrichment," to which he refers and which is recognised in some systems of law as a definite legal principle, and indeed underlay the famous *dictum* of Lord Mansfield in *Moses* v. *Macferlan* (11) in the year 1760, has now been rejected by English courts as a universal or complete legal touchstone whereby to test this cause of action. But Professor Ames was, as late as the early years of the present century, still treating that principle as the underlying source of obligation, upon the basis of which the action had been developed in our common law: see pp. 160, 166. Leake on Contracts (1st Edn., 1867) devoted a long subdivision to the title of " Contracts Implied in Law " (pp. 38-75), and commenced it thus:

> Simple contracts arising independently of agreement, or contracts implied in law including those transactions affecting the two parties, other than agreement between them, upon which the law operates by imposing a contract, that is, a liability on the one side and correlative right on the other. . . . The transactions between two parties, other than agreement, which give rise to contracts, may be described generally as importing that some undue pecuniary inequality exists in the one party relatively to the other which justice and equity require should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation.

Bullen & Leake (3rd Edn., 1868, p. 44), under the title of the " *indebitatus* count for money had and received," repeated the effect of the second of the above sentences; so did Dicey on Parties to an Action, 1870, p. 91.

So wide a statement of the principle upon which the action for money had and received is founded, however eminent the jurists who supported it, does not at the present time afford an authoritative criterion by which the court can decide whether a given claim discloses a cause of action for money had and received. The test is too vague, and, even if it was ever a test, it has certainly been modified by recent decisions, which have restricted the field of this action: see *Baylis* v. *London* (*Bp.*) (12), *per* Hamilton, L.J., at p. 140; *Sinclair* v. *Brougham* (1), *per* Lord Sumner, at p. 453; and *Holt* v. *Markham* (13), *per* Scrutton, L.J., at p. 513. But my citations from jurists of such high standing as writers on the common law do emphasise the importance of trying to find some common positive principles upon which these causes of action called " implied contracts " can be said to rest, and which will not altogether exclude that of unjust enrichment embodied in those citations.

An additional reason for keeping the door open is the very heterogeneous list of causes of action which unquestionably fall within this field of implied contracts. They are so various in kind as almost irresistibly to invite the inference that there may be one or more unifying principles upon which they rest. If one takes the action for money had and received by way of illustration of this point, one finds assembled under that heading the following wholly different types of causes: (i) money paid in mistake of fact; (ii) money paid for a consideration which has failed; (iii) money paid because it was extorted *colore officii*, or by duress, and the like; (iv) cases where the plaintiff has had an actionable wrong done him by the defendant, and, "waiving the tort," sues in assumpsit, whether any of his money has actually passed from himself to the defendant or not. In this context, I venture humbly and respectfully to doubt whether the criterion suggested by VISCOUNT HALDANE, L.C., in *Sinclair* v. *Brougham* (1), at p. 415, that:

> the fiction [the common law fiction of an implied contract] can only be set up with effect if such a contract would be valid if it really existed—

is consistent with the common law history of these implied contracts, for some of them are quite incapable of formulation as real—that is, consensual—contracts. But I am in complete agreement with SIR WILFRID GREENE, M.R., that there is a plain principle applicable to all those cases of payments in mistake of fact, and that is that the mistake must be, in some aspect or another, fundamental to the transaction. On the facts of this case, there was no fundamental mistake. To pay £24 for a betting debt is just as much, in the eye of the law, a purely voluntary gift as a wedding present of £24: the law prevents the plaintiff from saying that he intended anything but a present. I agree that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Ingledew, Sons & Brown*, agents for *Moxon & Petty*, Newport, Mon. (for the appellant); *Gibson & Weldon*, agents for *Everett & Everett*, Pontypool (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re TAPLIN, WATSON *v.* TATE.

[CHANCERY DIVISION (Simonds, J.), **May 5, 6, 1937.**]

Husband and Wife—Marriage—Presumption of marriage—Compulsory registration—Date and place referred to in children's birth certificates—No entry in register—Contrary suggestion in deed of covenant by husband's father.

T. B. lived in Rockhampton from 1860-1870 with a certain lady; they held themselves out to be husband and wife, and they and their children were received in local society, which would not have been the case had there been any suggestion of irregularity. T. B. at his death was one of the most prominent solicitors in Rockhampton. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on Jan. 10, 1860, but no such marriage was registered there, although registration had there been compulsory for some years. In 1873, T. B.'s father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained these words: "the following reputed children of his deceased son," T. B., "which children are now in England with their mother E. M., otherwise E. B." :— A

HELD: (i) the absence of any entry in the register of marriages was not sufficient to rebut the presumption of marriage of T. B.

(ii) the words in the deed of 1873 were insufficient to rebut the presumption.

(iii) the presumption of marriage can be rebutted only by evidence of the most cogent kind, and the children in question ought to be declared to be the lawful children of T. B. and his wife E. B. B

[**EDITORIAL NOTE.** This case, apart from dealing with the strong presumption in favour of marriage, decides that such presumption is not rebutted by reason of there being no entry in the register of marriages in respect of a marriage of known date and place celebrated in an area where registration of marriages was compulsory.

AS TO PRESUMPTION OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 598, 599, para. 931; and FOR CASES, see DIGEST, Vol. 27, pp. 70, 71, Nos. 542-548.] C

Cases referred to:

(1) *Piers* v. *Piers* (1849), 2 H.L. Cas. 331; 27 Digest 69, *536*; 13 L.T. O.S. 41.

(2) *Re Shephard, George* v. *Thyer*, [1904] 1 Ch. 456; 27 Digest 65, *472*; 73 L.J. Ch. 401; 90 L.T. 249. D

(3) *Doe d. Fleming* v. *Fleming* (1827), 4 Bing. 266; 27 Digest 68, *516*; 5 L.J. O.S. C.P. 169.

(4) *Re Stollery, Weir* v. *Treasury Solicitor*, [1926] Ch. 284; Digest Supp.; 95 L.J. Ch. 259; 134 L.T. 430.

PROCEDURE SUMMONS asking for a declaration that certain children E were the lawful children of Thomas Bellas and Emily, his wife.

Sarah Ann Taplin died, at an advanced age, a widow, without children, on Feb. 21, 1925. The deceased died intestate as to her residuary estate. At the date of her death, her nearest relatives were (*a*) some nephews and nieces, and (*b*) some second cousins. The deceased's F second cousins contested the claim of the nephews and nieces to share in the distribution of deceased's residuary estate, on the ground that such nephews and nieces were no more than natural relations, their parents never having been married.

The nephews and nieces were unable to prove strictly the marriage of G their father, Thomas Bellas, brother of the deceased Sarah Ann Taplin (née Bellas). Thomas Bellas, the deceased's brother, was born on July 17, 1828, in Westmorland, England. He was admitted a solicitor in this country in 1853; emigrated to Australia in 1855; was admitted a solicitor in that country in 1856; practised at Melbourne from 1856 H to 1860; in 1860 he moved to Rockhampton, in Queensland; he died at Rockhampton in 1870. Throughout his life at Rockhampton he lived with a certain woman; they held themselves out to be man and wife; her name was given as Emily Bellas, formerly Morris; several children were born to them at Rockhampton, some births being registered

by the father, Thomas Bellas, some by the mother, Emily Bellas, née
Morris.

By his will, Thomas Bellas left all his estate "unto my wife Emily
Bellas," and probate of such will was duly granted. The children's
certificates of birth recorded the marriage of the parents as having
A taken place at Ballan, Victoria, on Jan. 10, 1860. Search was made
at Ballan for the record of such alleged marriage, but it could not be
found, although registration was compulsory in that district for some
years prior to 1860. For the nephews and nieces, two old men, who as
children had lived at Rockhampton at the same time as the Bellas
B family, gave evidence that they had known Thomas Bellas and Emily
his wife, who had lived reputably together, that they and their children
had mixed in the local society, which they would not have done had
there been any suggestion of irregularity, and that Thomas Bellas was
one of the most prominent solicitors in the town at the time of his death.

C In 1873, deceased's father, Thomas Bellas the elder, entered into a
deed, covenanting to make certain payments to the children of his son
Thomas, or to their mother, for their support. This deed referred to:

> the following reputed children of his deceased son, Thomas Bellas, which children are now in England with their mother, Emily Morris, otherwise Emily Bellas.

D *G. W. Knowles* for the trustees of deceased's will.

Sir Gerald Hurst, K.C., and *Quentin Hurst* for the nephews and nieces.

Charles Harman, K.C., and *Wilfrid Hunt* for the second cousins.

Hurst, K.C.: The parties' cohabitation was not sporadic, but continu-
ous, in the face of the world. Anything unusual, any social taboo,
E would have impressed itself upon the minds of young people, such as
the two witnesses who had known the Bellas family. The parties were
received into a society whose moral standards were high; the state-
ments in the various certificates were mainly consistent; Mrs. Bellas
represented herself as a widow after Thomas Bellas's death. There was
F no scintilla of evidence from Australia hinting at illegitimacy, the only
suggestion coming from England. [Counsel referred to *Piers* v. *Piers* (1),
Re Shephard, George v. *Thyer* (2), *Doe d. Fleming* v. *Fleming* (3), and
Re Stollery, Weir v. *Treasury Solicitor* (4).]

Harman, K.C.: This is not a case of establishing a marriage by repute.
G The parties to the alleged marriage, having referred to a date and place,
are pinned down to that date and place, and failure to establish the
marriage from the records at that place, or in respect of that place,
must necessarily be fatal, in view of the compulsory nature of the regis-
tration administration. Letters, wills and similar documents, although
H admissible, should have little weight, because statements in them might
well be made to preserve reputation: HUBBOCK ON SUCCESSION, p. 245.
The cases show no definite statement as to time and place of marriage,
or show very clearly that a ceremony of some sort was undoubtedly
performed, although possibly imperfectly. There is usually the im-
portant factor of children of the alleged marriage being recognised by

the family, which, in the present case, is not present; not only so, but, on the contrary, the children were expressly not recognised by their paternal grandfather.

SIMONDS, J.: The evidence before me is not cogent; but it is adequate to satisfy me that the man and woman lived together at Rockhampton for ten years as man and wife in the sight of that small community. They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to marital relations, and were at all times regarded as man and wife. This being so, the presumption of our law is that they were man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind. Here it is sought to displace the presumption in two ways. First of all, because the parties pinned themselves to a marriage at a certain date and place, and the records contain no entry of such a marriage. Whatever the compulsory nature of the administration, this cannot, in my view, displace the presumption of marriage. The absence of a record is always a possibility. The presumption rests mainly upon the notorious fact of their living together, which has been fully proved.

The other ground upon which the presumption is sought to be displaced is that, in 1873, the deed of trust was executed; but I cannot draw from that deed any inference contrary to the presumption that I would otherwise draw. I cannot guess the motive which induced the grandparent to put into that deed those words of stigma on his son, and I find no sufficient reason in the deed for saying that the children were illegitimate.

In the circumstances, I declare that the children are the lawful children of Thomas Bellas and Emily his wife.

Solicitors: *Ridsdale & Son* (for the trustees of the deceased's will); *F. H. Adams* (for the nephews and nieces); *E. G. Draper* (for the second cousins).

Applied. RIDER *v.* METROPOLITAN WATER BOARD. [1949] 2 All E.R. 97.

orted by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

WITHINGTON *v.* BOLTON BOROUGH COUNCIL.

[MANCHESTER SPRING ASSIZES (Goddard, J.), **May 4, 5, 1937.**]

Water Supply—Duties and liabilities of undertakers—Defective apparatus in street—Reinstatement of street—Degree of reinstatement required—Waterworks Clauses Act, 1847 (*c.* 17), *s.* 32.

A road had been dedicated to and accepted by the public but not yet adopted by the local authority, so that the road was repairable by no one. The local authority was also the water authority and in this capacity in Sept., 1934, it laid in the pavement of the road certain stopcocks and levelled them with the pavement by ramming in earth. Owing to the action of rain and weather upon the earth one of the stopcocks protruded. In Sept., 1916, the plaintiff fell over the protruding stopcock and injured herself. In an action for damages the local authority relied upon the Waterworks Clauses Act, 1847, s. 32:—

HELD: it was not sufficient for the local authority, when it reinstated the road in accordance with its obligations under the Waterworks Clauses Act, 1847, s. 32, to level up the pavement with earth or otherwise, in such a manner that the action of the weather would revive the inequality; but the road ought to have been so reinstated that no inequalities would be produced except by the natural consequence of wear and tear. The local authority having failed in its statutory duty was therefore liable.

[**EDITORIAL NOTE.** The position of water supply authorities as to their liability for accidents due to defective apparatus placed in streets is here carefully considered. It arises in the present case in a form of particular interest at the present time, since the stopcock in question was laid in a street on a building estate not yet made up. The water supply authority naturally set their apparatus at the ultimate level of the pavement, but for some time after the houses are built this will probably not be the same as that of the unmade footpath. The statutory liability of the authority in this respect is here fully considered.

As to Liability for Defective Works in Streets, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 311, 312, para. 572; and for Cases, see DIGEST, Vol. 43, pp. 1096-1099, Nos. 266-290.]

Cases referred to:

(1) *Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; 43 Digest 1098, *279*; 55 L.J. Q.B. 304; 55 L.T. 309.

(2) *Hartley* v. *Rochdale Corpn.*, [1908] 2 K.B. 594; 43 Digest 1098, *285*; 77 L.J. K.B. 884; 99 L.T. 275.

(3) *Huyton & Roby Gas Co.* v. *Liverpool Corpn.*, [1926] 1 K.B. 146; 43 Digest 1097, *269*; 95 L.J. K.B. 269; 134 L.T. 203.

Action for damages in respect of an accident which happened to the female plaintiff on Nov. 6, 1936, in Wyndham Avenue, Bolton, and by reason of which she sustained injury. The second plaintiff claimed for out-of-pocket expenses incurred as husband of the female plaintiff.

At all material times, Wyndham Avenue was a highway which had not been adopted and which was not repairable by the inhabitants at large. It was not metalled, no footpaths had been made, and there was no street-lighting. The defendant corporation was the waterworks authority for the area, and, in the course of its statutory duties, it laid water pipes and inserted stopcocks in Wyndham Avenue. The stopcocks were placed a few feet from the walls outside houses which had recently been built in the Avenue. At about 9 p.m. on Nov. 6, 1936, when it was dark and stormy, the female plaintiff tripped and fell over the stopcock opposite No. 2, Wyndham Avenue, and was injured.

The plaintiffs contended that the said stopcock was not properly constructed and/or maintained, in that, first, it projected above the road surface, secondly, the defendant council had not taken any or adequate and reasonable precautions to prevent or remedy the projection, which thereby constituted a nuisance as a result of the defendant council's negligence. The defendant council contended that it had discharged its statutory duties, that it was not guilty of any negligence; alternatively, that the female plaintiff was guilty of contributory negligence in failing to keep a proper look-out for a projection of which she knew, or ought to have known.

E. G. Hemmerde, K.C., and *A. E. Jalland* for the plaintiffs.

G. J. Lynskey, K.C., and *A. E. Baucher* for the defendant council.

Lynskey, K.C.: By the Waterworks Clauses Act, 1847, s. 32, which is incorporated in the Bolton Corporation local Act, the authority is under no liability, after a period of three months from completing pipe-laying, or, in the event of subsidence, after 12 months, for any condition or lack of condition in which the stopcocks may be found. [Counsel referred to *Moore* v. *Lambeth Waterworks Co.* (1) and *Huyton & Roby Gas Co.* v. *Liverpool Corpn.* (3).]

Hemmerde, K.C.: To discharge its duty under the statutes upon which it relies, the authority must fill up the excavation made for the pipes and stopcocks with something stable, so as to withstand the wear and tear of foot passengers. Nothing stable has ever been put in here. [Counsel referred to *Hartley* v. *Rochdale Corpn.* (2).]

GODDARD, J.: The plaintiff in this action, Mary Ellen Withington, lives with her husband at No. 6, Wyndham Avenue, in the borough of Bolton. The houses in Wyndham Avenue have recently been built, and Wyndham Avenue itself, there is no question, is a highway in the sense that it has been dedicated to and accepted by the public, but it is a highway which has not been, or had not been, at all times material to this action, adopted by the local authority so as to become repairable by the inhabitants at large. Indeed, it was a highway which was repairable by nobody. The defendant council was not only the highway authority, and, as I have said, under no liability, at the times material to this action, to repair, but was also the water authority for the borough of Bolton, and, as such authority, had, in Sept., 1934, laid a main which ran down this street, which is on a hill, and had made connections from the main to the various houses, installing a stopcock in the roadway so that the water from the main could, if necessary, be shut off from each of those houses. The stopcock was placed in that part of the highway which it was intended should ultimately be a flagged footpath, and, in accordance with the usual practice when the stopcock was put into the street, the defendant council's workmen ascertained the level at which the path would ultimately be laid and brought the stopcock up to a height which would be flush with the flagstones when they were ultimately placed in position. Then, in order to make it safe, or endeavour to make it safe, and not to form an obstruction to people who were walking over this ground, where the stopcocks were they put earth, or ashes, or any waste material they could find, chamfered it off, and, I have no doubt, did some amount of ramming.

The evidence satisfies me that the stopcock outside No. 2, Wyndham Avenue, was never in a very satisfactory condition so far as this chamfering was concerned. I daresay it was due to the fact of the presence of the hill, and it seems, within a very short time of the stopcock being put down, and the earth being placed round it as I have mentioned, the

builders, though under no liability or obligation, so far as it has been proved before me, to do any work on the footpath concerned, in fact used to put down ashes and so forth for the convenience of the people to whom they had either sold or let the houses. Otherwise they would have had the foulest way over which to pass in getting to and from their
A houses. In Oct., 1934, that is, within a month of the laying of the stopcock, the builders appeared to have excavated the footpath to a depth of two or three inches, and put down ashes to make the footway along the side of this road. I have no doubt that, when they put down those ashes, they brought the ashes to the level of the stopcocks, but
B again it appears, and I am satisfied on the evidence, that, so far as the stopcock outside No. 2 is concerned, and I think also so far as the stopcock outside No. 16 is concerned, these ashes, probably owing to the ordinary action of the rains, were washed away, and the stopcock outside No. 2 was constantly appearing above the level of the surrounding
C soil, and so formed an obstruction in the footpath.

On the night of Sept. 6, 1936, the plaintiff left her house, No. 6, Wyndham Avenue, somewhere about 9 p.m., a dark night, and was picking her way along this path when she caught her foot on the stopcock cover. She was thrown heavily to the ground, and damaged her
D right arm. She dislocated her elbow and sustained a very serious injury, an injury of such a character that she will never have the full use of her arm again, and will have only a very limited use of her arm for the rest of her life. It will seriously handicap her in doing her domestic work ; I should think for the rest of her life she will always have to get
E some assistance to do her household work. I am afraid, from the medical evidence, which was not challenged, there must always be a certain amount of pain in that arm, because, although the dislocation has been reduced, the arm cannot be flexed, and neurasthenic conditions are likely to set in. In the event of liability being established, I think a
F fair sum to award her is £1,000, in addition to the £40, her special damages which are agreed.

The real question I have to determine is whether the defendant council is liable for what has happened, in the circumstances. Mr. Lynskey refers me to and relies upon the Waterworks Clauses Act, 1847, s. 32,
G which is incorporated in the local Act under which the defendant council laid the water. That section, omitting immaterial words, is as follows :

> When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate
> H and make good the road or pavement . . . so opened or broken up . . . and shall at all times, whilst any such road . . . shall be so opened or broken up, cause the same to be fenced and guarded, and shall . . . after replacing and making good the road . . . which shall have been so broken up, keep the same in good repair for 3 months thereafter and such further time, if any, not being more than 12 months in the whole, as the soil so broken up shall continue to subside.

Mr. Lynskey contends that the council can be under no liability after the period of 3 months, or, in the event of subsidence, of 12 months, for any condition or lack of condition in which this stopcock may be found after that period has expired. He relied in particular on *Moore* v. *Lambeth Waterworks Co.* (1). That case, however, was considered in a later case, *Hartley* v. *Rochdale Corpn.* (2). One of the things I have to do is to consider which of those two cases is applicable to the present facts. It seems to me quite clear that in this case the council's men did nothing which can be said to have had any element of stability in it. This stopcock, on the evidence, I am quite satisfied, was continually in the condition of being above the surface, due, as I think, to the washing away of this loose earth and so forth which was put around it. The question therefore arises as to whether the council has fulfilled its duty under sect. 32. Now, the primary and overriding obligation which is imposed by sect. 32 is to make good the roadway, and, when once it has made good the roadway, then the water authority has to maintain the work which it has made good for 3 months, but, if it has never made good the roadway, according to the true intent of the statute it cannot be said that, because it does a certain amount of extra work during the 3 months or during the 12 months, that is maintaining in accordance with the statute, because it has never made good. In this case, I think it is clear that the council could have made good if it had used cement or if it had used some flagstone, as suggested by the expert witness called by the plaintiffs, but at any rate I am satisfied that it never put down here anything except material which, with the ordinary incidence of weather, would wash away, and become a danger to the people who were using the road. The object which sect. 32 of the statute has in view is that the road, when once it has been broken up, should be restored to a condition of safety, restored to a condition in which people may pass and repass along the road without the danger of falling into trenches, or falling over other obstructions which have been caused or placed there owing to the works that have been done. When one comes to consider *Hartley* v. *Rochdale Corpn.* (2), especially the judgment of PHILLIMORE, J., I think that becomes perfectly clear, and, indeed, it is only common sense, because, if the other construction be right it seems to me that the water authority could scatter down or put down some earth or ashes, and keep doing that for 3 months, so that, during the period of 3 months, it would be perfectly true that somebody might be able to walk along the road without coming to grief, but, at the end of 3 months, the first rain storm might sweep everything away, and this thing would be left as a nuisance and a public danger to anyone walking along the road. PHILLIMORE, J., in *Hartley* v. *Rochdale Corpn.* (2) said this at pp. 598, 599:

> If this stop-box, which I presume is of metal, had been properly lodged in the highway by the defendants, and they had made good not only at first, but within their period of liability, any subsidence of the ground around it which they had had to remove, so that it would not subside shortly afterwards, and if the inequality in the road was due to the unequal wearing of metal and stone or the inequality of resistance of the earth with the brick and masonry under the iron, then, according to *Moore* v. *Lambeth Waterworks Co.* (1) and to general principles, the defendants

would not be liable; they would have lawfully put in the road something which they had a right to put there, and the inequality would be merely the effect of wear and tear, which the highway authority ought to make good. But here the county court judge has found, and there was evidence to support his finding, that the defendants put back the ground in such a way that there was a subsidence within their year of liability, and that that subsidence was not effectively made good within that year.

A In that case, the road was repairable by the highway authority, but in this case it is repairable by nobody.

I must point out that it will not do to say, "I came in and reinstated, by myself or by my contractor, and made the ground up level again," if the ground is so badly made up that in a brief period of time the inequality revives.

B That is exactly what I think happened in this case.

It is the duty of the water company to reinstate and to leave its reinstatement in such a condition that no further reinstatement will be required and that the inequalities will only be produced by the natural consequences of wear and tear.

That, as I say, is what happened here. I think it is quite clear that the C reinstatement that was done was a reinstatement which, though temporarily, merely day to day, might be satisfactory, would not have been satisfactory as it was if it had not been that the builder was constantly putting down material there. It is quite clear that the council did no reinstatement which could have, as Mr. Hemmerde put it, any element D of stability in it.

I think, therefore, that the council failed to carry out the statutory duty which was imposed by sect. 32. It is in the position of having laid down what would be a nuisance, or an obstruction, in the highway, under its statutory authority, and of not having carried out the statutory E duty of making good the road. I find it did not make good the road when it put this down, and, consequently, it is liable.

Judgment for the plaintiff for £1,040, *and costs.*

Solicitors: *Walter H. Goulding*, Bolton (for the plaintiffs); *H. B. Ashford*, Town Clerk, Bolton (for the defendant council).

F [*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re TAXATION OF COSTS, *Re* T.A.M., A SOLICITOR.

G [COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **May 7, 1937.**]

Costs—Taxation of costs—Application to the registrar by an insurer to apportion costs as between himself and a party to an action—County Courts Act, 1888 (*c.* 43), *s.* 118—*County Court Rules, Ord.* 53, *r.* 46.

H The plaintiff in a running-down action was insured against third party risks only. The defendant successfully counterclaimed for damage to his motor vehicle. The insurance company applied to the registrar to apportion the costs as between itself and the plaintiff. The registrar made an apportionment as requested:—

HELD: the registrar had no jurisdiction to make such an apportionment. Only the parties to an action are entitled to apply to the registrar to make an apportionment, and the insurance company was not a party.

[**EDITORIAL NOTE.** The practice of insurance companies to prosecute actions on behalf of the assured is well known. In the present case the insurance company was only interested in one issue, and the assured was solely interested in the other. The insurance company not being in fact made a party to the action, it was not in a position to ask for an apportionment of costs between the two issues.

As to Apportionment of Costs, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 180,181, para 329 ; and for Cases, see DIGEST, Practice, pp. 917-922, Nos. 4610-4651. See YEARLY SUPREME COURT PRACTICE, 1937, pp. 1410, 1411.]

Appeal from a judgment of His Honour Judge Kennedy, at Ross County Court, dated Jan. 23, 1937.

The Renown Insurance Association, Ltd., had issued to Scuddimore a policy insuring him against injury to the property of third parties. He had a collision with a car belonging to Power Petroleum, Ltd., and started an action against that company in the county court, claiming for the damage sustained by his car. Power Petroleum, Ltd., counterclaimed for the damage to its car. The insurance company retained Scuddimore's solicitor to watch its interests. The action was dismissed, but the counterclaim allowed with costs. The solicitor suggested that, from after the delivery of the counterclaim, two-thirds of the costs should be borne by the insurance company and one third by Scuddimore. The insurance company contended that it was liable for the costs incurred on the counterclaim only, and not for those incurred on the claim or defence. The insurance company applied to the registrar, under the County Court Rules, 1903-1935, Ord. 53, r. 46, to apportion the costs as between itself and Scuddimore. The registrar made an apportionment of two-thirds and one-third. The insurance company appealed to the judge, and thence to the Court of Appeal upon the method of apportionment, but in the Court of Appeal the question discussed was whether the registrar had any power to apportion costs in such a case, the insurance company not being a party to the proceedings.

Stephen Chapman for the Renown Insurance Association, Ltd.

A. A. Warren for the solicitor.

Chapman : It is submitted that the registrar and the judge had power to apportion these costs. A solicitor's client need not be on the record. The insurance company was the solicitor's client in respect of the counterclaim. To be within the rule, there must be costs incurred in a county court, and a dispute between a solicitor and his client. Both these conditions were fulfilled.

Warren : The insurance company had an interest in the matter, though not a direct interest. The County Courts Act, 1888, s. 118, refers to taxation between a solicitor and his client. It can apply to this case.

Greer, L.J. : In this case, we are of opinion that the registrar ought to have refused to have made any order whatever, or any order settling the proportions to be paid as between the insurance company and the defendant to the proceedings. The position was a little odd.

The plaintiff brought an action in order to recover damage to his motor car. So far as his claim was concerned, he was not covered by any policy of insurance in respect of damage to his own car, but he brought an action against the owner of a car or a lorry with which his car came into collision. The lorry owner, or the car owner, being a third party as between the plaintiff and the insurance company, counterclaimed for damages for the damage to his car. The damages were agreed at £65, and the action and the counterclaim came on for trial. The action was decided against the plaintiff and in favour of the defendant, claiming on his counterclaim. The liability on the counterclaim was covered by insurance by a Lloyd's policy. Under that policy there was the usual clause that the underwriters would pay all legal charges and expenses incurred with their written consent in dealing with or defending any claim against the assured :

> which may be the subject of indemnity in this policy, and the underwriters will also at their sole option arrange to pay the fee of a solicitor to represent the assured and his driver.

They do not say they will conduct the litigation themselves, that they will become defendants to the claim, or plaintiffs in respect of a claim, but that they will pay a solicitor to represent the assured. The only parties to the litigation on the counterclaim are the nominal parties to the counterclaim in this case. Nobody else can, in my judgment, come to the registrar or the judge to ask for a taxation of his costs. We have been referred to the County Courts Act, 1888, s. 118, which certainly gives power in the latter part of the section to the registrar, subject to review by the judge, to tax the costs of the parties to the action as between solicitor and client, if they desire to have their costs taxed as between solicitor and client, and not merely taxed as between party and party. But to my mind it is quite clear and beyond the possibility of controversy that that does not refer to the taxation of costs as between third parties, who are technically behind the parties to the litigation, but who are not in fact parties to the litigation, but it only empowers the registrar to deal with the taxation as between party and party, and, if so asked by either of the parties to the litigation, to tax the costs as between solicitor and client. The idea that the registrar can tax the costs as between a solicitor and a third party, who is not a party to the litigation, is, to my mind, an impossible contention as to the meaning of the section in question. It might just as well have been said that, if there was some friend helping, out of charity, one or other of the parties to the litigation, that person could come in and say : " I am going to pay the costs which have been incurred by the plaintiff or the defendant, and, therefore, please, Mr. Registrar, tax the costs as between me and the solicitor whom I have appointed to represent one of the parties to the litigation." That seems to me to be an impossible position, and there ought to be no doubt whatever that what was done by the registrar was not within the powers of the registrar. Therefore, in effect, though the appellant fails to establish the proposition he wanted to establish, namely, that the taxation was upon the wrong principle, he is entitled to say, and we are bound to say, that the order of the registrar and of the judge must be set aside. But, inasmuch as both parties concurred in asking the registrar to do something which he had no power to do, we think the appeal should be allowed to the extent that we set aside the A decision of the registrar and of the county court judge, and there should be no costs on either side.

SLESSER, L.J.: I agree, and would add, in confirmation of what has been said by my Lord, only that the County Court Rules, 1903-1935, B Ord. 53, r. 49, dealing with the review of the taxation by the judge commences thus:

> any party who may be dissatisfied with the allowance or disallowance . . . may apply to the judge.

It is abundantly clear, to my mind, that that order, and the rule dealing C with the application to the registrar himself, properly following upon sect. 118, are dealing with taxations as between parties. The question in this case, as stated by the judge, was what portion of the bill of costs of the solicitor who was acting for the plaintiff should be paid by the insurance company. That is a question quite outside any question which D can possibly arise under sect. 118. I agree that neither the registrar nor the judge has any jurisdiction to deal with the subject matter of this appeal at all.

MACKINNON, L.J.: I agree, and I would add only a word or two, in E case this sort of practice has become at all common, because, if it has, I regard this as a matter of some importance. For a century or more, underwriters have in reality been the parties interested in most litigation about ships, very often on both sides. In these days, the practice of insurance has spread to other objects, especially vehicles propelled by F internal combustion engines, and I should not be surprised to be told that possibly 50 per cent. of all actions in the King's Bench Division on one side or the other have some underwriters, really the interested parties, behind the nominal plaintiff or defendant. The duty of the taxing master, either in the county court or the high court, is to tax costs as G between the parties to the litigation on the record, or between one party to the litigation on the record and his solicitor. That is a difficult and troublesome task, and I think it would be perfectly intolerable if there were cast upon the taxing master the further task, not of settling any question of taxation, but of construing the terms of an insurance policy H so as to decide the liability of the underwriter and the distribution of the burden of the costs as between the party to the action and his underwriters. Quite apart from the fact that, for these reasons, I think there was no power in the registrar to entertain this application at all, it was further grossly irregular, inasmuch as he allowed the application to be made by a corporation called the Renown Insurance Association, Ltd., which had absolutely nothing to do with the litigation, and had no connection, directly or otherwise, with one of the parties to the litigation. The irregularity ended in his making an order that there was a certain liability on the Renown Insurance Association, Ltd., which obviously never had any liability at all in regard to these costs, and in making that order in the absence of Mr. Scuddimore and so as incidentally to set off in the action what was Mr. Scuddimore's liability. The whole thing appears to me to have been, not only beyond any jurisdiction of the registrar, but also in those respects grossly irregular. I agree in the result.

Appeal allowed.

Solicitors: *L. Bingham & Co.* (for the Renown Insurance Association, Ltd.); *T. A. Matthews* (for the solicitor).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

RENTIT, LTD. *v.* DUFFIELD.

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **May 4, 5, 24, 1937.**]

County Courts—Jurisdiction—Registrar—Application of both parties—Hire-purchase agreement—Non-payment of instalments—Action to recover instalments due—Allegation of fraud—Second action to recover further instalments—Fraud again alleged—Res judicata—County Courts (Amendment) Act, 1934 (*c.* 17), *s.* 19.

The respondent company took proceedings to recover certain instalments, amounting to about £6, due under a hire-purchase agreement. In the ordinary course, and under the County Courts (Amendment) Act, 1934, s. 19, the case came before the registrar. The respondent company was represented and was admittedly a consenting party; the appellant was not represented, but he wrote to the registrar alleging that the contract had been obtained by fraud. The registrar gave judgment for the respondent company. Subsequently the respondent company started a second action to recover further amounts due under the same contract. The appellant counterclaimed for cancellation of the contract on the ground that it had been obtained by fraud. The county court judge found that the contract had been obtained by fraud, but he held that the appellant was estopped from raising this defence, as the registrar had already decided this point against him. On appeal the appellant contended that the registrar had had no jurisdiction to hear the case, as the appellant had not applied to the registrar to hear the case:—

Held: the appellant's letter to the registrar amounted to an application to the registrar to hear the case, and the appellant could not therefore raise the question of fraud which was *res judicata.*

[EDITORIAL NOTE. This would be a common case of *res judicata* but for the fact that on the first occasion the allegation of fraud was only made by a letter to the court and the party did not attend the proceedings to support his allegation.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 13, pp. 441-446, paras. 496-501; and for Cases, see DIGEST, Vol. 21, pp. 178-181, Nos. 299-316.]

Cases referred to:

(1) *Kingston's* (*Duchess*) *Case* (1776), 20 State Tr. 355; 22 Digest 474, *4997.*

(2) *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295; 11 Digest 457, *1132*; 52 L.J.Q.B. 1; 47 L.T. 325.

Appeal from a decision of His Honour Judge Hill Kelly, in the Bloomsbury County Court, dated Dec. 21, 1936. The facts of the case are set out in the judgments.

P. Gordon Bamber for the appellant.

P. Malcolm Wright for the respondent company.

Bamber: The registrar had no power to hear this case; by the County Court Rules, 1903-1935, Ord. 22B, r. 2, the registrar can hear a case only with the consent of the parties. By the County Courts Act, 1919, s. 5 (1), he can do so only on the application of the parties and with the consent of the judge. The letter written to the registrar by the defendant was not an application to him to hear the case. Each summons is a fresh cause of action; it cannot be said that anything decided in a previous hearing is *res judicata*. In any event, the counterclaim is a completely fresh cause of action, which was never before the registrar. If the appellant fails, he must go on paying instalments for two and a half years, under a contract which the judge has said is a fraudulent one. An estoppel must be specifically pleaded; that has not been done in this case. [Counsel referred to *Abouloff* v. *Oppenheimer* (2).] The judge's decision on fraud was clear, and the matter had not previously been argued. The registrar's decision cannot be supported.

Wright: Once a matter has been tried and decided, it cannot be adjudicated upon again. It was not suggested at the trial that the registrar had no jurisdiction. The judge was satisfied that the registrar had heard the case properly.

Greer, L.J.: In this case the appellant appeals from a judgment of the county court judge, who decided the case before him on the ground that the plaintiff was estopped from raising the question that his agreement had been obtained by fraud. At one time, the jurisdiction of the registrars of the county court was very limited, and it is still limited in this way, that, unless the parties consent, even though the amount in dispute is a small amount, the parties are entitled to have it decided by the judge. The law bearing upon what we have to decide here is contained in the County Courts (Amendment) Act, 1934, s. 19:

> Sect. 5 (1) of the County Courts Act, 1919 (which provides that a registrar may on the application of the parties and by leave of the judge, hear and determine any case in which the sum claimed or the amount involved does not exceed £5), shall have effect as if the words "ten pounds" were substituted for the words "five pounds."

The effect of that section is that where the parties consent, that is to say, where both parties apply for the decision of the registrar, the fact that the claim exceeds £5 and amounts to £10 does not deprive the registrar of the jurisdiction. The present case arises out of an agreement for the purchase of certain goods by instalments, and several instalments were allowed to pass without being paid before any proceedings were taken, whereupon the plaintiff took proceedings to recover the sum of £6 odd, and in the ordinary course, and under the section to which I have referred, that came before the registrar. The plaintiff company was represented, and quite obviously was a consenting party to the decision being given by the registrar. The defendant was also there, and was not represented by counsel or solicitors, but he wrote to this effect to the registrar:

> I will now tell you the true facts of the case and leave it to you to decide whether I was in the right or wrong in not remitting money to people who had got my signature to a so-called contract which I had never seen by fraud and misrepresentation.

Thus, he was saying as plainly as possible the words: "I consent to the registrar deciding between us the question as to whether or not the contract, under which these sums will become due, was obtained by fraud." Thereupon the registrar embarked upon the inquiry, and, though the judge afterwards differed from him, we must take it that, as he found for the plaintiff, he found that there was no fraud in connection with the agreement under which the claim was made. He may have been right or he may have been wrong, and, once a decision between the litigating parties has been arrived at by a court of competent jurisdiction, those parties are bound by the finding of the court, not only in the particular case that has come before it, but also in any subsequent case that may come before it. That rule was established as long ago as the *Duchess of Kingston's Case* (1), and has been applied over and over again by courts in this country. The sole question being, therefore, whether or not the two parties did apply to the registrar for a decision within the meaning of sect. 19 of the Act to which I have referred, I think it is plain that they both applied for a decision, and, therefore, the decision is binding on both. The fact that subsequent instalments became due, and the judge thought it right that he should enter into the question as to whether there was fraud or not, and came to the conclusion quite definitely that there had been fraud, does not affect the question that we have to determine, namely, whether there was an estoppel, but it does affect the question as to whether or not, assuming Messrs. Rentit to be an honest company, it will now take advantage of a judgment that has been obtained in such circumstances as to meet with the severe disapproval of the county court judge. That is a matter, however, for the respondent company to decide, and not for us. The appeal will be dismissed with costs.

SLESSER, L.J.: I agree.

MACKINNON, L.J.: With regret, I agree. Rentit, Ltd., apparently by means of canvassers, seeks to get people to enter into hire-purchase agreements with it. The county court judge has found that this particular defendant, a retired sergeant-major, who keeps a public house, was induced to sign a hire-purchase agreement by the fraud of one of the company's canvassers. One might suppose that Rentit, Ltd., on being apprised of this, would have readily consented to the agreement being treated as set aside, and returned the money that it had recovered under the previous judgment of the registrar. Any man or any company with the most elementary sense of honesty and decency would have so acted. A Rentit, Ltd., and Mr. Herbert, its managing director, and Mr. Cole, its director, apparently do not feel moved by those motives. They rely on the technical rule of law, which unfortunately compels us to dismiss this appeal against the judgment in their favour. I can only hope that the report of these proceedings may be diffused among the public so widely that, as a result, members of that public may refuse to B have further dealings with people who behave in so roguish a fashion.

Appeal dismissed with costs.

Solicitors: *H. Flint & Co.*, agents for *Wallace, Watson & Flint*, Chatham (for the appellant); *Reid Sharman & Co.* (for the respondent company). C

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

WILSON (INSPECTOR OF TAXES) *v.* MANNOOCH. D

[King's Bench Division (Lawrence, J.), **April 12, 13, 1937.**]

Income Tax—Annual profits or gains—Isolated transaction—Loan by solicitor to builder to purchase property—Sum payable to solicitor on resale—Income Tax Act, 1918 (c. 40), *Sched. D, Case VI.*

E A partner in a firm of solicitors agreed with certain builders, who were in want of a loan of money for the purchase of certain property, that, in consideration of the solicitor's personally lending, or arranging for the loan of, the whole of the purchase price of the property, the solicitor should receive, on the resale of the property, a third of any resulting profit with a limit of £500. The solicitor procured the loan, from a client of his firm, of part of the sum required, on a first mortgage F of the property, and himself lent the balance on a second mortgage. The property was subsequently resold at a profit which entitled the solicitor to £500. On another occasion the solicitor had agreed with the same builders to provide the whole of the money required to purchase another property, and it was agreed that the solicitor should receive £300 regardless of the price on resale. The sums of £500 and £300 were received and retained by the solicitor for his sole use and formed no G part of the profits of his firm. The solicitor took no part in the development of the property or in its sale:—

Held: the sums of £500 and £300 were annual profits, and were liable to income tax.

[EDITORIAL NOTE. The cases distinguishing between a capital accretion and income are here carefully considered. It appears to have been suggested at some H time that there cannot be assessable income unless there is a finding that the sum in question resulted from an adventure in the nature of trade. If this has been suggested it is not the true criterion and there is no necessity for there to be a trade before an isolated gain can be treated as income.

As to Isolated Transactions, see HALSBURY, Hailsham Edn., Vol. 17, pp. 99, 100, para. 193; and for Cases, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-99.]

Cases referred to:

(1) *Ryall* v. *Hoare, Ryall* v. *Honeywill*, [1923] 2 K.B. 447; 28 Digest 81, *453*; 92 L.J. K.B. 1010; 129 L.T. 505; 8 Tax Cas. 521.

(2) *Sherwin* v. *Barnes* (1931), 16 Tax Cas. 278; Digest Supp.

(3) *Wylie* v. *Eccott* (1912), 6 Tax Cas. 128; Digest Supp.

(4) *Martin* v. *Lowry, Martin* v. *Inland Revenue Comrs.*, [1927] A.C. 312; 28 Digest 22, *114*; 96 L.J. K.B. 379; 136 L.T. 580; 11 Tax Cas. 297.

(5) *Pearn* v. *Miller* (1927), 11 Tax Cas. 610; Digest Supp.

(6) *Schulze* v. *Bensted* (*Surveyor of Taxes*) (1915), 7 Tax Cas. 30; 28 Digest 63, case *q*.

(7) *Jones* v. *Leeming*, [1930] A.C. 415; Digest Supp.; 99 L.J. K.B. 318; 143 L.T. 50; 15 Tax Cas. 333.

APPEAL by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the division of Holborn in the county of Middlesex, allowing an appeal by the respondent against an additional assessment of £500 for the year ended Apr. 5, 1933, and an additional assessment of £300 for the year ended Apr. 5, 1935, both assessments being made upon him under Sched. D. The facts and arguments are set out in the judgment.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), and *Reginald P. Hills* for the appellant.

G. O. Slade for the respondent.

LAWRENCE, J.: In this case, the respondent, who is a partner in a firm of solicitors, agreed with certain builders, who were in want of a loan of money for the purchase of certain property, that, in consideration of the respondent's personally lending, or arranging for the loan of, the whole of the purchase price of this property, namely, £7,000, the respondent should receive, on the resale of the property, a third of any resulting profit, with a limit of £500. The respondent procured the loan, from a client of his firm, of £5,200 on a first mortgage of the property, and himself lent £1,800 on a second mortgage at 6 per cent. The property was subsequently resold at a profit which entitled the respondent to the whole sum of £500, and it is in respect of that sum with another sum that the respondent has been assessed under Case VI or Case III of Sched. D. The second sum in respect of which the respondent has been assessed is a similar sum which was agreed to be paid by the same firm of builders to the respondent for the provision of the whole of the money, amounting to £3,750, necessary to purchase another property. In that case, it was agreed between the respondent and the firm of builders that, on the resale, the respondent should be paid a bonus of £300, regardless of what the price on resale should be. There appears to have been no security in that case, but there was an agreement that the respondent should be paid 6 per cent. on the amount of his loan. The respondent took no part in the development of the property or in its sale.

In those circumstances, the Commissioners have held that the respondent was not assessable, on the ground "that the respondent had engaged in a venture not in the nature of trade." In the submission of the

Crown, that was not the true point which the Commissioners had to consider, the Crown not putting the case under Case I of Sched. D, which deals with tax in respect of any trade, but putting the case under Case III, which deals with profits of an uncertain value, and interest and discounts, and under Case VI, which deals with :

> tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule. A

The Crown relied, primarily, upon the decision of Rowlatt, J., in *Ryall* v. *Hoare* (1). That was a case in which the directors of a company had given their personal guarantee of the overdraft of the company of which they were directors in consideration of a payment of 2 per cent. per annum on the amount guaranteed by the company to the directors, and there it was held that the amount so received by the directors was taxable under Case VI of Sched. D. Rowlatt, J., said, at p. 525 : B

> One may rule out two classes of emoluments from this description. In the first place, it is quite clear that anything in the nature of a capital accretion is outside the words "profits or gains," as used in these Acts ; that, of course, follows from the scope of the Act, and it is sanctified by the usage now of a century. That rules out, of course, the well known case of a casual profit made upon an isolated buying and selling of some article ; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is exigible in respect of a transaction of that kind. "Profits or gains" mean something which is in the nature of interest or fruit, as opposed to principal or tree. The other class of case that one can rule out is that of gifts. C D

He then proceeds to deal with gifts, and says :

> Without pretending to give an exhaustive definition, I think one may take it as clear that where an emolument is received, or, rather, where an emolument accrues, by virtue of some service rendered by way of action or permission, or both, at any rate that is included within the words "profits or gains." E

Then he goes on to deal with the question of the meaning of the word "annual."

It is contended, on behalf of the Crown, that, in the present case, the £500 received in the first instance and the £300 received in the second instance were emoluments which accrued by virtue of the service rendered by the respondent to the builders in providing them with the loans which they required. I was also referred to *Sherwin* v. *Barnes* (2), which was a case of the guarantee of an overdraft in consideration of the payment of a bonus of £1,000, and the guarantor was assessed to income tax under Case VI of Sched. D in respect of his share of that £1,000. Rowlatt, J., relying upon his own decision in *Ryall* v. *Hoare* (1), said this at p. 280 : F G

> The question is simply this : first of all, is this receipt in the nature of income ? If it is in the nature of income, then does it fall within the year ? That is the way Lord Atkin put it, and I think everybody agreed that that was right. Earning a commission by pledging your credit was held, and considered rightly held, in *Ryall* v. *Hoare* (1), to be in the nature of income. There it is, and I cannot get away from that. Mr. Joy suggested that this was more like appreciation of capital, but I cannot follow that argument at all. Appreciation of capital is not in the nature of income at all, and you only get that element into an income tax computation when you are dealing with the affairs of somebody who carries on a trade, and necessarily, if he is going to produce income out of his trade on which to pay income tax, he must sell for more than he buys. It is only in that way, H

> as I conceive it, where the appreciation is merged in a trade that that question comes in at all. As I have said before now, you cannot get an appreciation of capital by bringing it under Case VI.

It is argued, with reference to these two cases, by Mr. Slade, on behalf of the respondent, that this is not really a case of commission at all, in the proper sense of the word, and, as I understand his argument, it is this, that this was really the provision of money upon the terms that that money should be repaid, with an appreciation, which was in the nature of capital appreciation, the capital being the money lent, and the bonus payable on repayment being in the nature of an appreciation upon that capital. He contended that it was analogous to cases of debentures which are issued at a discount, below par, or repayable at a premium, over par. He said that, in those cases, the amount of the difference between the issue price and the repayment price was a capital appreciation, and had always been so treated by the revenue. On the other hand, with reference to that, the Solicitor-General explained the practice of not seeking to tax such sums as those by saying that they were not annual, because they were not attributable to the year in which they were received.

The other cases to which I was referred were *Wylie* v. *Eccott* (3), which was the case of the letting of a furnished house, which was held to be taxable, and *Martin* v. *Lowry* (4), which was the linen case. The observations of LORD SUMNER and of LORD CARSON upon *Ryall* v. *Hoare* (1) in that case have reference to Case I, which was the case with which their Lordships were dealing, and not directly to Case VI, but there is no doubt, as ROWLATT, J., pointed out, I think, in *Pearn* v. *Miller* (5), that equally in Case VI you cannot bring in a profit which is of the nature of capital, because the tax is, as LORD MACNAGHTEN said, a tax upon income, and not a tax upon capital.

With reference to the other argument for the Crown, that the matter falls within Case III, I was referred to *Schulze* v. *Bensted* (6), in which the LORD PRESIDENT gave a definition of "interest." He said:

> There is a very good working definition of "interest" to be found in Bell's Dictionary. It runs as follows: "Interest of money may be defined to be the creditor's share of the profit which the borrower or debtor is presumed to make from the use of the money. Otherwise stated, it is just recompense to the creditor for being deprived of the use of his money."

And so it is argued in this case that the £500 and the £300, in addition to the sum of 6 per cent. upon the capital lent by the respondent, were to be treated as interest within the meaning of Case III. The argument of Mr. Slade, which I have already summarised, is that these sums have the character of capital, because they relate to the loan of money by the respondent or through his intervention, in the second case by the respondent entirely, and in the first case in part by the respondent, and he relied upon *Jones* v. *Leeming* (7). That was a case of the sale of an estate, and the case, having been remitted to the commissioners in order that they should find whether the adventure was a concern in the nature of trade, and they having found that it was not a concern in the nature of trade, it was held throughout the courts and in the House of Lords that there was no liability to income tax. In that case, there are various references to the distinctions between capital and income, but I do not think the case is of assistance to the respondent's argument. In my judgment, the sums received in the present case are not analogous to the appreciation of capital upon the sale of an article, but are in reality payments to the respondent for the finding of money, and have the character of income, and not capital. The finding of the majority of the Commissioners, that it was an adventure not in the nature of trade, is not really, I think, the true point, although it may be that they had in mind the true question, which is whether it is an annual profit of a capital or of an income nature.

In my judgment, the sums were annual profits of an income nature, and I think, therefore, that the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Saville & Mannooch* (for the respondent).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

FARQUHARSON *v.* PEARL ASSURANCE CO., LTD.

[King's Bench Division (Singleton, J.), **May 5, 1937.**]

Insurance—Life policy—Assignment—Offer by assignee to pay premium—Refusal by insurance company—Post-dated cheque given by assured in respect of premium—Death of assured before date of cheque—Tender.

By the terms of a policy of insurance upon the life of the assured, the policy moneys were expressed to be payable provided the insurance company received the premiums on the dates specified, and it was provided that 30 days of grace were allowed for the payment of premiums. The policy was taken out as security for a loan, the mortgage providing that if the assured should at any time make default in payment of any of the premiums it should be lawful for the claimant to pay the same. On Apr. 9, 1936, the claimant, being aware of the assured's financial difficulties, called on the insurance company's district manager and offered to pay the premium for Mar. 15, 1936. The district manager declined this offer and said he was arranging for a cheque to be paid by the assured in a few days. On Apr. 17, 1936, the district manager received a cheque signed by the assured and post-dated to Apr. 23, 1936. The district manager in the premium account described this premium as outstanding. He did not state that the policy had lapsed. On Apr. 20, 1936, the assured died. The claimant claimed the policy moneys, but the insurance company repudiated the policy on the ground that it had lapsed, owing to non-payment of the premium due on Mar. 15, 1936 :—

Held : (i) the insurance company could not, in the circumstances, be heard to say that the premium due on Mar. 15, 1936, had not been tendered to it by the claimant on Apr. 9.

(ii) although it might not have been within the scope of the district manager's authority to waive the condition requiring payment of the premium on Mar. 15, 1936, or within 30 days thereafter, the insurance company ought not, after the refusal of the premium, to be allowed to raise that question.

[**EDITORIAL NOTE.** The matter here decided is of the first importance to mortgagees of insurance policies. The mortgage of a policy almost invariably contains a clause empowering the mortgagee to pay the premiums and add such payments to the sum charged on the policy. It is here decided that if the mortgagee offers to pay the premium during the days of grace, such offer is a tender of payment and the company cannot as against the mortgagee repudiate the policy by reason of late payment or non-payment of that premium.

AS TO PAYMENT OF PREMIUM, see HALSBURY, Hailsham Edn., Vol. 18, pp. 448, 449, paras. 646-649; and FOR CASES, see DIGEST, Vol. 29, pp. 360-363, Nos. 2917-2932.]

Cases referred to:

(1) *Finch* v. *Brook* (1834), 1 Bing. N.C. 253; 12 Digest 325, *2698*; 4 L.J. C.P. 1.

(2) *Re Farley, Ex p. Danks* (1852), 2 De G. M. & G. 936; 12 Digest 326, *2705*; 22 L.J. Bcy. 73.

(3) *Reay* v. *White* (1833), 1 Cr. & M. 748; 12 Digest 326, *2703*; 2 L.J. Ex. 229.

SPECIAL CASE STATED by an arbitrator in an arbitration between the holder of a life policy issued by the respondent insurance company and the respondent company.

The Pearl Assurance Co., Ltd., granted a policy of assurance, on Mar. 15, 1935, to a Mr. Alec Charles Curtis. By that policy the respondent company insured the life of Mr. Curtis in the sum of £3,000. The policy moneys were expressed to be payable provided the company received the premiums mentioned in the schedule on the dates therein specified. The premium payable by the assured on that policy was the sum of £41 12*s.* 6d., payable on Mar. 15, 1935, and thereafter quarterly in advance on June 15, Sept. 15, Dec. 15, and Mar. 15. Condition 4 of the policy provided that: "30 days of grace are allowed for the payment of renewal premiums." There was another policy between the same parties, the premium of which was £27 15*s.*, the premiums on the two policies amounting together to the sum of £69 7*s.* 6*d.*

The following facts are taken from the arbitrator's award:

By a deed of mortgage dated Apr. 7, 1935, the assured assigned his interest in the £3,000 policy to the claimant [Dr. Farquharson], who had lent the assured the sum of £3,000. The mortgage deed recited that the assured was entitled to the policy and provided that the assured should "punctually pay all premiums for keeping on foot the said policy," and that if he should at any time make default in payment of any of the premiums "it shall be lawful for the lender (the claimant) to pay the same." The claimant notified the respondents in writing on May 21, 1935, that the assured had by way of mortgage assigned to him his interest in the £3,000 policy.

The firm of Malkin, Curtis & Co., of which the assured was a member, were appointed agents in Guildford of the respondent company by writing dated Feb. 27, 1934, and as such they were entitled to commission on premiums collected by them. The district manager of the respondent company in Guildford was Mr. B. C. French. He was so appointed by agreement dated Oct. 3, 1934. The agreement appointing Mr. French district manger contained no specific limitation of authority, but Mr. French was supplied by the respondent company with a book of "Instructions," which contained the following rule: "Acceptance letters and renewal notices must be delivered forthwith, and premiums collected must be paid through the next following account. D.M. (district manager) must return the receipt forms for unpaid premiums to C.O. (central office) with the first account following the expiry of the days of grace. Particulars of renewals and first premium receipts received and premiums collected each week must be entered in receipt register under the respective headings."

In and after Oct., 1935, the assured was in financial difficulties. The premiums payable on Sept. 15, 1935, were paid by a post-dated cheque payable within the days of grace; and the premiums payable on Dec. 15, 1935, were paid by him by cheque on Jan. 15, 1936. The premium of Dec. 15 had in fact lapsed on Jan. 15, 1936, but Mr. French accepted the cheque, and paid it into the Midland Bank at Guildford. When filling up the relevant green form on Jan. 16, 1936, instead of entering the premiums as lapsed in the appropriate space, and returning the receipt form, Mr. French entered the premiums in the columns headed "Cash Account" and "Premium Account" as having been collected.

On Apr. 8, 1936, the claimant, being aware of the assured's financial difficulties, consulted Mr. Richards, a collector of taxes at Guildford. Mr. Richards advised him that, as he was entitled to pay the premium on the £3,000 policy himself, he had better see the representative of the respondent company and pay the premium. On Apr. 9, 1936, the claimant called on Mr. French and offered to pay the premiums on both policies. Mr. French replied that there was no need to complicate things in that way as he was arranging for a cheque to be paid by the assured in a few days. The claimant said that he had the right to pay the premium on the £3,000 policy in the event of a default by the assured, and asked Mr. French how he would know if the policy had lapsed. Mr. French replied that in such an event he would be informed by the head office or through the local office of the respondent company.

On Apr. 11, 1936, Mr. French, who had on various occasions applied to the assured for the March premiums on the two policies, told the assured that Apr. 14 was the last day on which he could pay them. Mr. French called on the assured on Tuesday, Apr. 14, and the assured promised to send a cheque the next day. No cheque was received on Apr. 15, but on Friday, Apr. 17, Mr. French received a cheque signed by the assured and post-dated to Apr. 23, 1936, for £67 12*s.* 7*d.* (being £69 7*s.* 6*d.* less the commission to which the assured's firm were entitled, as agents). Mr. French on Thursday, Apr. 16, had already filled up the green form sent to him by the central office. On this form he described the premiums of £69 7*s.* 6*d.* in the "Premium Account" column as "Outstanding." He did not describe the premiums as "lapsed" in the appropriate space at the back of the green form, and he retained the receipt form.

On Apr. 17, Mr. French sent a memorandum to the central office:

> *Re* Curtis. Have received a post-dated cheque in this case to-day; have, therefore, retained amounts on the outstanding and will account for items next week. Yours faithfully, B. C. French, District Manager.

On Apr. 20, the assured was found injured on the railway line near Guildford, and he died the same day in hospital. On Apr. 21, Mr. French reported to the head office in these terms:

> I reported to you that cheque had been received, and I was holding receipts. On examination of cheque I find it is post-dated. Have therefore returned you the receipts and cheque. The assured was found on the railway line on Monday, 20th instant, and died later in hospital.

On the same day Mr. French asked Mr. Curtis's clerk, at the office of Malkin, Curtis & Co., to let him have payment of the post-dated cheque. On the same day, again, Mrs. Farquharson, the wife of the claimant, acting on behalf of the claimant, called upon Mr. French, told him of the death of the assured, and asked him if everything was in order for the payment of the £3,000 policy. He told her that he had received a post-dated cheque for the premium, and gave her to understand that the premium might possibly be deducted from the policy moneys. On the same day, Mr. French told the claimant, Dr. Farquharson, that the death of the assured would make things very awkward for him, as he had accepted a post-dated cheque. Thereupon, Dr. Farquharson offered to pay both premiums—an offer similar to that which he had made on Apr. 9. Mr. French told Dr. Farquharson that this might complicate things, and gave him to understand that quite possibly the premiums would be deducted from the policy moneys. On Apr. 25, Mr. French, the district manager, at the request of the claimant forwarded to the central office the claimant's certificate, stating that the claimant was entitled to receive the amount due under the £3,000 policy. On Apr. 27, the claimant gave notice to the respondent company that A the Midland Bank, Farnham, was authorised to collect the policy moneys. On Apr. 28, the respondent company returned to the firm of the assured the post-dated cheque for £67 12*s.* 7*d.*, and on the same day the respondent company, by letter, informed the Midland Bank at Farnham that the £3,000 policy had "lapsed owing to non-payment of the B premium on the 15th ultimo." The dispute between the parties was submitted to arbitration in accordance with a condition in the policy.

R. F. Levy, K.C., and *Harold Simmons* for the claimant.

E. J. Macgillivray for the respondent company.

C SINGLETON, J.: [His Lordship referred to the facts.] This somewhat extraordinary position arises: a policy of assurance was taken out in order that it might provide security for a loan, and that policy of assurance was assigned to the lender of money, the claimant in this case. About a year afterwards, when a premium is due or is becoming due, the lender D of the £3,000, who has the right and the power under the mortgage deed to pay the premiums due on the policy, in order to protect his security attended at the office of the Pearl Assurance Co., Ltd., and saw the district manager, who had authority to receive moneys (premiums) on behalf of the respondent company. He was ready and willing, on E the findings of fact in this case, to pay the premium on this policy and the premium on another policy. He would have paid it if the district manager of the respondent company had been ready and willing to accept it, but he was not. At a later stage, a day or two after the days of grace had expired, the assured himself paid the premiums by a post-F dated cheque, which the district manager of the respondent company accepted. So that there was no need to look further to the claimant, even if he had wished to do so. That cheque was kept in the hands of the respondent company or its manager until Apr. 28, and thereafter the respondent company repudiated liability under the policy.

G Mr. Macgillivray, in the course of his argument, reminded me that I was not concerned with the morals of the matter at all. He is quite right, and, if I may say so, he was quite right to remind me, because there always must be that which he himself spoke of as the view of the man in the street. I do find it a little difficult to see what security there H can be in insurance policies taken out in circumstances such as these if a position such as this is to be taken up by the respondent insurance company. It is right that I should be reminded that it is no concern of mine. I hope that I disregard it. At the same time, the position of insurance companies becomes more and more important every year. In some instances, members of the public are bound by law to insure;

in others, they take out policies for their own protection, or for family reasons; and often they take them out to provide additional security when it is found necessary to borrow money. That is well known to those who are responsible for the management and direction of insurance companies, and the system is universally recognised. In the present case, Dr. Farquharson had lent money to Mr. Curtis, and the value of the security to Dr. Farquharson depended on the policy of assurance being kept alive. When there was a danger of Mr. Curtis defaulting, Dr. Farquharson, the claimant, offered payment to the district manager of the respondent company. He was the person to whom payment should be made. He did not accept payment, for the reasons set out in the case. The premium was not in fact paid in money, though it was paid by way of a post-dated cheque of the assured's before the death. But for the refusal of the district manager to accept payment from Dr. Farquharson, the premium would have been paid. Dr. Farquharson was ready and willing to pay it on Apr. 9. How, then, can the assurance company be heard to say that the policy has lapsed? If it can, it seems to me that the whole value of this form of insurance, as a security for the purpose of loan, goes. I find it difficult to see what else Dr. Farquharson, the claimant, could have done, and, if, in this kind of case, there is to be repudiation when the claimant himself has offered payment of the premium well within the days of grace, I find it difficult to see what the next step is. This must become clear: that neither banks nor other persons can accept that form of policy as security if there is danger of repudiation in circumstances such as these. But what I have to deal with is a question of law as stated.

The arbitrator sets out the contentions of the parties in para. 5 of the case:

> It was contended for the respondents that at the date of the death of the assured the policy for £3,000 had lapsed owing to non-payment of the Mar., 1936, premium, and that Mr. French had no authority to accept the post-dated cheque in payment thereof. For the claimant it was contended that Mr. French had actual or ostensible authority to extend the time for payment of the premium; that the claimant had in effect tendered to Mr. French the premium on the £3,000 policy on Apr. 9, 1936, and that payment had been declined by Mr. French; and that Mr. French had waived the condition requiring the payment of the premium on Mar. 15, or within 30 days thereafter by refusing the offer of the claimant to pay it on Apr. 9, 1936.

Then the question which he states for the opinion of the court is:

> Whether the offer of the claimant to Mr. French to pay the premium on the £3,000 policy amounted in effect to a tender of the premium and whether Mr. French by declining the offer waived the condition of the policy requiring payment of the premium on Mar. 15, 1936, or within 30 days thereafter.

I ought to say that the arbitrator, having stated his findings of fact fully, stated the award in the alternative form, and, in the final award, he set out this:

> That Mr. French had no actual or ostensible authority to extend the time for payment of the premium for Mar., 1936; but that the respondent by offering to pay the premium in effect tendered the premium to Mr. French on Apr. 9, 1936;

and that, Mr. French, having declined the offer to pay the premium, waived the condition requiring the payment of the premium on Mar. 15, or within 30 days thereafter.

Then he awarded and determined, in the final form, that is to say, if this case was not brought up, that the respondent company does pay to the
A claimant the sum due under the policy.

Mr. Macgillivray argues that I am not entitled to consider that part of the award as in any sense a finding of fact, and I think that in that he is right ; but the arbitrator, in setting out his findings of fact, finds that Dr. Farquharson had called on Mr. French and offered to pay the
B premiums on both policies. Mr. French replied that there was no need to complicate things in that way, as he was arranging for a cheque to be paid by the assured in a few days. I think that is, as the arbitrator indeed says in his final award, a declining by the district manager to accept the premiums which were offered to him by the claimant, who
C had called on him for the express purpose of paying them.

Mr. Levy, in his argument on behalf of the claimant, submitted that that which took place on Apr. 9, 1936, was a tender of the premium by the claimant, and that I ought so to hold. Furthermore, he submitted that, in any event, the position was such that the respondent company
D could not be heard to say that the premiums were not tendered to it, and that I ought to hold that the respondent company could not, for that reason, take advantage of the fact that the premiums had not been paid, because their non-payment was due to the refusal of the district manager of the assurance company to take them.

E Mr. Macgillivray, on the other hand, submitted there was nothing which amounts in law to a tender, and that there was no finding by the arbitrator that there had been dispensation with production of the money on the occasion of Apr. 9. Further, he argued that no question of estoppel could arise ; that there was no misstatement of fact ; that there
F was nothing in the case amounting to estoppel ; that at the most there was a statement that the district manager was arranging with the assured for a cheque to be paid ; that the case could be put no higher against him than that the respondent company was estopped from saying that that arrangement was not being made, and that that was not the
G same thing as saying that the premium had been paid. Furthermore, he submitted that there was no waiver. He argued that, in order to be effective as a waiver, it must be a waiver of the condition precedent that the premium be paid within the days of grace ; that there was in fact no such waiver ; that the most that the district manager said was
H that he was arranging for the assured to pay within the days of grace, and that, if there should be either waiver or estoppel, the district manager of the assurance company had no authority to bring about or to effectuate either—truly in one sense a formidable array of points, and I remind myself, as Mr. Macgillivray reminded me, that I am not concerned with the morality of them. But I have to consider what is the effect in law,

and on that I have been greatly helped by the arguments of the counsel on both sides.

I am bound to say that the question whether or not there was a tender is one of considerable difficulty. I do not think any of the cases to which I was referred meets this case precisely, but the first case to which I was referred was *Finch* v. *Brook* (1), the headnote of which is:

> On a plea of tender of £1 12*s.* 5*d.* the jury found specially, that defendant's attorney called on plaintiff and said, "I come to pay you £1 12*s.* 5*d.*, which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that plaintiff said, "I can't take it, the matter is now in the hands of my attorney." Held, upon writ of false judgment, that such finding did not warrant a judgment for defendant.

TINDAL, C.J., said, at pp. 256, 257:

> All the cases agree that, in order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the defendant. . . .

Then GASELEE, J., said:

> I am of the same opinion. The jury, upon these facts, might have found for the defendant on the ground of a dispensation, as in trover they may find a conversion from the circumstances of demand and refusal; and had they found a dispensation, the court would not have interfered. But no such fact being found, and no money having been produced, the judgment must be reversed.

There are two other judgments, which I do not read. From that, it would seem fairly clear that, whether there was a dispensation, actual or implied, is a question of fact, for the jury.

In *Re Farley, Ex p. Danks* (2), the same question was discussed by KNIGHT BRUCE and LORD CRANWORTH, L.JJ., in a bankruptcy appeal, and at p. 941, KNIGHT BRUCE, L.J., in dealing with this question, said:

> Then comes the question, whether Mr. Farley, when in the office, either produced and showed the money to Mr. Danks, or, after addressing him on the subject, shook the money or part of it in a bag or pocket, so that Mr. Danks heard money (to use a phrase used in the evidence) "jingle." That, if both these things were not, one or the other of them was done, is, to my mind, perfectly clear. This last question may or may not be essential or material; but that to which I now come seems certainly so,—the question, namely, whether Mr. Farley did in the office state to Mr. Danks, distinctly and so as to be heard and understood by him, thus, in effect and substance: That Mr. Farley had brought with him, and then had there, £85 11*s.* 10*d.* for the purpose of paying to Mr. Danks, and offered then and there to pay him that sum, being the amount admitted to be due to him from Mr. Farley. The question is not, I say, whether these very words were used, but whether Mr. Farley expressed himself in that sense, and so as to be understood in that sense by Mr. Danks; and it is my opinion morally, as well as my conclusion judicially, upon all the materials before the court, that this question ought to be answered in the affirmative.

He said later, at p. 942:

> He does not appear to have taken any objection to the invisibility of the money, if it was invisible. He says in effect that he told Mr. Farley that he would not receive it, for that is the substance of what Mr. Danks has stated to the court. Whether he did or did not refer Mr. Farley to his attorney is, I conceive, upon this point of tender, not at all material.

LORD CRANWORTH, L.J., said, at p. 945:

> Now, in order to make a tender, I assume that the person pleading the tender must either have actually produced the money, or have been ready and able to

produce it, and only be prevented from producing it by the other party dispensing with his so doing. And in my opinion, for the reasons which have been very fully pointed out by my learned brother, it is clear to demonstration that Mr. Farley had the money, the exact sum; that he had it there for the purpose of tendering it; that he came instructed by his solicitor as to the mode in which he was to make that tender, and that he did make that tender; make the offer to produce it, even supposing the money was never out of his pocket.

I was referred to one other case, *Reay* v. *White* (3), which I do not propose to deal with, but Mr. Macgillivray, on this question of tender, referred me to a passage in LEAKE ON CONTRACTS, 8th Edn., p. 666, in these words:

> A tender of money in payment must be made with an actual production of the money. A mere statement of the debtor that he is ready to pay is not sufficient unless, the debtor having it ready and offering to pay, the creditor expressly or impliedly dispenses with the production.

Now, it is not said in this case that the claimant had the money in his pocket, in so many words, but the arbitrator finds that the claimant called on Mr. French and offered to pay the premiums on both policies. From that I assume that he was ready and willing to pay. I assume, too, as I think I must, that the only reason that payment was not made was that Mr. French, the district manager of the respondent company, declined to accept payment. It is true there was no jingling of money; I do not suppose that insurance premiums are paid, in the ordinary way, in ready cash; but, on these findings of the arbitrator, coupled with, indeed, the word or two in the final award, if it was necessary to look at it, though I do not think it is for my purposes, I am satisfied that the claimant was ready and willing to pay on that day, and that he would have paid but for the fact that the district manager of the respondent company was not ready and willing to accept the money from him on that day. It may be that the district manager of the respondent company at Guildford had certain arrangements of some kind with the solicitor (the assured) who was an agent of the respondent company. There certainly would have been a question as to the deduction of some part of the premium which the solicitor was entitled to keep, if it was paid, as his commission; but, for some reason best known to him, the insurance company's district manager did not wish to accept payment from the claimant on that day, when the claimant was ready and willing to pay it. I am inclined to think that the circumstances are such that, that does amount to tender in law. It is true there was no offer of the ready money. The circumstances were a little unusual. The assured himself was an agent of the respondent company; it was for him to pay it in the first place, but, on Apr. 9, when he had not paid, the claimant was ready and willing to pay. Whether or not it amounts to tender in law, I am satisfied that the circumstances are such that the respondent company ought not to be heard to say it is not a case of tender. The respondent company could have been paid on that day; it entrusted to its district manager the duty of receiving premiums. The district manager said, "No, do not complicate matters by your paying me; I am arranging with the assured for a cheque to be paid by him in the course of a few days." I think it would be inequitable, in a case of this kind, if the insurance company, having had that offer of payment to its agent and manager, who was authorised to receive payments, having had that opportunity and that offer, was able to say in law there is neither tender nor anything equivalent to tender.

When I look at the final award of the arbitrator, at which Mr. Macgillivray said I ought not to look, I find that he said:

> Mr. French had no actual or ostensible authority to extend the time for payment of the premium for Mar., 1936 ; but that the claimant by offering to pay the premium in effect tendered the premium to Mr. French on Apr. 9, 1936 ; and that, Mr. French, having declined the offer to pay the premium, waived the condition requiring the payment of the premium on Mar. 15 or within 30 days thereafter.

I observe that the arbitrator puts it in this way : "by offering to pay the premium in effect tendered the premium." It may be that that is a more correct way of putting it than that which I said just now : that, as the respondent company had the offer of the premium in that way, it cannot now be heard to say that the premium was not tendered to it. Now, Mr. Macgillivray, on behalf of the respondent company, admits freely and properly that, if there was a tender of the premium, he has no answer to this claim on the policy. He does not say the same if there was something which was equivalent to tender ; indeed, he says he does not know what "equivalent to tender" means, and again I am inclined to agree with him. But it does seem to me, on full examination of this case, that the insurance company certainly ought not to be heard to say there was nothing in the nature of tender, or that there was not a tender. Further than that, if it had not been for the action of its district manager in declining to accept the premium on Apr. 9, the premium would have been paid, and no question would have arisen on the efficacy of the policy. I do not think it could be heard to say that the policy was not in effect at the date of the death of the assured.

It was pointed out, in the course of the argument, that nothing is said about estoppel in the case, though it was argued before the arbitrator. The arbitrator deals with that rather as a case of waiver of the condition requiring the payment of the premium on Mar. 15, or within 30 days thereafter. I think, on the facts of this case, that the district manager did waive the premium, as the arbitrator purports to find. As to the question of authority, more difficult considerations arise. I very much doubt whether he had any authority to go outside the strict scope of the contract between the parties, but there is this position, which ought always to be borne in mind : the district manager is the person appointed by the respondent company to receive premiums. If the district manager causes a person such as the claimant in this case to be put into the position of not paying within the days of grace, I do not think the company ought to be heard to take any advantage of that at all. But for its action, the premium would have been paid, and no question would have arisen.

It is unnecessary for me to consider the questions which might arise on the post-dated cheque which was received by the manager thereafter. It is sufficient for me to say that I think the question put by the arbitrator, "whether the offer of the claimant to Mr. French to pay the premium on the £3,000 policy amounted in effect to a tender of the premium," ought to be answered, "Yes." On the question "whether Mr. French by declining the offer waived the condition of the policy requiring payment of the premium on Mar. 15, 1936, or within 30 days thereafter," I think he did, although, as I have said, I prefer to put that in this way: that I do not think that, after the refusal of that premium, the respondent company ought to be allowed to raise any question such as it seeks to raise in this case. That means that the claimant succeeds.

Judgment for claimant.

Solicitors: *Leader, Plunkett & Leader* (for the claimant); *F. G. Bowles* (for the respondent company).

[*Reported by* J. MACGILLIVRAY ASHER, ESQ., *Barrister-at-Law.*]

Considered. LAWSON *v.* ODHAMS PRESS, LTD. [1948] 2 All E.R. 717.

SOUTH SUBURBAN CO-OPERATIVE SOCIETY, LTD. *v.* ORUM AND CROYDON ADVERTISER, LTD.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Finlay, J.), **April 20, 21, May 31, 1937.**]

Practice—Interrogatories—Libel action—Publication in newspaper—Action against contributor—Interrogatory as to identity of informant.

In an action for libel against a newspaper and the contributor of a letter to the newspaper, the plaintiffs sought to interrogate the contributor *inter alia* as to the identity of his informants:—

HELD: the interrogatory was relevant, and the rule of practice which confers upon the owner or publisher of a newspaper an immunity from such interrogatories could not be extended to give a contributor to a newspaper a similar immunity. The interrogatory ought therefore to be answered.

[EDITORIAL NOTE. In the absence of special circumstances, a newspaper will not be forced to discover the names of its informants, but the rule cannot be extended to the contributors to newspapers, who must answer an interrogatory directed to elicit such information. Such interrogatories are, of course, relevant upon the question of malice.

AS TO INTERROGATORIES AS TO MALICE, see HALSBURY, Hailsham Edn., Vol. 10, p. 417, para. 510; and FOR CASES, see DIGEST, Vol. 18, pp. 208-210, Nos. 1557-1571.]

Cases referred to:

(1) *Marriott* v. *Chamberlain* (1886), 17 Q.B.D. 154; 18 Digest 204, *1526*; 55 L.J.Q.B. 448; 54 L.T. 714.

(2) *Hennessy* v. *Wright* (*No.* 2) (1888), 24 Q.B.D. 445, n.; 18 Digest 204, *1528*.

(3) *White & Co.* v. *Credit Reform Assocn. & Credit Index, Ltd.*, [1905] 1 K.B. 653; 18 Digest 206, *1536*; 74 L.J.K.B. 419; 92 L.T. 817.

(4) *Plymouth Mutual Co-operative & Industrial Society, Ltd.* v. *Traders' Publishing Assocn., Ltd.*, [1906] 1 K.B. 403; 18 Digest 205, *1532*; 75 L.J.K.B. 259; 94 L.T. 258.

(5) *Lyle-Samuel* v. *Odhams, Ltd.*, [1920] 1 K.B. 135; 18 Digest 206, *1534*; 88 L.J.K.B. 1161; 122 L.T. 57.

(6) *Hope* v. *Brash,* [1897] 2 Q.B. 188; 18 Digest 96, *479*; 66 L.J.Q.B. 653; 76 L.T. 823.

(7) *Elliott* v. *Garrett,* [1902] 1 K.B. 870; 18 Digest 209, *1562*; 71 L.J.K.B. 415; 86 L.T. 441.

(8) *Adams* v. *Fisher* (1838), 3 My. & Cr. 526; 18 Digest 160, *1115*; 7 L.J. Ch. 289.

Appeal from a decision of Lewis, J., in chambers, dated Mar. 24, 1937. The facts of the case are fully set out in the judgments.

Gilbert J. Paull for the appellant: It is a matter of principle that a newspaper should be free to publish matters of interest to its readers. Therefore, no interrogatories should be allowed which would compel anyone connected with the publication to disclose the sources of his information. In old cases this was said to be irrelevant: see *Hennessy* v. *Wright* (*No.* 2) (2), which was followed in *Hope* v. *Brash* (6). These two cases are referred to, in later cases, as the basis of the newspaper rule. On the other hand, this was said to be a relevant matter in *White & Co.* v. *Credit Reform Assocn. & Credit Index, Ltd.* (3). [Counsel also referred to *Elliott* v. *Garrett* (7), *Plymouth Mutual Co-operative & Industrial Society, Ltd.* v. *Traders' Publishing Assocn., Ltd.* (4), *Adams* v. *Fisher* (8), and *Lyle-Samuel* v. *Odhams, Ltd.* (5).] The question here is not whether the proposed interrogatories are relevant and answerable, but whether the newspaper rule applies to exclude them. Interrogatories ought not to be allowed in cases where the matter is of interest to a large number of people. It is of public interest that newspapers should be allowed to publish news; all persons who take part in the publication of a paper ought to be protected. The rule is not limited to proprietors; an editor is also within the exception. It is submitted that all contributors are also covered; they also take part in the publishing of a libel.

Gordon Alchin, for the respondents: The exception cannot be extended to cover the writer of a letter who is himself a defendant. The rule is that where malice is in question the source of information must be disclosed, with the anomalous exception of a defendant proprietor of a newspaper. That is the whole extent of the rule; the defendant is seeking to extend this rule; the onus is on him to justify that. [Counsel referred to *White & Co.* v. *Credit Reform Assocn. & Credit Index, Ltd.* (3), *Lyle-Samuel* v. *Odhams, Ltd.* (5), *Hope* v. *Brash* (6), *Plymouth Mutual Co-operative & Industrial Society, Ltd.* v. *Traders' Publishing Assocn., Ltd.* (4), and *Marriott* v. *Chamberlain* (1).]

Paull, in reply: The true test is, is the matter of interest to the public? In *Hope* v. *Brash* (6), it was not suggested that the rule should be limited, but that it should apply generally in actions for libel against a newspaper.

Scott, L.J. [reading the judgment of the court]: In the present action, the South Suburban Co-operative Society, Ltd., claims damages and an injunction in respect of an alleged libel contained in a letter signed by the defendant, Orum, which was published in the defendant company's newspaper of Feb. 6, 1936.

The appeal raises the question, often considered incidentally but not actually decided in its simplest form, as to whether, on a defence of fair comment, a defendant, who is not sued as the owner or publisher of a newspaper, but in his individual capacity as the author of a defamatory publication in the newspaper, can properly be interrogated, not only as to the information he had when he wrote the alleged libel, and as to what precautions he took to verify his information, but also as to the identity of his informants. In the case of a newspaper, this court has repeatedly held that there is an old rule of practice according to which discovery of the names of the paper's informants ought not to be enforced, at any rate in the absence of special circumstances—a phrase which has not been explored very much judicially. There is no question before us which affects the defendant newspaper. The sole appellant is the individual defendant, Orum, and the real question that we have to decide is whether the well established rule of practice to which I have referred is a privilege limited to newspaper defendants, or is applicable also to an individual defendant signing a letter published in a newspaper. The master gave the appellant the benefit of the rule, and struck out those parts of the interrogatories which asked for the names of the appellant's informants. Lewis, J., reversed the master, and ordered the appellant to answer. The appeal is from that decision. I have no doubt that we should dismiss the appeal. To do otherwise would, in my view, be inconsistent with carefully reasoned expressions of opinion in the Court of Appeal, the principles of which we ought to apply, even if they were not the actual grounds of decision. In addition, I respectfully agree with those opinions. The question raised is one of considerable importance in practice, and, as the case has been well argued by both sides on first principles, it is desirable to analyse the considerations on which, in my judgment, our decision depends.

The fundamental feature of the present case is that the subject matter of the interrogatories which the defendant was ordered by the judge to answer is, on the one hand, within the scope of relevancy for the purpose of discovery as defined by Lord Esher in *Marriott* v. *Chamberlain* (1), and, on the other hand, is not within the exceptional immunity from such discovery conferred upon newspaper defendants by the special rule of practice, followed for more than half a century, and explicitly recognised and enforced by the Court of Appeal as long ago as 1888, in the case of *Hennessy* v. *Wright* (*No.* 2) (2). In the ordinary case of a libellous statement made upon the faith of information gathered from third parties, it is relevant to the issue of malice raised by a plea of fair comment for the jury to know, not only what the information was, but also any facts affecting the propriety of the defendant's action in accepting the information at its face value to the extent of making a defamatory statement about the plaintiff upon the credit of it. The whole of the circumstances in which the defendant obtained the information are, or may be, relevant; and, of these circumstances, not the least relevant will be the position, standing, character, and opportunities of knowledge of the particular person upon whom the defendant says he relied for his information. If the defendant is in a position to give those particulars about his informants, the plaintiff is entitled to know them, in order that he may criticise the defendant's conduct, and, also, in order that he may make his own inquiries about the persons named, with a view to attacking the defendant's alleged reliance upon the information so received. If the defendant is not in a position to say from whom he got his information, this admission may in itself be a valuable piece of evidence for the plaintiff.

That information about the identity of a defendant's informants falls within the general field of relevance on the issue of malice seems to me to be self-evident, although I realise that there are expressions in the cases before 1905 which seem to throw doubt upon that view; but in that year there was an important decision in the Court of Appeal in *White & Co.* v. *Credit Reform Assocn. & Credit Index, Ltd.* (3), and whatever doubts may have been raised by the earlier cases on the general question of relevance are set at rest by the judgments in that case. It was an action of libel by a trader against a trade protection society, the libel being upon the plaintiff's financial position and the publication having been made to subscribers to the defendants' "credit index," a card index system of circulating information in a confidential form about the financial position of particular traders. Privilege was pleaded, and, on the issue of malice, the following interrogatory was proposed by the plaintiff:

> Did the defendants before publishing the said credit index and key card take any and what precautions, or make any and what inquiries as to the truth of the said particulars [the statements complained of] or make any and what inquiry at all with respect to such particulars? From whom did the defendants obtain the information on which they relied in making the statements complained of?

Sir Richard Henn Collins, M.R., on p. 658, said:

> Therefore, it is clear that, the question being as to the condition of mind of the person publishing the defamatory statement, the amount of information upon which he acted, and the means taken by him to ascertain the truth of that statement, are legitimate subjects for interrogation. If so, why should one stop there? The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statements published, but to whom such inquiry was addressed. If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. To sever the question from whom such information was obtained from the question whether any and what information was obtained appears to me quite illogical. I can see no principle on which, or reason why, such a severance should be made

Mathew, L.J., on p. 660, said:

> I do not see any reason in this case for thinking that the first interrogatory is put for any other than a legitimate purpose, namely, to rebut the defence of privilege by showing that the information upon which the defendants published the state-

ments complained of was such that no person could reasonably be supposed to have acted *bona fide* upon it. It is obvious that the best test of the value of information would be the character and position of the persons from whom it was obtained. I have nothing further to add to what the Master of the Rolls has said on this subject.

There can be no question that, in that case, there was a definite decision A of this court that the identity of the defendant's informant is, for purposes of discovery, relevant in such an action as the present.

What I have called the special newspaper immunity does not rest on any independent principle of law, but is in truth an exception, the grounds of which have not been very completely defined, carved out of B the general field of relevance, of which the judgments I have just cited give a clear picture. The nature of this newspaper immunity was discussed to some extent in 1906 in *Plymouth Mutual Co-operative & Industrial Society, Ltd.* v. *Traders' Publishing Assocn., Ltd.* (4). At p. 415, VAUGHAN WILLIAMS, L.J., treated it as "a general rule of practice" C to the effect that a newspaper should not be called upon to disclose the name of its informants on the issue raised by a plea of privilege or fair comment. A much fuller discussion upon this "rule of practice" took place in 1920, in *Lyle-Samuel* v. *Odhams, Ltd.* (5), where the plaintiff sued the defendants as publishers of a paper called *The National News* D for a libel upon his private character published when he was a candidate for parliament. The defendants pleaded justification and fair comment. Interrogatories as to who the defendants' informants had been were disallowed by the master and by ROCHE, J. At p. 140, BANKES, L.J., recognised that the interrogatories were within the general field of E relevance, and referred to the principle of their relevance as "the general rule," whilst adding:

> it is also well established, at any rate so far as this court is concerned, that there is an exception to that rule in the case of newspapers.

BANKES, L.J., made some observations upon the possible reasons for the F exception, and seemed at one point inclined to doubt whether it ought to be limited to newspapers, but, on p. 143, he ended by saying:

> All I say is that this is an action of libel against the publishers of a newspaper, that it is well established that in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment.

G

SCRUTTON, L.J., discussed both the general scope of relevance in such cases and the exceptional newspaper immunity. On p. 143, after pointing out that the information acquired by the defendants before publishing their libel might be obviously relevant on the issue of malice, he added:

> H If one approached the question unfettered by authority, it seems to me that on principle there would be a great deal to be said for allowing the name of the informant to be asked in a case like the present. It seems to me that in questions of malice it would ordinarily be relevant to ask, not only what the defendant knew when he published the libel, but also who told him. The informant may be a person who has been convicted of perjury, or a well known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that anyone who acted on that person's information deserved

> whatever happened to him. If the matter had been free from authority I should have thought that there was a great deal to be said for the proposition that the name of the informant was as relevant as the information which he gave, unless it could be said that there was sufficient public policy in allowing newspapers to make attacks on people without imposing any obligation on them to disclose the name of the person from whom the materials for those attacks were obtained to override what otherwise would seem to be a matter of principle. But it is said that the practice in the King's Bench Division has established a rule under which interrogatories such as these are not allowed in the case of libels in newspapers. A

He then analysed the authorities on the newspaper exception, and summed up the position, on p. 145, in these words:

> I think that there is in these three decisions of the Court of Appeal, spread over a period of thirty years, a recognition of a settled rule of practice in the King's Bench Division applying to alleged libels published in newspapers, and not applying to alleged libels published elsewhere. Whatever I may personally think of the desirability or undesirability of such a rule, I do not think I am at liberty to depart from a rule of practice which has been acted upon for over thirty years and recognised in three judgments of this court. B

He concluded his judgment by saying, at the bottom of p. 146: C

> Therefore, feeling myself bound by the previous decisions of this court, whatever my view might have been had I approached the question unfettered by authority, and finding nothing that I can see to be a special circumstance in any way weakening the effect of the rule, I agree that the appeal must be dismissed.

The two judgments in the *Lyle-Samuel* case (5), in my view, cover the ground of the present appeal. They recognise the general rule of relevancy, and they confine the exception to the special case of newspapers. I respectfully agree with both views, but, in any case, I should feel great difficulty in holding that we are not bound by those judgments. D

The interrogatories allowed by the judge in the present case were clearly relevant, and I can see no sufficient ground of principle for extending the rule of practice so as to bring the writer of a libellous letter in a newspaper within the umbrella of the newspaper, so as to give him the special and exceptional immunity conferred by the rule on the newspaper. The appeal must be dismissed with costs. E

Appeal dismissed with costs. F

Solicitors: *Shaen, Roscoe, Massey & Co.* (for the appellant); *Haslewood, Hare & Co.*, agents for *Aston, Harwood, Somers & San Garde*, Manchester (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

WORKINGTON HARBOUR AND DOCK BOARD *v.* TRADE INDEMNITY CO., LTD. (No. 2).

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **May 24 25, 1937.**]

Building Contract—Contract for construction of dock—Guarantee—Default by contractor—Action against guarantor—Engineer's certificate—Action dismissed—Second action claiming loss caused by delay—Res judicata—Actions on Breaches on Bonds Act, 1696 (*c.* 11), *s.* 8.

A firm of contractors agreed to construct a new and enlarged dock. The defendant company gave the dock board a bond in the sum of £50,000 to guarantee the performance of the contract. The contractors defaulted, and the dock board brought an action against the defendant company upon the bond. They relied upon an engineer's certificate showing that the contractors owed them £78,000, which they had failed to pay. The action was dismissed. The dock board then started a second action, claiming for damages caused by delay, owing to the contractors not having proceeded with due diligence and expedition. The defendant company applied to have the proceedings stayed, on the grounds that the same matters had already been finally settled in the first action:—

HELD [MACKINNON, L.J., dissenting]: this was an action that was bound to fail, and it ought to be stayed, as the damages here claimed could have been claimed in the previous action.

[**EDITORIAL NOTE.** The question that arises in this case is whether it was possible to suggest that damage of a different kind arose under a contract, with the result that although damage arising under the contract had been the subject of a previous action, it was possible to bring a second action for damages on the same contract. The difficulty arises partly from a remark of LORD ROCHE set out in the judgments herein which might suggest the possibility of further proceedings.

AS TO ASSESSMENT OF DAMAGES ONCE AND FOR ALL, see HALSBURY, Hailsham Edn., Vol. 10, p. 92, para. 113; and FOR CASES, see DIGEST, Vol. 17, pp. 87-91, Nos. 59-91.]

Cases referred to:

(1) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; 21 Digest 207, *480*; 53 L.J. Q.B. 476; 51 L.T. 529.

(2) *Nelson* v. *Couch* (1863), 15 C.B.N.S. 99; 21 Digest 201, *443*; 33 L.J. C.P. 46; 8 L.T. 577.

(3) *MacDougall* v. *Knight* (1890), 25 Q.B.D. 1; 21 Digest 205, *473*; 59 L.J. Q.B. 517; 63 L.T. 43.

(4) *Serrao* v. *Noel* (1885), 15 Q.B.D. 549; 21 Digest 212, *511*.

(5) *Henderson* v. *Henderson* (1843), 3 Hare, 100; 21 Digest 174, *276*; 1 L.T. O.S. 410.

(6) *Green* v. *Weatherill*, [1929] 2 Ch. 213; Digest Supp.; 98 L.J. Ch. 369; 142 L.T. 216.

(7) *Eastmure* v. *Laws* (1839), 5 Bing. N.C. 444; 21 Digest 202, *454*; 8 L.J. C.P. 236.

(8) *Conquer* v. *Boot*, [1928] 2 K.B. 336; Digest Supp.; 97 L.J. K.B. 452; 139 L.T. 18.

(9) *Goodson* v. *Grierson*, [1908] 1 K.B. 761; 12 Digest 194, *1534*; 77 L.J. K.B. 507; 98 L.T. 740.

(10) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 30 Digest 142, *184*; 80 L.J. K.B. 531; 103 L.T. 707.

(11) *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86; 32 Digest 209, *2599*; 68 L.J. Q.B. 34; 79 L.T. 429.

(12) *Read* v. *Brown* (1888), 22 Q.B.D. 128 ; 1 Digest 13, *107* ; 58 L.J. Q.B. 120 ; 60 L.T. 250.

(13) *Hunter* v. *Stewart* (1861), 4 De G. F. & J. 168 ; 21 Digest 201, *442* ; 31 L.J. Ch. 346 ; 5 L.T. 471.

(14) *Ord* v. *Ord*, [1923] 2 K.B. 432 ; 21 Digest 152, *140* ; 92 L.J. K.B. 859 ; 129 L.T. 605.

(15) *Payana Reena Saminathan* v. *Pana Lana Palaniappa*, [1914] A.C. 618 ; 6 Digest 387, *2540* ; 83 L.J. P.C. 131 ; 110 L.T. 913.

(16) *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*, [1926] A.C. 94 ; Digest Supp. ; 95 L.J. P.C. 33 ; 134 L.T. 335.

(17) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155 ; Digest Supp. ; 94 L.J. P.C. 79 ; 134 L.T. 354.

(18) *Inland Revenue Comrs.* v. *Sneath*, [1932] 2 K.B. 362 ; Digest Supp. ; 101 L.J. K.B. 330 ; 146 L.T. 434.

(19) *Ward & Co.* v. *Wallis*, [1900] 1 Q.B. 675 ; 12 Digest 560, *4658* ; 69 L.J. Q.B. 423 ; 82 L.T. 261.

(20) *Electric, etc., Co., Ltd.* v. *A.-G. & Hydro Commission*, [1919] A.C. 687 ; 17 Digest 420, case *t*.

APPEAL from a decision of LEWIS, J., in chambers, dated Apr. 29, 1937. The facts in the case are set out in the judgments, and the earlier action is reported in [1936] 1 All E.R. 454.

F. R. Evershed, K.C., and *H. J. Astell Burt* for the appellants.

N. L. C. Macaskie, K.C., *Arnold Inman, K.C.*, and *Laurence Mead* for the respondent company.

Evershed, K.C.: If the plaintiffs deliberately neglected to give any particulars to their statement of claim in the first action, but elected to rely exclusively upon the engineer's certificate, they cannot now complain and bring a second action. The only difference between this action and the earlier one is that they are now trying to prove their damage by other methods. The same cause of action is being litigated: it is *res judicata.* [Counsel referred to *Serrao* v. *Noel* (4), *Brunsden* v. *Humphrey* (1), *MacDougall* v. *Knight* (3), *Henderson* v. *Henderson* (5), *Green* v. *Weatherill* (6), *Eastmure* v. *Laws* (7), and *Conquer* v. *Boot* (8).]

Macaskie, K.C.: This is the first case in which an attempt has been made to strike out a statement of claim where an action has been brought on a bond. The question is, is this so plainly a case where a plea of *res judicata* must inevitably succeed? It is submitted that the court should order pleadings, and then, if a plain issue of *res judicata* does arise, it can be tried as a preliminary point. The causes of action are not the same in the two cases; in the first action, the question was the liability of the defendant company to pay the loss caused to the plaintiffs by the failure of the contractors to pay them a sum owing; the second action is a claim for the expense incurred by the plaintiffs in having to re-enter and complete the work of the contractors, and a claim for damages caused by delay. The test is, would the same plea as defeated the first action defeat the second action? Also, is the same evidence necessary in both cases? By both tests the plea of *res judicata* fails; it is highly technical, and should be used only in clear circumstances.

[Counsel referred to *Goodson* v. *Grierson* (9), *Dyson* v. *A.-G.* (10), *Macdougall* v. *Knight* (3), *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark* (11), *Read v. Brown* (12), *Nelson* v. *Couch* (2), *Hunter* v. *Stewart* (13), *Ord* v. *Ord* (14), *Saminathan* v. *Palaniappa* (15), *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (16), *Hoystead* v. *Taxation Comr.* (17), *Inland Revenue Comrs.* v. *Sneath* (18), *Ward & Co.* v. *Wallis* (19), and *Electric, etc., Co., Ltd.* v. *A.-G. & Hydro Commission* (20).] Even if the causes of action are the same, there is the question as to whether there have not arisen special circumstances which entitle the plaintiffs to re-litigate the same matters.

Evershed, K.C., in reply: If there are two causes of action, it is plain that satisfaction for one would not satisfy the other. But here, if the £78,000 had been paid, there could have been no other claim. There are no special circumstances here which entitle the plaintiffs to re-litigate the same matters.

GREER, L.J.: This is an appeal from a decision of LEWIS, J., in chambers, reversing the decision of the master, the judge in chambers deciding that there was nothing in the first action which prevented the second action from being brought. It has been suggested that this is not one of those cases in which we should take the course of stopping the action *in limine*, but that we should rather leave it to be decided when the pleadings are closed, either on a preliminary point of law raised by the pleadings or when the action comes on for trial; but, if it seems to be clear to demonstration that the action cannot succeed, we would be doing nothing but that which would be injurious to the parties if we postponed the decision of this case until either a point of law was raised on the pleadings and discussed in court or the action came on for trial. I am satisfied that this action must necessarily fail, because the result of its going on to trial would be that the defendant company would be twice vexed in the same cause, and the long string of authorities to which our attention has been called would necessarily have been wrongly decided. In my judgment, the only action that could be brought under the bond was an action against the bondsmen, the company, for damages, because it had not paid the sum which the third party, whom it guaranteed, had become liable to pay to the plaintiffs. I take the law as stated in the clearest possible terms by BOWEN, L.J., in *Brunsden* v. *Humphrey* (1), to which we have been referred. The test which was laid down in that case by BOWEN, L.J., in the Court of Appeal was this at p. 147:

> It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all.

He distinguished the facts of that case on the ground that the causes of action there referred to, namely, trespass to the person and trespass to property, were two distinct causes of action; and the fact that an action had been brought on one of these causes could not be any answer to an action subsequently brought on the other cause of action. In the present case, it seems to me to be clear to demonstration that the original action was brought for the damages sustained by the plaintiffs by the refusal by the bondsmen to adhere to their bond, and the mistake that the plaintiffs made was made owing to a misconstruction of sections in the contract between Messrs. Kirk & Randall, the contractors, and the harbour board: they thought that the certificate of the engineer was a final ascertainment of the amount due from the contractors to the building owner, whereas the only authority the engineer had was to find what was due from the building owner to the contractors. In these circumstances, it seems to me that it is idle to say that the original case, which was started by means of a statement of claim indorsed on the writ, did not cover the whole of the liability which was being alleged against the bondsmen. It was put upon a wrong ground, a ground in respect of which the plaintiffs failed to be able to give particulars, for which they were asked from time to time, and were excused until the hearing of the case. The case came on for hearing, and it ultimately went to the House of Lords. There were several matters to be considered in the action when it came before this court, one of them being whether this was a contract of insurance, and whether the principle of non-disclosure applied to the contract. This court held, and so did the House of Lords, that it was not a contract of insurance, and therefore the principle of non-disclosure did not apply.

The plaintiffs claim indorsed on the writ in the first action says:

> The plaintiffs claim the sum of £50,000 as payable under a contract bond dated Oct. 11, 1922, entered into by the defendants (as sureties) with the plaintiffs, to secure the due performance of a contract entered into by Kirk & Randall, Ltd. (hereinafter called "the contractors") with the plaintiffs for the extension of the Lonsdale Dock (now known as "the Prince of Wales Dock") at Workington in the county of Cumberland. The contractors made default in the performance of their contract, and in consequence under the conditions of the contract the plaintiffs took possession and completed the works. Messrs. Rendel, Palmer & Tritton, the engineers under the contract, made their final certificate dated Jan. 8, 1932, certifying under the conditions of the contract the indebtedness of the contractors to the plaintiffs in the sum of £78,785 14*s.* 7*d.* Payment of this sum has been demanded from the contractors but they failed to pay the same. Particulars:—1932, Mar. 4—To amount due under the above-mentioned contract bond: £50,000.

I cannot read that claim as other than a claim that the bondsmen were liable because the engineer had given a certificate for £78,000, and a claim that the bondsmen were liable because they had not complied with the terms of their bond.

That action came on for trial, and, as I have said, on one point in this court and in the House of Lords it was held that the plaintiffs were right, but, as regards the other part of the case, I cannot read the speech of LORD ATKIN—which was concurred in by the majority of their Lordships, including LORD RUSSELL OF KILLOWEN and LORD MACMILLAN—otherwise than as holding, though perhaps it was not necessary for him so to state, for the purposes of the case, that all liability was finally disposed of by the first action with which their Lordships were dealing. In the course of his speech, LORD ATKIN says this at p. 464:

> The result is that the only evidence of default by the contractors under the original contract is the non-payment of a certificate which, if binding upon the contractors at all, is only binding by reason of the additional and independent loan contract, and is not binding at all upon the guarantors, for it includes sums to an unknown A amount which are not due on the original contract. Whether the certificate is sufficient to establish a breach of the condition of the bond by the contractors it is not necessary to determine. The plaintiffs, having assigned a breach, have to prove the damages that flow from it. If the certificate had been unimpeachable no question would arise as to the defendants' liability for £50,000. So if it were severable and proof were given of a certificate valid as to an amount due under the original contract. But no such evidence was given in the present case. The amount of the balance of loans and interest may reduce the defendants' liability to B less than £50,000, and in the absence of any evidence as to what the true amount of the liability is the case against them fails, and they are entitled to judgment.

The plaintiff bringing an action has not merely to prove a breach of contract: he has to prove the damages which he has suffered by reason of that breach of contract. In the present case, the plaintiffs wholly C failed to prove the damages which resulted from the breach of contract. They were in a position to prove part of them, and in fact were in a position to prove the whole of them, because they could have called upon the engineer to say how much delay there was, what was payable in respect of delay, and how much damage there was in respect of other D matters. It seems to me, quite clearly, that, if we allowed this second action to proceed, we should be allowing the defendant company to be twice vexed for the same cause of action. The second action is brought by reason of the same failure of the contractors to perform their contract; the damages are put in a different way, but in the second action it is still E the same damages which are claimed as are sued for in the first action.

The only other case to which I wanted to refer was *Nelson* v. *Couch* (2), because part of the judgment in that case seems to me particularly to apply to this case. In that case, the question which arose was as to whether, there being an Admiralty action *in rem* against the vessel, F and judgment, the Admiralty action precluded the plaintiff from bringing a common law action in regard to his damages, by reason of the fact that the amount recovered by the sale of the vessel was insufficient. WILLES, J., says at p. 109:

> To constitute such former recovery a bar, however, it must be shown that the G plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action. Everyone is familiar with the case of a party who brought an action for the recovery of £1,000, and for default of evidence recovered £5 only, and then brought a second action to recover the balance; and the recovery in the former action was held to be a bar to the latter, on the ground that the plaintiff had had an opportunity of recovering in the first action the whole of his demand, and that, regard being had H to the shortness of life, it was unreasonable to allow a defendant to be vexed a second time for the same cause. But, in order that it may be a bar, the circumstances must be such that the plaintiff might have recovered in the former suit that which he seeks to recover in the second.

In my judgment, the plaintiffs could have recovered in the former suit that which they are seeking to recover in the present suit, and, for these reasons, I think the appeal should be allowed.

SLESSER, L.J.: I am of the same opinion. By the contract between the contractors and the building owners it was provided that, in certain events, certificates given should be final and binding on the owners and contractors when the amounts had been ascertained and determined by the engineers. As to the liability, however, for what might be payable by the contractors to the owners, that was dealt with in cl. 86 (6), following upon cl. 85, which provided for a certificate of the engineers that the contractors had made default, or were in default, in the performance of their obligations under the contract. The other provisions as to the final and conclusive nature of certificates, those contained in cls. 106, 107, were in clauses limited to liabilities of the building owners to the contractors.

Now, in the contract bond the obligation is stated thus: it recites the contract between the contractors and the building owners and the condition:

> that if the contractors shall execute construct complete and maintain the said recited works subject to and in accordance with the provisions of the said cl. 1 of the contract and shall in all things whatsoever observe perform fulfil and keep all and singular the clauses and conditions agreements matters and things which on the part of the contractors are and ought to be observed performed fulfilled and kept by them according to the contract then the above written bond shall be null and void otherwise it shall remain in full force and virtue.

Then there is the proviso:

> that the surety shall not be released or discharged from the above written bond by any arrangement which may either with or without the assent or notwithstanding the dissent of the surety be made between the contractors and the owners.

It goes on to say this:

> that the surety shall be bound by all decisions opinions orders directions requisitions and/or certificates of the said engineers under the provisions of cls. 106, 107, of the contract as the contractors are so bound.

LORD ATKIN, speaking on that matter, says this, at p. 462:

> I agree with MAUGHAM, L.J., that this must mean "bound under the provisions of cls. 106 and 107, as the contractors are bound, by all decisions, etc., of the said engineer." But when cl. 106 is examined it will be found to relate solely to claims by the contractor.

Therefore, on the face of it, the earlier clause which was relied upon in argument by Sir William Jowitt, which is the material clause here, that is to say, as to the certificate under cl. 86 (6), had no application in so far as that matter was not provided for in the bond. Now, however, when we come to look at the final certificate which was given that there was a default under cl. 85, the respects in which it was given are stated, namely, thus:

> We hereby certify that the contractors referred to in the undermentioned contract have made default, and are in default . . . in the following respects, viz., the contractors are not proceeding with the works with diligence and expedition and have not sufficient labour on the works.

The certificate goes on to say:

> that on the final settlement of accounts there is due from Kirk & Randall, Ltd., to the said Workington Harbour & Dock Board the sum of £78,785 14*s.* 7*d.*

Now, that is a certificate of default, before one comes to the question of quantum, on the face of it that the contractors are not proceeding with the work with diligence and expedition. The plaintiffs suing the bondsmen have thought fit to treat that certificate as final and conclusive, and the question of how much damage had actually been suffered
A by the building owners for which they might make the defendants liable under the bond was never gone into at all: reliance was placed entirely upon that certificate. But, as I read it, whatever else was intended to be covered by that certificate, this much is clear, that it was to cover the fact that the contractors were not proceeding with the work with
B diligence and expedition and had not sufficient labour on the works; and, in point of fact, when Sir Frederick Palmer was cross-examined on the point at the hearing, he said this in answer to a question:

> Is the £78,000 odd, the figure that we have, the whole of the sums which were due or which you found to be due from Messrs. Kirk & Randall to the board on
> C every account ?—On every account.

When we come to look at the present proceedings, we find that the statement of claim, similarly made by assigning breaches upon the bond, is based upon the principle that the contractors, having neglected, or failed to complete, the works, should pay liquidated damages for
D delay, and on that basis the present damage is made up. In my opinion, that claim was an essential part, an ingredient, of the original claim, but, instead of seeking to prove the damage suffered by means of express evidence, it was thought right to rely upon the conclusiveness of the certificate, which the House of Lords, for the reasons I have indicated,
E held was not binding upon the contractors.

In those circumstances, the case seems to me to fall clearly within the maxim *nemo debet bis vexari pro una et eadem causa.* I think that the litigant, having had an opportunity of proving the fact, that is, that he had suffered, and could therefore recover upon the bond by
F reason of the delays and defaults of the contractors, chose not to rely upon that method of proving his damage which was then open to him, chose to rely upon the certificate, which proved to be a broken weapon in his hand, and is now in effect, in this second action, seeking once more to litigate that which he could have had litigated and considered and
G decided upon the evidence, if he had thought fit to do so. Indeed, as I understand it, the only ground really on which the matter is justified at all is, not the ground that the party had made a mistake in the method of relying upon the certificate, but the ground that, at that time, he was, through ignorance of the contents of the claim, not in a position
H to put his claim in detailed figures before the court, that, particulars having been sought, he could not obtain them, but that, subsequently, he had been able to obtain them. That does not seem to me, on the authorities, a sufficient ground on which it can now be said that he can bring a second action. It is not a case where it is suggested that, by fraud or any exceptional circumstances, he was prevented from having

these figures, and, if a party chooses prematurely to bring his action, before he has the necessary materials upon which he can bring it, that does not seem to me to take it out of the general principle *nemo debet bis vexari pro una et eadem causa.*

There is only one other matter to which I wish to refer, and it is this: this is an action brought upon a bond, and, as is notorious, by reason of A the statute it is necessary, in recovering damages upon a bond, to assign the breach, for which only under the Actions on Breaches on Bonds Act, 1696, s. 8, can damages be assessed by the jury. These damages were sought on an assignment of the breach which was the subject matter both of the second as well as of the first action, namely, damages B flowing from the fact that the building owner was entitled to recover damage for the default of the contractors under the contract; and, while it is perfectly true that, when judgment has been obtained upon a bond upon breaches assigned, by *scire facias* a plaintiff can, even after judgment, sue for damages for breaches which have occurred after C judgment, it does appear that it is not possible to sue on breaches which might have been the subject of assignment before judgment was obtained. That is the view stated in BULLEN & LEAKE ON PLEADINGS, 3rd Edn., 117, and finds expression in the form of *scire facias*, which is to be found in CHITTY'S KING'S BENCH FORMS, 15th Edn., 820. In D my opinion, it was competent and possible for these plaintiffs to have assigned the whole of these breaches, and to have sought damages under the head of default at the time when the first action was brought, not relying upon the certificate, as they did, but upon such evidence of the damage as had actually been suffered; and, in my opinion, they E are seeking now, in this second action, to do that which they might have done and ought to have done, if they wished to do it at all, in the process of the first action. It is true—and this has given me some doubt in this case—that there is a passage in the speech of LORD ROCHE, at p. 465, in the report of this case in the House of Lords, which does seem to F indicate possibly a different view. Respectfully, I agree with my Lord that LORD ATKIN and the majority of the House seem to be treating that decision as conclusive of the whole matter, more particularly when LORD ATKIN speaks of the plaintiffs having assigned a breach and having to prove the damages which flow from it. But LORD ROCHE G does say this, at p. 465:

> It is no doubt regrettable that, in default of some agreement on the figures between the parties, further litigation to establish the amount of the defendant's liability under the original contract will be necessary; but at least the parties have the satisfaction of knowing that the main point of controversy between them, that is to say the disclosure point, has now been finally disposed of.

H

If that is to be regarded as an opinion that this litigation, which his Lordship was then considering, was not conclusive of the question of the amount of damage flowing from the default, and is to be relied upon, I think it is to that extent not supported by the speeches of the majority of their Lordships, and I can find nothing in the case which would justify one in feeling that one was bound by that opinion, which, at the most, was *obiter* at that stage. The law on the matter has now been examined. At that stage it was not necessary to examine it. It now appears that this is a case in which, in accordance with the decision in *Macdougall* v. *Knight* (3), we ought here and now to say that these proceedings in the inherent jurisdiction of the court should be ended. I therefore agree with GREER, L.J., that this appeal should be allowed.

MACKINNON, L.J.: I have the misfortune to be of a different opinion. I think this appeal should be dismissed. Protracted litigation between these parties, ending in the House of Lords, took place upon what LORD ROCHE described as the main point of controversy between them, namely, whether these guarantors could claim to set aside their contract altogether, on the ground that it was a contract of insurance, which could be avoided for non-disclosure. In that, they failed: it was held that it was not an insurance contract, but a guarantee; and, there being no doubt that the contractors had hopelessly failed to carry out their contract, and had gone bankrupt, it was tolerably clear that, under the guarantee, a very large sum would be payable to the harbour board. It is said that, by reason of that previous litigation, the harbour board never can recover anything of that sum.

Now, in this case, it would have been perfectly feasible for the House of Lords to have framed their order in the terms of a declaration that the guarantee was an effective document, and that the claim to have it set aside on the ground of non-disclosure had failed, with a direction that the amount of the liability of the guarantors should be assessed by the King's Bench Division, or by an official referee, or some tribunal of that sort; that would have been quite a possible form of order, and, on my inquiring of him, Mr. Evershed agreed that that would have been quite possible. The House of Lords in fact did not make an order in that form. LORD ROCHE in his opinion said this at p. 465:

> It is no doubt regrettable that, in default of some agreement on the figures between the parties, further litigation to establish the amount of the defendants' liability under the original contract will be necessary.

None other of their Lordships, as far as I can see, says anything at all inconsistent with that expression of opinion. But the matter does not stop there. In the course of the argument before the House, as has been pointed out to us, this very question, whether further proceedings could be taken by the harbour board, was debated, and Mr. Croom-Johnson, counsel then appearing for the Trade Indemnity Company, in express terms stated that, in his view, it would not bar another action. Now, I feel quite certain that, if, at the conclusion of the hearing in the House of Lords, their Lordships had realised that Mr. Croom-Johnson was going to retire from this case, and that another counsel in his stead was going to come to this court and to say that the plaintiffs could not, in the words of LORD ROCHE, indulge in further litigation to establish the amount of the defendant company's liability, and that this court must forbid any such further litigation—I feel quite sure that, if the House of Lords had realised that that was the position that was going to arise, they would have protected the harbour board in some such way as I have suggested, namely, probably by framing their order in the terms of a declaration that the guarantors were liable, and by directing the assessment of the amount of that liability in some appropriate manner. The end of the formal order of the House of Lords is:

> And it is also further ordered that the cause be, and the same is hereby, remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment.

Now, I think that obedience to that direction can be achieved only by allowing the plaintiffs to have the amount of their claim under the guarantee ascertained and determined. That can be done, and we can "do therein as shall be just and consistent with this judgment," only by dismissing this appeal, which is asking this court to forbid any further proceedings between the parties.

Now, of course, I am not at liberty merely to follow that direction and do what I think is just and consistent: I have to sit here and apply rules of law and of procedure. But we sit here, applying those rules, not as umpires, while counsel play the game of litigation, but because those rules of law and procedure in most cases assist us to do justice. Occasionally a strict reliance upon them may do otherwise. In such a case, I think, the court should be astute to see, and be quite certain that they are bound to an unfortunate result by a technical rule such as that of *res judicata*. I think we are not bound in this case: I think we can distinguish the operation of the rule upon the ground suggested by and relied upon by Mr. Macaskie, namely, that, in the first litigation, the breach assigned, under the Act of 1696, was the failure of the contractors to comply with a certain provision of the contract, namely, cls. 91, 106, failure to pay a sum certified by the engineers, whereas, in this second action, the breach assigned under the Act of 1696 is a breach of another provision or condition of the contract: I think it is cl. 1 of the contract, a general undertaking to carry out the terms and obligations.

For those reasons, I do not think the cause of action now relied upon is the same as that in the first action, and, as a result, I think we are not bound by the application of the rule of *res judicata* to come to the conclusion that these guarantors are never to pay anything in a case where, apart from technical rules of law, it is obvious to me that they ought to pay a large sum. I think the appeal should be dismissed.

Appeal allowed with costs. Leave to appeal to House of Lords.

Solicitors: *Wedlake, Letts & Birds* (for the appellants); *Johnson, Weatherall, Sturt & Hardy* (for the respondent company).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

Re SIMEON.

[CHANCERY DIVISION (Luxmoore, J.), **May 27, 28, June 1, 1937.**]

Compulsory Purchase—Land for waterworks—Injurious affection of easements —Reservation of water coupled with grant of easements and restrictions for the purpose of obtaining the same—Injury resulting from execution of the works—Right to compensation—Lands Clauses Consolidation Act, 1845 (*c.* 18), *s.* 68—*Public Works Facilities Act,* 1930 (*c.* 50).

The owner of certain property, in 1904, for a certain consideration, granted to the respondent council the right to enter upon part of the property for the purpose of searching for and taking water, to make a reservoir and to lay a pipe-line, with all necessary ancillary powers. This agreement was from time to time modified and extended. In 1932, the claimant, the owner's successor in title, conveyed a part of the property, including the part subject to the agreement of 1904, to a purchaser, subject to certain reservations and rights and to a covenant, which, if enforceable, admittedly ran with the land conveyed for the benefit of the land retained by the claimant. The reservation included a reservation of all water, whether surface or underground in or under any part of the property conveyed, and all necessary easements, rights of way, privileges, advantages, powers and liberties for the full enjoyment of the reservation. The covenant was that the purchaser and his successors in title would not do anything whereby any supply of water then obtained or to be obtained from the property conveyed should be diminished or the purity thereof impaired. In 1934 the respondent council sought to acquire compulsorily part of the property subject to the conveyance of 1932, other than the part upon which the council's existing works were situated. This property was required for the construction and maintenance of waterworks. It was found as a fact that a pumping station, if erected on the new site, would probably tap water which would otherwise percolate to the area tapped by the existing works, and might affect the quantity of the water reaching such works, and that a pumping station on the new site would not be likely to tap any water which, in the absence of such a pumping station, could not be tapped by pumping at the existing works. In a claim by the claimant for compensation for the injurious affection to the property retained by him, the council contended (i) that the reservation of water in the conveyance of 1932 conferred no legal right or interest in land, and that the restrictions, if construed strictly with reference to the reservation, were meaningless, and, consequently, were inoperative to confer on the claimant any right or interest in land; (ii) that as, in the case of percolating water, there was no supply of water except at the point where it was drawn off, the covenant was meaningless; and (iii) that no compensation could be given in respect of the claimant's interests because any injury would not arise from the construction of the proposed works, but only from the user of those works:—

HELD: (i) although the reservation of water as such had no legal effect, the reservation of easements, rights of way, etc., for the full enjoyment of that reservation, was an effective reservation of all necessary rights to enable the grantor reserving those rights to obtain water from the land conveyed, and conferred an interest in land on the claimant.

(ii) the covenant ought to be construed as imposing a contractual prohibition of the covenantor, and those deriving title under him, from doing anything to interfere with the existing and future water supply at the existing works.

(iii) the words "execution of the works" in the Lands Clauses Consolidation Act, 1845, s. 68, included the carrying out of the statutory powers, and the claimant was entitled to compensation for injury caused by the same.

[**EDITORIAL NOTE.** It was argued here that as there are no rights in percolating water, a reservation of such water creates no interest in land. Although this may be strictly so, yet such a reservation coupled with the grant of easements and privileges to obtain such water and a restrictive covenant that nothing shall be done to prevent such water being obtained does create an interest in land. This interest is, further, a proper subject of compensation under the Lands Clauses Act, 1845, s. 68.

As to Injurious Affection of Easements, see HALSBURY, Hailsham Edn., Vol. 6, pp. 56-59, paras. 52-54; and for Cases, see DIGEST, Vol. 11, pp. 144, 145, Nos. 282-287; Vol. 43, pp. 1072-1074, Nos. 104-114.]

Cases referred to:

(1) *Manchester, Sheffield & Lincolnshire Ry.* v. *Anderson, Anderson* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, [1898] 2 Ch. 394; 11 Digest 146, *299*; 67 L.J. Ch. 568; 78 L.T. 821.

(2) *Race* v. *Ward* (1855), 4 E. & B. 702; 19 Digest 145, *997*; 24 L.J. Q.B. 153; 24 L.T. O.S. 270.

(3) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 43 Digest 1076, *124*; 64 L.J. Ch. 759; 73 L.T. 353.

(4) *Hammersmith & City Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 11 Digest 106, *28*; 38 L.J. Q.B. 265; 21 L.T. 238.

(5) *Fletcher* v. *Birkenhead Corpn.*, [1907] 1 K.B. 205; 43 Digest 1073, *108*; 76 L.J. K.B. 218; 96 L.T. 287.

Special Case Stated by an arbitrator for the opinion of the High Court as to whether upon the facts set out in the judgment the claimant, Sir J. W. B. Simeon, Bart., was entitled to be compensated for the injurious affection of his Swainston Estate and certain interests, easements and restrictions appertaining thereto.

A. F. Topham, K.C., and *L. W. Byrne* for the claimant.

Erskine Simes for the respondent council.

Luxmoore, J.: On Sept. 11, 1934, the Isle of Wight Rural District Council served upon Sir John Walter Barrington Simeon (hereinafter referred to as "the claimant") a notice to treat in respect of some 15 acres of land in the parish of Calbourne, in the Isle of Wight, forming part of Pitts Farm. The claimant is not the owner of the land comprised in the notice, but he is the owner of the Swainston Estate, which adjoins Pitts Farm, and, as such, he claims to be entitled to the benefit of certain reservations, restrictions and easements reserved out of and imposed upon the land comprised in the notice. The notice was served by the council in pursuance of the powers conferred on it by the Public Works Facilities Act, 1930, and the Isle of Wight Rural (Public Works Facilities Compulsory Purchase) Confirmation Order, 1934. The purpose for which the land is required is the construction and maintenance of waterworks, and the supply of water for certain districts under the jurisdiction of the council, in accordance with the powers conferred by the Public Health Act, 1875, ss. 51-70.

The claimant claimed a sum of £7,500 for the injurious affection of

the Swainston Estate, by reason of the compulsory acquisition of the land comprised in the notice for the statutory purposes authorised. The claim was made under the Lands Clauses Consolidation Act, 1845, s. 68, which is incorporated in the 1930 Act and the 1934 order. The council and the claimant were unable to agree the amount of compensa-
A tion, and, accordingly, the question was referred to Mr. Hugh Calthrop Webster, one of the official arbitrators appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919. It was subsequently agreed between the parties that Mr. Webster should not proceed under that Act, but should act as an agreed arbitrator under the Lands Clauses
B Consolidation Act. Mr. Webster in due course published his award in the form of a special case under sect. 19 of the Arbitration Act.

The question of law to be determined is whether the claimant is entitled to be compensated for the injurious affection of the Swainston Estate, and the interests, easements and restrictions appertaining thereto,
C by reason of the facts found by the arbitrator. The arbitrator has assessed the compensation at the sum of £6,000, if the court is of opinion that the claimant is entitled to be compensated. His award also deals with the incidence of costs in either event.

The only facts to be considered are those found by the arbitrator.
D Shortly, they are as follows: On Aug. 18, 1904, the then owner of the Swainston Estate, who was a predecessor in title of the claimant, granted to the council for a term of 999 years the right to enter upon a piece of land forming parts of Pitts Farm, but not included in the notice to treat, for the purpose of searching for and taking water from such land, in
E order to obtain a supply of water for domestic purposes for the parish of Calbourne, and to make a reservoir on another piece of land forming part of Pitts Farm, but also not included in the notice to treat, and to lay a pipe-line leading thereto, with all necessary ancillary powers. By the agreement, the council agreed to pay to the then owner of the
F Swainston Estate £500 for the privileges thereby granted, to provide a free supply of water for a farm which is named, not to extend their mains or water supply outside the then existing boundaries of the parish of Calbourne without the previous consent in writing of the owner, and not, without the like consent, to levy water rates, rents or charges
G on the owners or occupiers, as the case might be, of any premises that might thereafter be supplied with water in the parish of Calbourne in excess of a certain specified scale. Cl. 11 of the agreement provided that, in certain events, which the arbitrator has found, the owner of the Swainston Estate should be at liberty at his own expense to tap and lay
H down pipes, with all necessary incidental fittings and works, and to take water therefrom for the purposes of supplying water to certain premises forming part of the estate, and that for such purpose the council should provide a constant and sufficient supply of water free of any charge to the owner or the lessees or occupiers for the time being of the premises. The arbitrator has found that these works have been carried out, and that,

at the present date, a free supply of water is being provided by the council to the premises, under the agreement.

Three agreements supplemental to the agreement of Aug. 18 were subsequently entered into with the council by the respective owners of the Swainston Estate at the respective dates of those supplemental agreements. The effect of these agreements was to confer on the council the right to make certain additional works, to use the water taken by the council in connection with its duties as a highway authority, on payment of a specified sum per 1,000 gallons of water, and to supply water obtained from the works authorised by the principal and supplemental agreements to certain parishes in the Isle of Wight, in addition to the parish of Calbourne. The water supplied to the other parishes was to be paid for at the rate of 2*d.* per 1,000 gallons of water, and this power was subject to a proviso that the supply of water to the parish of Calbourne was not thereby lessened or diminished. During the years 1924 to 1935 the terms of the principal and supplemental agreements were extended, so as to enable the council to take water under the terms of those agreements to augment the supply of water from other sources to the parish of Shalfleet, while in 1934 the council was by agreement also allowed to take water under the terms of those agreements for the purpose of augmenting the supply of water to West Wight.

By a conveyance dated July 14, 1932, the claimant conveyed Pitts Farm to a purchaser in fee simple. The conveyance is expressed to be subject to the reservations and rights set out in the second schedule to that conveyance, and also to the covenant in the third schedule. It is agreed that the covenant in the conveyance is so framed that, if it is an enforceable covenant, it runs with the land conveyed for the benefit of the Swainston Estate. The reservations in favour of the Swainston Estate fall under two heads: First, all water, whether surface or underground in or under any part of the property conveyed by the conveyance, and all necessary easements, rights of way, privileges, advantages and liberties necessary for the full enjoyment of this reservation, together with certain other rights to which I will refer later. The second head is: All moneys, rents and other payments, which might be payable or receivable by the claimant as owner of the Swainston Estate, in connection with the first reservation, and also all moneys, rents and other payments now payable or hereafter to become payable by the council under the principal and supplemental agreements, to which I have already referred. The covenant is that the purchaser of Pitts Farm and his successors in title will not do anything on the property conveyed by the conveyance, or any part or parts thereof, whereby any supply of water now obtained therefrom or any part thereof, or any supply hereafter to be obtained therefrom, in addition to or in substitution therefor, shall be diminished or the purity thereof impaired.

The arbitrator has found that no water flowing in any known or defined channel is tapped by the council works erected under the principal and supplemental agreements (to which he refers in his award as the existing works, and I will refer to them by the same description) or would be tapped by the works proposed to be erected on the land to be acquired compulsorily. He has also found (*a*) that a pumping station, if erected on the new site (that is, the land referred to in the notice to treat) would probably tap water which would otherwise percolate to the area tapped by the existing works of the council, and might affect the quantity of water reaching such works; and (*b*) that a pumping station on the new site would not be likely to tap any water which, in the absence of such a pumping station, could not be tapped by pumping at the existing works.

The council proposes to erect on the new site a reservoir with a capacity for 500,000 gallons, and it is anticipated that a minimum of 100,000 gallons of water, and possibly as much as 250,000 gallons of water will be drawn from the new site in each 12-hour pumping day. On the findings of the arbitrator, any water delivered to the new reservoir would probably have been available for the existing works.

It is, I think, settled law that, in all cases where land is subject to a burden which runs with it for the benefit of other land, a purchaser taking under compulsory powers takes the land subject to that burden, like any other purchaser, but the covenant cannot be enforced by injunction in the courts, if the breach of it is attributable to the execution of the works authorised by the statute under which it was taken, or to the exercise of the statutory powers thereby conferred on the purchaser. The law is stated by SIR N. LINDLEY, M.R., in *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *Anderson* (1). In that case, the property was leasehold, and the covenant in question was one for quiet enjoyment, but there is no difference in principle between such a case and a restrictive covenant running with the land with regard to freehold property. The passage to which I wish to refer is to be found on p. 400. It is this:

> Let us see what is the effect of the covenant for quiet enjoyment upon the railway company. They have bought the reversion, and, like other assignees of a reversion, they are bound by the covenant, for it runs with the land. I do not see any reason for holding that the covenant has gone, or in any way been extinguished. The company must be bound like any other assignee of a reversion—it is not a question of obligation on the company, but a question of remedy. When we consider the remedy I fail to see the answer to the contention of the railway company. They say "You cannot bring an action against us on the covenant or otherwise for anything we are doing lawfully under our statutory authority." It is said that then the covenant is of no use to the defendant; but it is of very considerable use to him, for it may give him rights of compensation which otherwise he might not have. He may be able to prove, having regard to his covenant, that his land is injuriously affected when he could not prove it if he had no such covenant. Suppose, for instance, that this is a house less than 20 years old, and suppose the railway company had not bought the reversion, and that they made an excavation which let the house down, it is possible that letting it down would be no actionable wrong. But that could not possibly be the case where the company are bound by a covenant of this kind, because whether the house was new or old the assignee of the reversion could not lawfully let it down except under their statutory powers. The covenant, therefore, is by no means inoperative: it binds the company just as it would bind anyone else. But when you come to the question of the remedy for an infringement of the covenant, you must look at the Act of Parliament. There may be other covenants binding on the company for breach of which an action

might well lie, because a breach of them could not be attributable to the execution of the works authorised by the statute. Suppose, for example, there were a covenant by the lessor to keep the place insured. A breach of that covenant could not arise from the construction of the works under the Act. An action would lie against a railway company for the breach of a covenant like that, but for any breach of covenant that is authorised by the Act of Parliament there is no remedy at all except under the compensation clauses.

A

Mr. Simes, on behalf of the council, accepted this view, but he argued that the reservations and restrictions in this case are unenforceable by the claimant as against the original purchaser under the conveyance of July 14, 1932. He argued, as I understand him, that the reservations confer no legal right or interest in land, and that the restrictions, if B construed strictly with reference to the reservations, are meaningless, and, consequently, are inoperative to confer on the owner for the time being of the Swainston Estate any right or interest in land. The first reservations is of " all water whether surface or underground in or under any part of the property conveyed." Mr. Simes argued, and I agree C with him to this extent, that water is not the subject of property. As was pointed out in the well known case of *Race* v. *Ward* (2), at p. 709, water is :

> no part of the soil, like sand, or clay, or stones ; nor the produce of the soil, like grass, or turves, or trees. . . . [Water] when it issues from the ground . . . while it remains in the field where it issues forth, in the absence of any servitude or custom D giving a right to others, the owner of the field, and he only, has a right to appropriate it ; for no one else can do so without committing a trespass upon the field ; but, when it has left his field, he has no more power over it, or interest in it, than any other stranger.

There is, however, nothing to prevent the owner of land giving to another the right to enter upon his land in order to obtain a supply of water E from it, and for that purpose to dig wells, make reservoirs and lay pipes, or execute any other specified works. I agree with Mr. Simes that the attempt to reserve all water out of the land conveyed by the conveyance of July 14, 1932, has no legal effect, so far as that reservation is concerned ; but I disagree with him when he says that, consequently, no F meaning can be given to the words that follow, so as to confer any right or easement in respect of water in or under the land conveyed. The reservation of " all necessary easements rights of way privileges advantages powers and liberties for the full enjoyment of this reservation " can, and, in my judgment, ought to be construed as the reservation G of all necessary rights to enable the grantor reserving those rights to obtain water from the land conveyed. This meaning of the parties is, I think, made clear by the later words of the reservation :

> It is hereby declared that this reservation is not to prevent or hinder the subpurchaser of the said property at his own cost from taking water (whether surface H or underground) from his own premises for all agricultural and domestic purposes connected with the use and enjoyment of such premises but not for sale or use on any other property without the consent of the owner for the time being of the water excepted from this conveyance.

It is quite true that there is no legal owner of the water excepted in the strict sense of the words, and, if these words stood alone, there would be

surer ground for Mr. Simes' argument, but they do not stand alone. The rest of the conveyance, and, in particular, the heading to the second schedule, makes it clear that the person referred to as the owner of the water reserved is "the estate owner for the time being of the remaining part of the Swainston Estate." If the grant of the easements and rights
A had stood alone, and the attempted reservation of the water had been omitted, there could be no doubt but that the easements and rights would have been valid, and would, in the events that have happened, confer an interest in land on the claimant. I see no difficulty in giving the same effect to the reservation of these easements and rights, although
B the words attempting to reserve water in or under the land conveyed are present. So far as the covenant is concerned, the position is, I think, clearer. It is that:

> the purchaser and his successors in title will not do anything on the property conveyed or any part or parts thereof whereby any supply of water now obtained
> C therefrom or any part thereof or any supply of water hereafter to be obtained therefrom in addition to or in substitution therefor shall be diminished or the purity thereof impaired.

It is plain that, at the date of the conveyance, the owner of the Swainston Estate was receiving at the existing works, through pipes laid through
D Pitts Farm, water which was derived from under Pitts Farm. Mr. Simes argued that, in the case of percolating water, there is no supply of water except at the point where it is drawn off, and that, consequently, the covenant is meaningless. I see no reason to adopt such a construction when it is possible to give a sensible meaning to the words used. In
E my judgment, reading the covenant in the light of the rest of the conveyance, and bearing in mind the surrounding circumstances, the covenant ought fairly to be construed as imposing a contractual prohibition on the covenantor, and those deriving title under him, from doing anything to interfere with the existing and future water supply at the
F existing works. In my judgment, there is nothing in the speeches of the members of the House of Lords in *Bradford Corpn.* v. *Pickles* (3) to prevent me from so construing the covenant. On the contrary, I think I ought, if possible, to give a sensible meaning to the covenant, rather than to adopt a construction so strict as to render it a dead letter. It
G follows, from what I have said, that, in my judgment, the claimant has an interest in the land which is the subject of the compulsory notice.

Mr. Simes further argued that no compensation can be given in respect of these interests, because any injury caused to the claimant will not arise from the construction of the council's proposed works, but only
H from the user of those works; and in support of that argument he relies on *Hammersmith & City Ry. Co.* v. *Brand* (4). The decision in that case turned on the particular phraseology of the Railways Clauses Consolidation Act, 1845, s. 6. In the preset case, the Public Health Act, 1875, s. 51, authorises the construction and maintenance of waterworks for the supply of water. It seems to me that, although the material

section of the Waterworks Clauses Act is not incorporated in the particular statutes and orders governing the present case, the reasoning to be found in the judgment of the Court of Appeal in *Fletcher* v. *Birkenhead Corpn.* (5), and especially the reasoning to be found in the judgment of Farwell, L.J., applies to the present case, and distinguishes it from the decision in *Hammersmith & City Ry. Co.* v. *Brand* (4), because the statutory powers in this case are to construct and maintain waterworks and to supply water. In order to supply water, it is necessary to draw the water from the land taken, and this is an execution of the works authorised. The words of the Lands Clauses Consolidation Act, 1845, s. 68, are not, as in the case of the Railways Clauses Consolidation Act, 1845, s. 6, "construction of the works," but "execution of the works." In my judgment, the latter words are wider than the former, and include the exercise, that is, the carrying out and the execution, of the appropriate statutory powers.

For these reasons, I am of opinion that the question submitted by the arbitrator should be answered in the affirmative, with the result that the claimant is entitled to recover, under the award of the arbitrator, the sum of £6,000. The council must pay the costs of the special case.

Judgment for the claimant.

Solicitors: *Emmet & Co.*, agents for *Gunner, Wilson & Jerome*, Newport, Isle of Wight (for the claimant); *Russell-Cooke & Co.*, agents for *Strattons*, Newport, Isle of Wight (for the respondent council).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

THORNE *v.* MOTOR TRADE ASSOCIATION AND ANOTHER.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Roche), **April 9, 12, 13, June 3, 1937.**]

A *Trade—Trade protection association—Provisions for price maintenance—Stop list—Rule providing for placing on stop list unless fine within limits to be fixed by association paid—Validity.*

Criminal Law—Demanding money with menaces—Reasonable or probable cause—Trade protection association—Stop list—Fine as alternative—Letter demanding payment of fine—Larceny Act, 1916 (c. 50), *s.* 29 (1).

B By the rules of a trade protection association, in pursuance of a policy of price protection, the members were required to sell their goods at fixed prices and not to sell such goods to any person, whether a member or not, who sold such goods at other than the fixed prices. The association prepared and circulated a "stop list" of the names of those who, having acted contrary to the price-maintenance provisions, had come within the scope of the prohibition. There was C also a rule which provided that the council and price protection committees of the association should have power to make an order in case of a breach by a member of the price-maintenance provisions or in case of conduct on the part of any other person, which in the case of a member would constitute such a breach, that the name of such member or person be placed on the stop list unless within 21 days such member or person should have paid to the association a fine D within limits to be laid down by the council. A member of the association sought a declaration that this rule was illegal and/or *ultra vires* on the ground that if the council or price protection committee were to make an order under that rule, the person who wrote on behalf of the association to demand the fine would necessarily commit the offence constituted by the Larceny Act, 1916, s. 29 (1):—

E HELD: (i) the rule adopted by the association was neither illegal nor *ultra vires* if operated with the honest intention of carrying out the association's trade policy, in which case the association would not be demanding the payment without reasonable or probable cause, within sect. 29 (1).

(ii) the offer to receive payment of a fine as an alternative to placing F the offending person on the "stop list" was intended to be more favourable to the offending person, and the existing right of placing a person on the "stop list" afforded reasonable and probable cause for the alternative offered, with the result that no felony was committed.

Decision of Court of Appeal affirmed.

R. v. *Denyer* (1) *disapproved.*

G **[EDITORIAL NOTE.** These proceedings were friendly proceedings brought to determine a point upon which conflicting decisions had been given by the Court of Appeal and the Court of Criminal Appeal. A trade protection association for the purposes of price maintenance made orders that a member's name should be placed upon the stop list unless he paid a fine and gave an undertaking. The question raised was whether the person writing the letter to give effect to this H decision committed the offence of demanding money with menaces without reasonable or probable cause within the provisions of the Larceny Act, 1916, s. 29 (1). The conflict of authority is decided in favour of the decision of the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* (2).

AS TO DEMANDING MONEY BY MENACES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 536, 537, para. 915; and FOR CASES, see DIGEST, Vol. 15, pp. 945-947, Nos. 10460-10481.]

Cases referred to:

(1) *R.* v. *Denyer*, [1926] 2 K.B. 258; 43 Digest 119, *1234*; 95 L.J. K.B. 699; 134 L.T. 637.

(2) *Hardie & Lane, Ltd.* v. *Chilton*, [1928] 2 K.B. 306; 43 Digest 119, *1233*; 97 L.J. K.B. 539; 139 L.T. 275.

(3) *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.*, [1921] 3 K.B. 40; 43 Digest 124, *1264*; 90 L.J. K.B. 949; 125 L.T. 265. A

(4) *Sorrell* v. *Smith*, [1925] A.C. 700; 43 Digest 113, *1183*; 94 L.J. Ch. 347; 133 L.T. 370.

(5) *R.* v. *Tomlinson*, [1895] 1 Q.B. 706; 15 Digest 946, *10471*; 64 L.J. M.C. 97; 72 L.T. 155.

(6) *R.* v. *Boyle & Merchant*, [1914] 3 K.B. 339; 15 Digest 946, *10475*; 83 L.J. K.B. 1801; 111 L.T. 638. B

(7) *R.* v. *Dymond*, [1920] 2 K.B. 260; 15 Digest 947, *10480*; 89 L.J. K.B. 876; 123 L.T. 336.

(8) *Quinn* v. *Leathem*, [1901] A.C. 495; 43 Digest 112, *1179*; 70 L.J. P.C. 76; 85 L.T. 289.

(9) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 43 Digest 10, *51*; 61 L.J. Q.B. 295; 66 L.T. 1. C

(10) *Allen* v. *Flood*, [1898] A.C. 1; 43 Digest 111, *1164*; 67 L.J. Q.B. 119; 77 L.T. 717.

(11) *Fisher & Co.* v. *Apollinaris Co.* (1875), 10 Ch. App. 297; 15 Digest 706, *7641*; 44 L.J. Ch. 500; 32 L.T. 628.

Appeal from an order of the Court of Appeal (Greer and Greene, D
L.JJ., and Talbot, J.) affirming an order of MacKinnon, J., in an action in which the appellant was plaintiff and the respondents were defendants, directing judgment to be entered for the respondents. The facts and the arguments are set out in the judgments.

Neville J. Laski, K.C., and *Richard Hurst* for the appellant. E

Sir William Jowitt, K.C., *H. Phillip Levy* and *P. I. V. Rippon* for the respondents.

Lord Atkin: My Lords, this an appeal from an order of the Court
of Appeal affirming a judgment in favour of the plaintiffs given by F
MacKinnon, J., on Apr. 29, 1936. The plaintiff is a member of the Motor Trade Association, and the action was brought for a declaration that:

> so much of r. 15 (1) of the defendant association as provides that the council and price protection committees shall have power to make an order that the name
> of such member or person be placed upon the stop list unless within 21 days such G
> member or person pay to the association a fine within limits to be laid down by the council is illegal and/or *ultra vires* having regard to the status and objects of the association—

and for an injunction to restrain the defendants from acting on the power so given. The action is in the nature of a friendly proceeding
brought to determine a very practical difficulty that has arisen in the H
affairs of the association by reason of two decisions of the courts which appeared to conflict. In *R.* v. *Denyer* (1), in the Court of Criminal Appeal, one of the officials of the association, who had acted under a similar rule, had been convicted under the Larceny Act, 1916, s. 29 (1), of uttering a letter demanding money with menaces, and without any

reasonable or probable cause, and his conviction was upheld. In *Hardie & Lane, Ltd.* v. *Chilton* (2), the plaintiffs sought to recover back money which had been demanded from them in circumstances similar to those in *R.* v. *Denyer* (1). The Court of Appeal disagreed with the decision in *R.* v. *Denyer* (1), and entered judgment for the defendant. It is not surprising, therefore, that the members of the association should desire to know where they stand. In the courts below there was no argument, as the case was properly treated as being governed by the previous decision of the Court of Appeal. Before your Lordships, the case was fully argued, and, though it is probable that the appellant will suffer no depression of spirits if the appeal be dismissed, yet every relevant consideration was put before this House. No evidence was called at the trial, though your Lordships asked for and received copies of the resolutions of the association, indicating how the rules are administered at present in regard to the limits of the amounts demanded. The question appears to be whether the effect of r. 15 (1) is such that, if the council or price protection committee makes an order that the name of a member or non-member be placed on the stop list, unless within 21 days such member or person pay to the association a fine as prescribed by the council and give the required undertaking, the person who writes on behalf of the association to demand the fine necessarily commits the offence constituted by sect. 29 (1) of the Larceny Act or sect. 31. This House allowed an amendment to raise the effect of the last-mentioned section. If the rule can be administered without a criminal act, the present plaintiff must, in my opinion, fail, for it must not be imputed to the association that they would commit or authorise a crime when the powers given to them are capable of being exercised lawfully.

Is it true, then, that, if the council, as an alternative to putting the name of a person on the stop list, requires him to pay a limited sum, and to give an undertaking to comply with the terms of the rules, and writes to the person to that effect, its agent is necessarily guilty of demanding money with menaces, without reasonable or probable cause? To my mind, the key to the situation is to be found in the fact that to put a man's name on a stop list, in such circumstances as the present, is not a wrongful act, and it does not infringe any right of the person so pilloried. This seems to have been conclusively decided by *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3), which was approved in this House in *Sorrell* v. *Smith* (4). It is an act done in lawful furtherance of business interests, and, though done in combination, is done without any express intent to injure the person whose name is published.

Now, when the association writes to what I will call an offender, announcing that it will put him on the stop list unless he pays a sum of money, I think that several of the elements of the offence under sect. 29 (1) exist. The association seems to me to "menace" him with the stop list. If the matter came to us for decision for the first time, I think there would be something to be said for a construction of "menace" which connoted threats of violence and injury to person or property, and a contrast might be made between " menaces " and " threats " as used in other sections of the various statutes. But in several cases it has been decided that " menace," in this subsection and its predecessors, is simply equivalent to threat: *R.* v. *Tomlinson* (5), *R.* v. *Boyle & Merchant* (6). The Larceny Act, 1916, was passed after these decisions, and I think they must be accepted, though possibly some of the expressions in some of the judgments are open to criticism. In *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3), and again in *Hardie & Lane, Ltd.* v. *Chilton* (2), Scrutton, L.J., appeared to indicate that, if a man merely threatened to do that which he had a right to do, the threat could not be a menace within the Act. With great respect, this seems to me to be plainly wrong, and I entirely agree with the criticism of this proposition made by Lord Hewart, L.C.J., in *R.* v. *Denyer* (1). The ordinary blackmailer normally threatens to do what he has a perfect right to do, viz., communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often, indeed, he has not only the right, but also the duty, to make the disclosure, as of a felony to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause, and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a " menace " within the Act or in itself provides a reasonable or probable cause for the demand. It could not be contended that, in writing such a letter as suggested, the association would not be demanding money. It would be proved, therefore, that it uttered a letter demanding with menaces money, and the only question is whether the demand would be without reasonable or probable cause. It is here that I am unable to agree with the decision in *Denyer's* case (1). It appears to me that, if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business, he may also lawfully, if he is still acting in furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must, no doubt, be acting, not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money. In the present case, the rules empower the council and the committees to demand sums " within limits " as an alternative to the stop list. It is obvious that a reasonable construction of the rules leads to the inference that the intention is to deter persons in the trade from violating recognised conventions as to maintaining list prices and the like, to give the council power to preclude all traders from commerce with the offender, but to allow the council to mitigate the grave penalty of " stop list " by substituting a money payment, and an undertaking not to offend again. If the council *bona fide* exercised this power, with the *bona fide* intention only of carrying out this trade policy, in my opinion, it would not be demanding the payment without reasonable and probable cause. It is impossible to assume that the rules must necessarily be abused, and, as the power given can be exercised lawfully, it cannot be said that they are *ultra vires*. By consent of the parties, resolutions of the council were produced, indicating what appeared to be reasonable limits for the sums to be demanded, varying as the supposed offence was a first or second offence, and so on. I do not think that the actual limits fixed should determine the question as to the validity of rules giving power to demand sums within limits to be fixed. It is plain that these rules, and any similar rules of any other association in any other trade, are capable of being abused, and, if so, nothing in this decision will prevent offenders from being subject to the criminal law.

But, if the rules were genuinely enforced, I am satisfied that there would not be, as, in my opinion, in *Denyer's* case (1) there was not, any evidence of an absence of reasonable or probable cause. It follows, from what I have said, that I cannot agree with the judgment in *Denyer's* case (1) that there was no nexus or relationship between a right to put the name of Mr. Read (the alleged offender) upon the stop list, and a right to demand from him £257 as the price of abstaining from that course. I think that the final passage from the summing-up of TALBOT, J., cited in the judgment of the Court of Criminal Appeal, was wrong. It is the excessive width of the proposition there stated that seems to me to constitute the flaw in the reasoning in that case throughout. I think that the absence of reasonable or probable cause is, in a criminal charge under this subsection, a question of fact for the jury. But, if the cause is reasonably capable of being associated with the promotion of lawful business interests, the judge should not allow the case to go to the jury if there is no evidence of the accused's intention going beyond such lawful business interests.

I only wish to add a word as to the case of *R.* v. *Dymond* (7), referred to in the argument, which may have a bearing on cases to be tried under this section. In that case, the prisoner was charged under this subsection. Her defence was that she had been indecently assaulted by the prosecutor, and that she thought she had a right to demand money from him in compensation. The judge at assizes, DARLING, J., had refused to allow evidence to be called either as to the fact or as to her belief. The argument for the Crown was that an indecent assault differed from a common assault, and that, even if the accused woman had been assaulted, it would not justify a claim for compensation, and that her belief that it would was irrelevant. The court agreed with this contention, and I express no opinion upon it. But language was used in the judgment which seemed to indicate that, even if the mistake were as to a fact which would have constituted a reasonable cause, such a mistake would be irrelevant. In other words, there must be in fact a cause, not merely a genuine belief in a cause. This seems to me incautiously expressed, and I do not think that doubt should exist upon a well established proposition in criminal law, that, normally, a genuine belief in the existence of facts, as apart from law, which if they existed would constitute a defence, is itself a sufficient defence.

I think this appeal should be dismssed with costs.

Lord Thankerton : My Lords, I find myself in agreement with the opinions of my noble and learned friends, which I have had the privilege of considering, and I will add only a few observations, as the appeal raises an apparent conflict of view between the Court of Criminal Appeal and the Court of Appeal in the criminal case of *R.* v. *Denyer* (1) and the civil case of *Hardie & Lane, Ltd.* v. *Chilton* (2) respectively.

The appellant seeks a declaration that r. 15 (1) of the rules of the association is illegal and/or *ultra vires* in so far as it empowers the council or price protection committee, as an alternative to placing the offending person—whether a member or not—on the stop list, to make an order that the name of such person be placed on the stop list, unless within 21 days he pay to the association a fine to be fixed as provided for. The only ground submitted by the appellant was that the pronouncing of such an order would necessarily constitute a felony within the meaning of the Larceny Act, 1916, s. 29 (1). In other words, the appellant undertakes to satisfy your Lordships that no such order could be made without committing a felony. I agree with your Lordships that the appellant has failed to do so, but it does not follow, from the refusal to give the declaration sought by the appellant, that such order could not be made in such circumstances as might bring it within sect. 29 (1) of the Act. In the view that I take, it will be sufficient to consider whether any such order must necessarily be made " without any reasonable or probable cause," for, if it need not be so made, it will not be within the subsection, and it will be unnecessary to consider whether, in any other respects, it need not fall within the terms of the subsection.

It is now settled that the use of the stop list by an association, in good faith, and in furtherance or protection of its legitimate trade interests, is legal : *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3), approved of in *Sorrell* v. *Smith* (4). In the present case, there can be no doubt that the offer to receive payment of a fine as an alternative to the exercise of that right is intended to be more favourable to the offending person, and that the cause of the offer is the existing right of the association to place such person on the stop list, and, in my opinion, that existing right, in the absence of special circumstances, affords reasonable and probable cause for the alternative offered. I therefore agree that the decision of the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* (2) was correct, and that the decision in *Denyer's* case (1), so far as in principle it conflicts therewith, is incorrect. The facts in the latter case are not sufficiently disclosed in the report to enable me to discuss the correctness of the decision in that particular case, even if it were necessary to do so.

For these reasons, I agree that the appeal should be dismissed.

Lord Russell of Killowen [read by Lord Thankerton]: My Lords, the question for our decision is whether so much of r. 15 (1) as gives power to the council or price protection committees to order that the name of a member or any other person be placed upon the stop list unless within 21 days he pay to the association a fine within limits to be laid down by the council, and give such undertaking as the council or price protection committees may demand, is illegal; the ground for the alleged illegality being that an exercise of that power must necessarily involve the commission of the felony described in the Larceny Act, 1916, s. 29 (1) (i). That particular felony is thus described:

> Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life . . .

The power of putting names, whether of members or of non-members, on the stop list, if exercised *bona fide* for the promotion of the trade interests of members, was held to be lawful by the Court of Appeal in *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3), a decision subsequently approved by your Lordships' House in *Sorrell* v. *Smith* (4). But requesting the payment of a fine as part of an offered alternative to inclusion in the stop list is a different matter, and the question whether sending a letter containing such a request is an offence within the beforementioned provision of the Larceny Act, 1916, is one upon which an acute difference of opinion arose between the Court of Criminal Appeal in *R.* v. *Denyer* (1) and the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* (2). There can be no doubt as to the conflict between these two decisions, which no ingenuity can reconcile. It is for us to say which was right in law.

For myself, I feel no doubt; though, like others of your Lordships, I think that some of the propositions of Scrutton, L.J., are too widely stated, and might cover and protect an undoubted blackmailer, I am of opinion that the decision in *Hardie & Lane, Ltd.* v. *Chilton* (2) was correct, and that *Denyer's* appeal (1) should have been allowed. I will assume that Denyer's letter, and the letter in the *Chilton* case (2) can rightly be said to be letters "demanding . . . with menaces," though I confess that, in view of the fact that the payment of money is only one part of an alternative, the end and object of which is protection of trade interest, I feel a doubt whether such letters can properly be brought within the terms of a provision which is undoubtedly aimed at blackmailers. But, in order that the offence described in the Larceny Act, 1916, s. 29 (1) (i), may be established, the jury must be satisfied, not only that the accused had uttered a letter or writing demanding of a person with menaces some property or valuable thing, but also that the demand had been made without any reasonable or probable cause. They would have to be satisfied that there was an absence of any reasonable or probable cause. It is on this point that I think that the decision in *R.* v. *Denyer* (1) erred. The extract from the summing up of Talbot, J., which is set out in the judgment at p. 269, and which was accepted as a proper direction to the jury, shows that the jury were told in broad terms:

> a person has no right to demand money, according to the Act of Parliament as a price of abstaining from inflicting unpleasant consequences upon a man.

That proposition seems to me far too wide, and, so stated, it is in effect a direction that no reasonable or probable cause for Denyer's demand existed. I am in agreement with the views expressed by Romer, J., in the judgment which he delivered in the *Chilton* case (2), in the course of which he said at p. 335:

> For it is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the stop list, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do. The question of reasonable or probable cause appears to be one for the jury, but only of course where there is some evidence of its absence. In the present case there is, in my opinion, none.

My Lords, so long as the payment of money demanded in the letter is demanded as part of, or in furtherance of, the association's object of promoting trade interests, there cannot, in my opinion, be an absence of reasonable or probable cause for the demand. The writer of the letter cannot, therefore, be convicted under the provision of the Larceny Act, 1916, which is here in question. For these reasons, I would dismiss this appeal.

Lord Wright: My Lords, the appellant (I may disregard the fact that the original plaintiff has died and been replaced by his executrix) was at all material times a member of the respondent association. In these proceedings, the court is asked to make declarations whether certain rules of the respondent association are or are not valid. Whether a declaratory judgment should be made is, in any case, a matter of the court's discretion. There is here a further complication, in that the action is what is called a friendly action. I have had some doubts whether this action is one in which declaratory relief should be granted. But the questions are not merely abstract, but are of practical importance to persons in the position of the appellant, and, on the whole, I think this House should not refuse to entertain the appeal. What is in issue is the validity of r. 15 (1) of the respondent association, which is attacked as necessarily contravening a provision of the criminal law, contained in the Larceny Act, 1916, s. 29 (1). The ground of attack has been limited to that section. The action is justified because of the conflict between a decision of the Court of Criminal Appeal in *R.* v. *Denyer* (1) in a criminal case and a decision of the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* (2) in a civil action. The latter decision was followed by the trial judge and the Court of Appeal, without any independent judgments being given. It will be necessary to consider the latter decision as embodying the judgments appealed from.

The facts and the relevant rules of the respondent association have been fully placed before your Lordships, and I shall content myself with the barest summary. The object, so far as is here material, of the respondent association is generally to promote and protect the interests of its members, *inter alia*, by preventing cutting or inflating the prices
A fixed for their goods by manufacturers or sole concessionaire members. This is described as the policy of price protection. In pursuance of that policy, the rules of the respondent association provide that members shall sell such goods at the prices so fixed, neither higher nor lower, and, further, that members shall not sell such goods to any person, whether
B member or not, who sells such goods at other than the fixed prices, or sells to any person who supplies to another who sells them at other than the fixed prices. In order to carry out these purposes, a list called the "stop list" is prepared, containing the names of those who, having acted contrary to the price-maintenance provisions, have come within
C the scope of the prohibition. This list is also circulated in the motor trade journals, so that all persons in the trade, whether members of the respondent association or not, may know to whom such goods are not to be supplied.

That the stop list is not unlawful in itself, at least if prepared and
D published in good faith, was not contested. Each member of the respondent association is free in law either to supply or not to supply his goods to any particular individuals; hence he may lawfully exercise his freedom of choice by deciding not to supply his goods to any person named in the stop list. An agreement or combination of the members,
E or of the respondent association and the members, not to supply the goods to persons whose names appear in the stop list is also lawful, provided that the intent of the combination is to promote and protect the legitimate trade interests of the respondent association and its members, and is not a combination wilfully to injure. I take the law
F on this point as stated by LORD DUNEDIN in *Sorrell* v. *Smith* (4), at p. 724, where he says that:

> in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act is not illegal is of the essence of the conspiracy.

G LORD DUNEDIN states this as being the result of *Quinn* v. *Leathem* (8), after an examination of that case and of *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (9) and *Allen* v. *Flood* (10). The opinions of the other members of the House were in substance the same. Indeed, the lawfulness of the stop list of the respondent association was expressly con-
H sidered by the House of Lords in *Sorrell* v. *Smith* (4). The House approved the decision of the Court of Appeal in *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3), where it was held that the publication in the stop list of the name of the plaintiff, who was not a member of the defendant association, was done by the defendants *bona fide*, in the protection of the trade interests of the members of the association, and

was therefore not unlawful. In that case, as in *Sorrell* v. *Smith* (4), the essential features were the absence of an intent on the part of the defendants to injure, and the presence of the purpose of the defendants to promote their legitimate trade interests. On these grounds, *Quinn* v. *Leathem* (8) was distinguished as being a case where there was a deliberate intention to injure. On the other hand, the *Mogul* case (9) was a case where what the combination did was held to be done in the way of commercial competition. The defendant shipowners had combined to obtain a monopoly of the tea trade from China by offering a discount to customers who shipped by their vessels only, by underbidding the plaintiff when he put a vessel on the berth, and by taking away their agency from persons who acted as shipping agents for the plaintiffs. All these matters were necessarily injurious to the plaintiffs, but injury to them was not the essence of the combination, which was that the defendants should for their own benefit obtain control of the trade in the way of legitimate competition. There were no unlawful means employed. The defendants were lawfully entitled to offer such terms as they thought fit to secure business, even though the result was to take business from the plaintiffs. The decisive question was, as Lord Dunedin said, in *Sorrell* v. *Smith* (4), at p. 730, to ask " a jury or a judge whether there was a conspiracy to injure or only a set of acts dictated by business interests." The *Mogul* case (9) was the leading case for the doctrine that the right of every person to be free to trade or employ his services as he will is subject to and conditioned by the similar right in every other person. When a person is placed on the stop list, the traders who refuse to supply him are exercising their freedom to trade as they will just as much as the person who exercises his freedom to sell at other than the fixed prices and at any price that suits him. The traders who refuse to supply him are free to combine for this purpose, so long as they do so within the conditions just stated. In these circumstances, the detriment suffered by the trader (if neither the combination nor the means employed are unlawful) gives him no cause of action.

I have analysed very summarily the reason why the stop list has been held to be *prima facie* lawful, that is to say, that a plaintiff can complain of it only if he can show special grounds why it should be held to be unlawful. But it is necessary to pass to the real question in this case, viz., whether so much of the rule is invalid as goes on to authorise the respondent association to offer, to a person whose name after due inquiry it has been found proper to place on the stop list, the option, instead of that being done, of paying a sum of money, called a fine, or penalty, of which, under the rules, notice must be communicated in writing. An undertaking may also be exacted. Does the sending of such a communication in writing constitute (i) a letter or writing, (ii) demanding with menaces, and (iii) without any reasonable or probable cause, (iv) any property or valuable thing within the Larceny Act, 1916, s. 29 (1) ?

Before I consider the two directly relevant authorities, I shall state briefly how I construe the subsection. In such a case as that assumed, there is, within the terms of the subsection, a letter or writing. There must be in it a demand for money, which is property or a valuable thing. I think the word menace is to be liberally construed, and not as limited to threats of violence, but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that, in certain events, such action is intended. Thus, it might ordinarily include such a threat as the threat to place on the stop list, which, for a motor trader, has serious consequences. The crucial question is whether there is an absence of reasonable or probable cause. I find it difficult to give a precise meaning to "probable," as distinguished from "reasonable," and I shall assume that it adds nothing beyond what is meant by "reasonable." The question, then, is whether there is reasonable cause for the demand. A demand to satisfy the subsection must be not merely with menaces but with an absence of reasonable cause. Is the liberty in law, which the respondent association possesses, to put a trader's name on the stop list capable in law of constituting a reasonable cause for demanding the money? I have stated the question in this form because I now feel I must make some observations on a peculiar difficulty in answering the questions put in the statement of claim. The effect of sect. 29 (1) can arise for decision only in a concrete case. The facts would, in that event, be before the jury, who would, as I think, in general be asked to find a verdict of guilty or not guilty. For that purpose, they would have to decide, after being duly directed in law, if there was a demand in writing, if it was with menaces, if it was without reasonable or probable cause. The last direction would, in my opinion, need to be carefully explained. I think the jury should be directed by the judge that the respondent association had a legal right to put the person's name on the stop list, so long as it did so in order to promote the trade interests of the association and its members, and not with intent to injure, and so long as the money, fine, or penalty demanded was reasonable, and not extortionate. In other words, the jury would have to answer the question suggested by LORD DUNEDIN: "whether there was a conspiracy to injure or only a set of acts dictated by business interests." The question of reasonable cause would have to be applied to the amount of the penalty or fine, as well as to the menace of inserting in the stop list. If the amount demanded is beyond reason in all the circumstances, there could not be a reasonable cause for demanding that amount, regarded merely from the aspect of quantum. There must be a reasonable cause for demanding the particular amount. When the problem is looked at in this way, it follows that a categorical declaration that the rule is valid cannot be made unless the rule is construed as limited to what is reasonable. Otherwise, the apparatus under the rule might obviously be used oppressively, and for purposes of injury and extortion. But, for purposes of this action, I think that it should be assumed that the rule and the powers under it are implicitly controlled by what is reasonable, and that the rule must be so construed. I proceed on that assumption. In the absence of evidence from which an actual intention to injure can be established or inferred, I think the mere fact that a person has been notified by a demand in writing that his name will be placed on the stop list unless he pays a fine and gives an undertaking in the words of r. 15 (1) would not, as a rule, show a case proper to go to the jury that an offence had been committed under sect. 29 (1) of the Larceny Act. The prosecution would be required to establish that there was an absence of reasonable cause in the full sense, that what was done was not done in the promotion of the legitimate trade interests of the association and its members, that there was an intent to injure, and that the money demanded, as an alternative to the name being put on the stop list, was extortionate, or excessive. The onus is, throughout, on the prosecution to establish all the elements of the offence. If it appeared, on the evidence for the prosecution, that, though there was a demand in writing with menaces, yet there was reasonable cause, in the sense which I have explained, the case should be withdrawn from the jury. If, however, there was evidence of the absence of reasonable or probable cause, then the jury must decide after hearing the whole case.

In *R.* v. *Denyer* (1), the Court of Criminal Appeal upheld a conviction under the Larceny Act, 1916, s. 29 (1), against the superintendent of the respondent association's stop list. A motor dealer named Read, not a member of the association, had offered to sell a car at a certain price named by him, and had sold a tyre. An inquiry was held by the council of the association, at which Read appeared; then a letter was sent by the defendant, on behalf of the association, offering to Read the option of paying £250 and £7, as the alternative to his name being included in the stop list. The jury convicted under sect. 29 (1). On appeal, the conviction was upheld. Lord Hewart, L.C.J., said at p. 268:

> In the opinion of this court there was not merely some, but ample and overwhelming material for the consideration of the jury in this case. It has been said again and again, that because this trade protection association had the legal right to put the name of Mr. Read on the stop list, it therefore had a legal right to demand money from him as the price of abstaining from putting his name upon the stop list. In the opinion of the court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest nexus or relationship between a right to put the name of Mr. Read upon the stop list, and a right to demand from him £257 as the price of abstaining from that course.

I cannot, with great respect, accept this as a correct or sufficient statement of the law. I do not know the facts of the case, except so far as they appear in the report, but I cannot find in the facts as reported any evidence of the offence charged proper to go to the jury. It does not appear that the complaint was directed to the amount demanded being extortionate. The objection taken was that any money at all was demanded. I need not repeat that it may be quite legitimate, for the reasons I have stated above, to give the trader the option of paying a reasonable sum of money as an alternative to the association taking, as, in proper circumstances, it lawfully might, the much more damaging course of putting the trader's name on the stop list. The matter may thus resolve itself into a mere question for the trader to decide which alternative is for him commercially more expedient. As I shall explain A later, when I discuss the judgment of the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* (2), there may be blackmail where a man is threatening to do something which he is at liberty lawfully to do. But the fact that the stop list is, in proper cases, legitimate will constitute, in such cases, reasonable cause for a reasonable demand. On the other hand, B the stop list cannot be lawfully used as an instrument of extortion and oppression. Later in his judgment, LORD HEWART, L.C.J., quotes part of the summing up of the trial judge. I shall repeat only one short passage at p. 269:

> A person has no right to demand money ... as a price of abstaining from inflicting C unpleasant consequences upon a man.

It is always difficult to criticise a short passage in a summing up, but the general proposition as stated cannot, I respectfully think, be justified, and constituted a material misdirection. There are many possible circumstances in which a man may say to another that he will abstain D from conduct unpleasant to the other only if he is paid a sum of money. Thus, he may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worth while to pay him, rather than have the amenities of his E house destroyed by an eyesore. Or a valued servant may threaten to go to other employment unless he is paid a bonus or increased wages. Or a man may offer to abstain from prosecuting for a common assault, or infringement of his trade mark, if he is paid compensation for the civil wrong, or if the other man makes a public apology, as in *Fisher &* F *Co.* v. *Apollinaris Co.* (11). Many similar instances may be given. As I read the report, I am bound, with respect, to say that the decision in *R.* v. *Denyer* (1) was, in my opinion, wrong. I cannot accept the propositions of law which I have just quoted as accurate statements of the general law, or as a proper direction to a jury.

G I turn to *Hardie & Lane, Ltd.* v. *Chilton* (2). That was a civil action. The plaintiffs were members of the Motor Trade Association, and had been offered, under the rules, as an alternative to being placed on the stop list, the option of paying £200, in addition to buying back the car which had been sold below the list price and giving an undertaking. H They agreed, and paid £100 on account of the £200. Later, becoming aware of the decision in *R.* v. *Denyer* (1), they issued a writ claiming repayment of what they had paid. The jury, having been directed by AVORY, J., that to obtain money for which there was no legal claim by threats calculated to deprive a man of his voluntary power of action was illegal, whether done by two or more persons in agreement or by one person only, found a verdict for the plaintiffs. The Court of Appeal set the verdict aside, and entered judgment for the defendants, holding that the case should have been withdrawn from the jury. Romer, J., thus summed up his opinion, at p. 335:

> It is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place A the plaintiffs on the stop list, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do.

On these assumptions of fact, I completely agree. I think that the case was rightly decided. There are, however, in the judgments of the Court of Appeal, various observations not necessary for the decision, on B sect. 29 (1) of the Larceny Act, which I do not think can be fully supported. Thus, at p. 322, Scrutton, L.J., says:

> if there is no evidence on which a jury could find lack of reasonable and probable cause, in that the act threatened is all which the defendant had a right to do, the judge should withdraw the case from the jury and that such a case is where the C threatener has a legal right to do what he threatens.

If, by "right to do," it is intended to refer to a right of a man to use his property as he desires, or to give or withhold his services, without any breach of contract, as he desires, or to abstain from legitimate competition, the proposition seems to me to be correct. I may add, to the D instances I have given above, such a case as that of the owner of multiple stores offering not to open a shop in a particular locality if a tradesman or tradesmen in the locality will compensate him for so doing. But there are many cases where a man who has a "right," in the sense of a liberty or capacity, of doing an act, which is not unlawful, but which is E liable seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. Such instances, indeed, are very typical cases of blackmail, either under sect. 29 or sect. 30 or sect. 31 of the Act. Thus, a man may be possessed of knowledge of discreditable incidents in the victim's life, and may seek F to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. Such is a common type of blackmail. Cases where the non-disclosure to the proper authority is illegal as amounting to compounding a felony, or a misdemeanour of public import, or where the G publication would constitute a criminal libel, are *a fortiori*. Again, a legal liberty (that is, something that a man may do with legal justification) may form the basis of blackmail. Thus, a husband, who has proof of his wife's adultery, may threaten the paramour that he will petition in the divorce court unless he is bought off. Though it is possible that H the facts of such a case might show merely the legitimate compromise of a claim to damages, on the other hand, the facts might be such as to constitute extortion and blackmail of a serious type. I cannot assent to the proposition that sect. 29 (1) is sufficiently excluded once it is shown that the act threatened is not a legal wrong in itself, that is, something which the person threatening may either do or not do without a breach of the law, something which may, perhaps, be described better as a legal liberty than as a legal right. I may add that I do not find, in sect. 29 (4), a comprehensive definition of menaces or threats, but merely an explanation in view of certain provisions of the earlier subsections.

A The two declarations asked for distinguish the cases of a member and of a non-member of the respondent association. There are, no doubt, certain differences between these cases, because a member has agreed to be subject to the rules, whereas a non-member has not. But even a member cannot legally consent in advance to be the victim of an B offence under sect. 29 (1). If, however, the rule is construed as limited to what is reasonable, as, in my opinion, it should be, I think the declarations claimed should properly be made.

LORD ROCHE: My Lords, I also am of opinion that this appeal C should be dismissed. Your Lordships who have already given your opinions have dealt with the facts of the case, and the authorities bearing on the matters under discussion, so fully, and in a sense so completely meeting with my concurrence, that I can state shortly the steps which lead me to the conclusion I have expressed.

D This action and appeal can succeed only if the exercise by the respondents of the powers they assume under the rules, to require payment of money in lieu of placing a name on the stop list, must involve an illegality, to wit, an offence under sect. 29 of the Larceny Act. If the direction given by the trial judge to the jury in *R.* v. *Denyer* (1), and E approved by the Court of Criminal Appeal, is correct, then such an illegality is necessarily involved. The passage from the summing up of the trial judge, quoted in opinions already delivered, amounts to a direction that the demand of any money at all is a demand made without reasonable or probable cause. This direction is, in my judgment, contrary F to the principles implicit in the decision of this House in *Sorrell* v. *Smith* (4), approving *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (3). The reason why procedure by way of stop list was there held not to be unlawful was that, though it was taken by persons acting in combination, the intent of the procedure was the protection of the defendants' trade G interests. But, if the protection of trade interests from damage and injury could be lawfully effected by means of a stop list, though the stop list would damage the plaintiffs, the conclusion seems to be necessarily involved that, in lieu of procedure by stop list, money compensation might lawfully be asked and accepted in respect of the injury to the H defendants' trade interests done by the plaintiffs. Money adjustments of business injuries are normal and lawful, and, accordingly, merely to ask for or to demand money, as an alternative to the placing of a name on the stop list, cannot, in my judgment, be properly said to be making a demand without reasonable or probable cause.

It will be observed that I have confined my observations on *Denyer's* case (1) to the question of the direction to the jury, and have stated my opinion that it is too broadly expressed, and cannot be supported. It may be—I do not know enough of the facts to express an opinion—that there were facts in that case proper to be left to the jury with another direction, upon which the jury would have been entitled to convict. I agree entirely with LORD WRIGHT in his views as to the proper directions A to, and questions for, a jury, and, in particular, I agree that, if a sum is demanded in the manner struck at by the statute, there must be reasonable and probable cause for demanding that very sum. A demand of a sum extortionate in amount would, I think, clearly be evidence fit to be left to a jury in a civil case of an intent to injure, as opposed to an intent B to protect, trade interests, and, in a criminal case, of the fact that the sum was demanded without reasonable or probable cause. I also agree that, in the judgments of the Court of Appeal, in the case of *Hardie & Lane, Ltd.* v. *Chilton* (2) there are statements which, taken literally, do not accurately state the law, in that they would seem to import that no C demand of money in connection with a stop list could amount to an actionable wrong or to a crime. It would, in my opinion, be both erroneous and mischievous to give colour to the opinion that, because a demand of money in such a connection is not necessarily unlawful or a crime, it cannot, in any circumstances, be either the one or the other. At the same D time, I do not entertain any doubt that, in the case of *Hardie & Lane, Ltd.* v. *Chilton* (2), the correct conclusion was reached by the Court of Appeal. The plaintiffs were members of the association, consenting to, but breaking, its rules, and it was plain, on their own evidence, that they regarded the money demand as welcome, because more merciful E to them, as offenders, than appearance in the stop list. This is indeed a typical case where, had the proceedings been in the nature of a criminal prosecution under the Larceny Act, and had the same evidence been given for the prosecution as was given for the plaintiffs in the civil proceedings, the proper direction to the jury would have been that there was no evidence F upon which they could find an absence of reasonable or probable cause for the demand, and that they ought to return a verdict of not guilty. That case therefore provides a clear example of how the rules sought to be impeached in this action can in practice be applied without illegality. The case of a non-member of the association does not, in my opinion, G differ from that of a member in any material respect, save that, in the case of a member, proof of the absence of reasonable and probable cause for demanding the sums fixed by the rules would obviously be more difficult, if not insuperable.

My Lords, these are my reasons for thinking that the appeal should H be dismissed.

Appeal dismissed with costs.

Solicitors: *Nicholson, Graham & Jones* (for the appellant); *Michael Abrahams, Sons & Co.* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re GLADITZ, GUARANTY EXECUTOR & TRUSTEE CO., LTD. *v.* GLADITZ.

[CHANCERY DIVISION (Bennett, J.), **June 2, 1937.**]

Husband and Wife—Insurance policy—Expressed to be for benefit of wife—Memorandum that policy moneys payable to wife if alive at happening of event giving rise to claim—Married Women's Property Act, 1882 (*c.* 75), *s.* 11.

Insurance—" Policy of assurance effected by any man on his own life "—Accident policy—Moneys payable on disablement or death—Married Women's Property Act, 1882 (*c.* 75), *s.* 11.

By a policy of insurance, described as a Lloyd's accident policy, certain sums, calculated according to a schedule, were expressed to be payable to the assured, his executors, administrators or assigns, in the event of bodily injury by accident, as therein specified, causing the death or disablement of the assured. There was a memorandum at the foot of the policy that all claims under the policy should be payable to the wife of the assured, if living at the happening of the event upon which the claim should become payable, or if she were dead then to the executors, administrators or assigns of the assured. Upon the death of the assured the question arose whether the wife was solely and beneficially entitled to the policy moneys or whether such moneys formed part of the estate of the assured :—

HELD : the fact that the policy included payments on a number of events besides the death of the assured did not prevent it from being " a policy of assurance effected by any man on his own life " within the Married Women's Property Act, 1882, s. 11, and the memorandum on the policy was a sufficient expression of intention that the policy was for the benefit of the wife, within that section. The wife was, therefore, solely and beneficially entitled to the policy moneys.

[**EDITORIAL NOTE.** The policies which have been the subject of decisions under the Married Women's Property Act, 1882, s. 11, have been life policies, but in the present case the policy is an accident policy. The policy included a provision for the payment of a sum upon death resulting from accident. Such a policy is here held to be a policy effected by a man on his own life within the terms of the Act.

AS TO POLICIES EFFECTED UNDER MARRIED WOMEN'S PROPERTY ACT, 1882, s. 11, see HALSBURY, Hailsham Edn., Vol. 16, pp. 671, 672, para. 1069 ; and FOR CASES, see DIGEST, Vol. 27, pp. 149-152, Nos. 1207-1228.]

Cases referred to :

(1) *Re Fleetwood's Policy,* [1926] Ch. 48 ; 29 Digest 387, *3091.*

(2) *Griffiths* v. *Fleming,* [1909] 1 K.B. 805 ; 29 Digest 349, *2826* ; 78 L.J.K.B. 567 ; 100 L.T. 765.

(3) *Re Engelbach's Estate, Tibbetts* v. *Engelbach,* [1924] 2 Ch. 348 ; 29 Digest 422, *3288* ; 93 L.J.Ch. 616 ; 130 L.T. 401.

(4) *Cleaver* v. *Mutual Reserve Fund Life Assocn.,* [1892] 1 Q.B. 147 ; 29 Digest 369, *2969* ; 61 L.J.Q.B. 128 ; 66 L.T. 220.

SUMMONS asking whether, upon the true construction of a policy of assurance against accident to Charles Julius Gladitz, and in the events which had happened, his widow, Winifred Gladitz, was solely and beneficially entitled to a sum of money paid by certain Lloyd's underwriters under the policy, or whether such moneys formed part of the estate of the said Charles Julius Gladitz.

Andrew Clark for the Guaranty Executor & Trustee Co., Ltd., administrator of the estate of the deceased.

C. R. R. Romer, K.C., and *M. R. C. Overton* for the widow.

Hon. Denys Buckley for Alfred Charles Gladitz, one of the persons beneficially interested in the said estate.

Clark: If this policy does not come within the provisions of the A Married Women's Property Act, 1882, s. 11, the fact that the person who has paid all the premiums indorses on the policy a statement that the policy moneys are to be for the benefit of a nominee is not sufficient to create a trust for the benefit of the person named therein, but the policy moneys belong to and form part of the estate of the deceased. [Counsel B referred to *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (3) and *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (4).]

Bennett, J.: The question raised by the summons before me is whether a sum of money paid under a policy of insurance made between C the deceased Charles Julius Gladitz and certain Lloyd's underwriters is a sum of money to which his widow, the defendant Winifred Gladitz, is solely and beneficially entitled, or whether it forms part of the deceased's estate. In my judgment, the question depends upon whether the policy is one which falls within the provisions of the Married Women's Property D Act, 1882, s. 11. The policy is dated Nov. 27, 1934, and is described as a Lloyd's accident policy. It recites that the deceased, Charles Julius Gladitz, has paid a premium of £66 5*s*., and that the underwriters agree with the assured, that is, Charles Julius Gladitz:

> that if at any time during the period commencing on Nov. 4, 1934, and ending on E Nov. 3, 1935, both days inclusive, with 15 days' grace after expiry for renewal the assured shall sustain any bodily injury caused by accidental violent external and visible means which shall solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death or disablement as hereinafter defined and a claim be substantiated under this policy we will pay the assured, his executors, administrators or assigns according to the schedule of compensation hereunder specified within 7 days after satis- F factory proof of death or disablement to the underwriters (or in the case of disablement as defined in cl. 7 of the schedule hereunder within 7 days after the final settlement and adjustment of the claim) not exceeding in all the sum of £15,000.

The schedule of compensation provides for payment of £15,000 in the event of the death of the assured and there are certain other recitals. The conditions indorsed upon the policy include, amongst others, this G condition:

> 1. This policy does not cover death or disablement directly or indirectly caused or contributed to by war or invasion, intentional self-injury, disease or natural causes, suicide or attempted suicide (whether felonious or not), provoked assault, duelling, or fighting (except in *bona fide* self-defence), nor does it cover death or disablement directly or indirectly resulting from medical or surgical treatment H (except where such treatment is rendered necessary by bodily injury from accident within the scope of this policy) or resulting from the assured deliberately exposing himself to exceptional danger (except in an attempt to save human life) or resulting from his own criminal act; nor does it cover death or disablement resulting from bodily injury occasioned or occurring while the assured is in a state of insanity (temporary or otherwise) or in a state of intoxication or while engaged or taking part in military or naval service or operations or civil commotions or riots of any

> kind or in aeronautics and/or aviation of any description or resulting from being in any aircraft or while riding or driving in any kind of race. Accidental death shall not be presumed by reason of the disappearance of the assured. Should the assured become entitled to weekly compensation, the liability of the underwriters shall be discharged as soon as the disablement, wound or injury shall have ceased, healed, or been cured as far as possible, notwithstanding some permanent or other injury may remain.

A At the foot of the policy, there is this memorandum:

> It is understood and agreed that all claims under this policy shall be payable to Winifred Gladitz, *née* Worthington, wife of the assured, if she is living at the happening of the event upon which the claim becomes payable, or if she is dead, then to the executors, administrators or assigns of the assured, whose receipt shall be deemed sufficient discharge and relieve underwriters thereon.

B On Mar. 8, 1935, the assured died, as the result of an accident. The question arises whether his widow is entitled to the sum payable under the policy, or whether the sum payable under the policy forms part of the estate of the deceased. The claim of the wife rests upon the Married Women's Property Act, 1882, s. 11. The terms of the section are as C follows:

> A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his D debts.

Two questions arise. The first is whether the policy in question is a policy of insurance effected by the deceased, Charles Julius Gladitz, on his own life, and the second is whether the policy, being in the form which I have stated, is expressed to be for the benefit of his wife. In my E judgment, both questions should be answered in the affirmative. I see no reason for restricting the meaning of the words "a policy of assurance effected by a man on his own life," and I am unable to say that a policy including payments on a number of other events, if it does include provision for payment on that happening, is not a policy within the F meaning of the section. In my judgment, a policy providing, as this policy does, for the payment of a sum of money upon the death of a man as the result of an accident is a policy of insurance effected by a man on his own life.

The next question is whether it is expressed to be for the benefit of the G wife. The only provision is the provision in the memorandum at the foot of the policy.

I should have been myself doubtful if that memorandum was a sufficient expression that the policy was to be for the benefit of Winifred Gladitz, were it not for two decisions. One of these is the decision of H Tomlin, J., in *Re Fleetwood's Policy* (1) and the other that of Farwell and Kennedy, L.JJ., in *Griffiths* v. *Fleming* (2). Both these cases seem to me to decide that words which in substance are not distinguishable from the words of the memorandum which has been put upon the policy in question are a sufficient expression of intention that it is for the benefit of the person to whom the policy moneys are to be paid. Both decisions bind me, and I propose to follow them. Because of these decisions, which are authorities, this policy is a policy expressed to be for the benefit of Mrs. Winifred Gladitz within the provisions of the Married Women's Property Act, 1882, s. 11, and I therefore decide that Mrs. Winifred Gladitz is solely and beneficially entitled to the moneys paid by the underwriters under the policy, and that the moneys do not form part of the estate of the said Charles Julius Gladitz, deceased. The costs of the summons to come out of the estate, if it is sufficient. If the estate is insufficient, the balance to be payable out of the policy moneys.

Solicitors: *Mead & Dennis* (for the plaintiff company); *Templer & Passmore* (for the widow); *Mead & Dennis* (for Alfred Charles Gladitz).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH, *Ex parte* HACK.

[King's Bench Division (Lord Hewart, L.C.J., Swift and Humphreys' JJ.), **June 1, 1937.**]

Public Health—Housing—Clearance area—Compulsory purchase order—Objection—Notice stating facts alleged as principal grounds of unfitness—Sufficiency of notice—Housing Act, 1935 (*c.* 40), *s.* 63 (1).

The applicant, the owner of certain properties in a clearance area, gave notice to the Minister of Health of objection to a compulsory purchase order. The local authority served notices upon the applicant under the Housing Act, 1935, s. 63 (1), alleging that the properties were unfit for human habitation, and stating the facts which the local authority alleged to be its principal grounds for being satisfied as to the unfitness. The applicant objected to the notices on the ground that they did not give him sufficient particulars of the facts in support of the local authority's allegation of unfitness, and he contended that the Minister had no power to hold a public local inquiry into the local authority's application for confirmation of the compulsory purchase order:—

Held: by the Housing Act, 1935, s. 63 (1), it is the Minister, and not the objector, who is to be satisfied that the local authority has served appropriate notices under that section, and as the Minister was satisfied, in the present case, that a sufficient notice had been served upon the applicant, the applicant could not object to the holding of the public inquiry after the expiration of the period required by sect. 63 (1).

[**EDITORIAL NOTE.** The matter here is confined to the Housing Act, 1935, s. 63, and decides that the particulars of the unfitness of a house have to be given to the satisfaction of the Minister and not to that of the objector. So long as the Minister acting reasonably in the matter is satisfied, that is all the section requires. Sect. 63 of the Act of 1935 is now reproduced in sect. 41 of the consolidation Act of 1936. The court expressly did not deal with the question whether under sect. 11 of the 1930 Act (Sched. II, para. 3, of the 1936 Act) a writ of prohibition is available in such a case.

As to Houses Unfit for Habitation, see HALSBURY, Supp., Public Health, paras. 1034-1042; and for Cases, see DIGEST, Supp., Public Health, Nos. 502*g*-502*v*.]

Application to make absolute a rule *nisi* obtained on behalf of Sydney John James Hack, directed against the Minister of Health, to prohibit him from holding a public local inquiry into the application of the West Ham Borough Council for the confirmation of a compulsory purchase order made by the council on May 26, 1936.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), and *Valentine Holmes* showed cause against the rule on behalf of the Minister of Health.

A. M. Trustram Eve, K.C., and *H. G. Robertson* for the West Ham Borough Council.

C. S. Rewcastle, K.C., and *Hon. Dougall Meston* in support of the rule.

LORD HEWART, L.C.J.: This is a rule *nisi* for a writ of prohibition to prohibit the Minister of Health from holding a public local inquiry into the application of the West Ham Borough Council for the confirmation of a certain compulsory purchase order made by that council on May 26, 1936, an order whereby a certain area, including some properties of the applicant for the rule, in a clearance area should be compulsorily purchased. The grounds upon which the rule *nisi* was sought and obtained are that, as it is alleged, the notices relating to the properties of the applicant, which had been served by the local authority, were not such notices as are called for by the Housing Act, 1935, s. 63, and failed to be such notices for this reason, as it is alleged, that they did not give to the objector, with sufficient particularity, the facts which the authority alleged as its principal grounds for being satisfied that the properties in question were unfit for human habitation.

I cannot help thinking that these present proceedings have been misconceived. I do not propose to enter upon the interesting, and perhaps important, question of the scope of prohibition in relation to the Housing Acts. Our attention has been directed by the Solicitor-General to the provisions of the Housing Act, 1930, s. 11, and the precise machinery therein described and prescribed, but at present I refrain from expressing an opinion upon that aspect of the matter. I will say only that, at the moment, it appears to me that the limitation which that section imposes upon such remedial methods as applications for prohibition or *certiorari* appears to be confined to orders of the particular type therein referred to, namely, clearance orders and compulsory purchase orders, and I refrain from expressing any opinion upon the contention which has been made, that that limitation imposed upon the jurisdiction, for example, in prohibition is a limitation which makes the present application one which this court ought not even to entertain. I prefer to base my decision upon something quite different, namely this, that, as it appears to me, this applicant, this objector under the Act, has misconceived the scope and meaning of the Housing Act, 1935, s. 63 (1). That section, dealing, as it does, with some of the steps that have to be taken for the purposes of the Housing Act, where clearance orders or compulsory purchase orders are in contemplation, provides that:

> Where a person upon whom notice of a clearance order or of a compulsory purchase

> order . . . is required to be served has duly made objection thereto on the ground that a building included therein is not unfit for human habitation, and the objection has not been withdrawn, the Minister shall not cause the public local inquiry with respect thereto to be held earlier than the expiration of 14 days after it has been shown to his satisfaction that the local authority have served upon the objector a notice in writing stating what facts they allege as their principal grounds for being satisfied that the building is so unfit.

Now, it is manifest that the purpose of that section, where objection is persisted in, is to afford the objector a reasonable interval before the public local inquiry is opened, and that reasonable interval is an interval of not less than 14 days after a certain event. Now, what is that event ? It is after the Minister has been satisfied of a certain matter. He is to be satisfied that the local authority has served upon the objector a notice in writing of a particular kind, namely, a notice in writing stating what facts it alleges, not what evidence it proposes to offer, but what facts it alleges as its principal grounds ; not even as its sole ground, but its principal grounds for being satisfied that the building is so unfit. Those words have, no doubt, been most deliberately chosen. The moment from which the time runs is the moment when the Minister is satisfied on that particular point. The statute does not require that the objector is to be satisfied. The Minister is to be satisfied. He is to be satisfied that a notice has been served, and that notice is described ; it is to be a notice stating the facts which the authority alleges as its principal grounds.

In view of the plain words of that subsection, it seems to me that the result is clear. No doubt the Minister must not be satisfied with unreasonable readiness, or with culpable complacency, but otherwise it suffices that he is in fact satisfied ; and, when I look at the bundle of notices received by the applicant for this rule, I cannot conceive that, except for controversial purposes, it can be seriously argued that the Minister, as a reasonable man, ought not to be satisfied that a sufficient notice of the description required was served upon the applicant. I think, therefore, that this rule clearly ought to be discharged.

Swift, J. : I agree that this rule should be discharged, and I have nothing to add to what Lord Hewart, L.C.J., has said.

Humphreys, J. : I agree with the judgment of Lord Hewart, L.C.J., on the language of the Housing Act, 1935, s. 63. I prefer to express no opinion at all on the question raised under sect. 11 of the Act of 1930.

Rule discharged with costs.

Solicitors : *Solicitor to the Ministry of Health* (for the Minister of Health) ; *Town Clerk*, West Ham (for the West Ham Borough Council) ; *Deacon & Co.* (for the applicant).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

KANGOL (MANUFACTURING), LTD. v. CENTROKOMISE (LONDON), LTD.

[CHANCERY DIVISION (Bennett, J.), **April 13, 14, 15, 1937.**]

Designs—Registration—Prior publication—Disclosure—Disclosure by person other than the registered proprietor. A

Before the registration of a design a stranger to the registered owner had shown it to a business acquaintance for the purpose of securing orders for articles embodying the design. It was not proved that the registered owner was party to the disclosure:—

HELD: such disclosure was not a confidential but a commercial disclosure and was a prior publication of the design. The registration was therefore invalid and ought to be expunged. B

[**EDITORIAL NOTE.** If the disclosure had been by the registered proprietor in such a case it would be settled by authority that there was prior publication. In this case, however, the disclosure was made by a stranger.

AS TO PRIOR PUBLICATION, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, C Trade Names and Designs, p. 733, para. 1311; and FOR CASES, see DIGEST, Vol. 43, pp. 253, 254, Nos. 935-940.]

Case referred to:

(1) *Nevill* v. *Bennett* (*John*) *& Sons* (1898), 15 R.P.C. 412; 43 Digest 252, *923*.

D ACTION for an injunction to restrain the defendant company from infringing the plaintiff company's rights in a registered design in respect of its application to berets and for damages for the alleged infringement. The plaintiff company complained of the sale in Mar., Apr. and May, 1935, of 100,000 dozens of berets, which, it was alleged, were infringe-
E ments of the registered design. The design was registered on Feb. 10, 1935, by one Wharton, but he had assigned all rights thereunder, including the benefit of all rights of action for previous infringements by an assignment dated Oct. 25, 1935, and made in favour of the plaintiff company. The defendant company pleaded that the registration was
F invalid by reason of prior publication, relying upon a publication by one Imovicz in Dec., 1934, and Jan., 1935, and moved to expunge the mark from the register. Imovicz was at no time the registered owner of the design. The circumstances of the publication are set out in the judgment.

G *G. H. Lloyd-Jacob* for the plaintiff company.

James Mould for the defendant company.

BENNETT, J.: The first ground of defence is that the design was not properly registrable in the first instance owing to prior publication
H in the United Kingdom, and the defendant company has moved to expunge the mark from the register as not being new or original at the time of the registration. The material sections of the Act are sects. 49 (1), 53 (1) and 55, which provide:

> 49. (1) The comptroller may, on the application made in the prescribed form and manner of any person claiming to be the proprietor of any new or original

design not previously published in the United Kingdom, register the design under this part of this Act.

53. (1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration.

55. The disclosure of a design by the proprietor to any other person, in such circumstances as would make it contrary to good faith for that other person to use or publish the design, and the disclosure of a design in breach of good faith by any A person other than the proprietor of the design, and the acceptance of a first and confidential order for goods bearing a new or original textile design intended for registration, shall not be deemed to be a publication of the design sufficient to invalidate the copyright thereof if registration thereof is obtained subsequently to the disclosure or acceptance.

For the purposes of the motion these are the relevant sections. It is B said that the facts proved made it impossible for this design to be registered on Feb. 15, 1935. I have come to the conclusion that the defendant company has proved facts which show that the design was not new and original at that date.

The following facts were proved. In the autumn of 1934, Imovicz C who desired to make berets in England came here. He had obtained from a firm in Paris a trade circular dated Oct., 1934, which contained three representations of berets. On one of these was embossed a design which is identical with the registered design. Imovicz's evidence was that he got from the French firm berets embossed with the design. The D evidence proved that he arrived in this country on Dec. 11, 1934, with the leaflet and the berets, and on that day he showed to a Mr. Beevar the leaflet, and in January he showed him one of the berets. On these occasions he asked Beevar if he would be interested in these berets and it is clear that the object of the interviews was a commercial one. I am E satisfied that Imovicz and Beevar are speaking the truth, and each of them has certain material by which he can assist his memory.

Now, is it possible to say that this design was on Feb. 15, 1935, a new design not published in the United Kingdom ? It is said that the circumstances in which Imovicz made the disclosure to Beevar were such as to F preclude him from making any use of the design he was shown. The suggestion is that the disclosure was made in confidence. If Beevar in Jan., 1935, after the second of the two interviews had given instructions to a block maker in respect of this design, would Imovicz have been able to apply successfully for an injunction ? The plaintiff company must be G able to say this if it is to make out that there was no publication in law. It is important to remember that when Imovicz showed the beret to Beevar he was not the proprietor of the design. I have come to the conclusion that the two interviews which took place were in no way confidential. Imovicz was seeing if he was in a position to do business. H They were commercial interviews. In this respect the interviews were quite different from those in *Nevill* v. *Bennett* (*John*) *& Sons* (1), on which Mr. Lloyd-Jacob relies. In fact, there was a publication in London of the design and, that publication not being of a confidential but of a commercial nature, the design ought not to have been registered.

The motion to expunge the design succeeds. The register must be rectified, and the action fails and must be dismissed with costs.

Solicitors: *Edwin E. Clark & Son* (for the plaintiff company); *Churchill, Clapham & Co.* (for the defendant company).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION.

[PRIVY COUNCIL (Viscount Sankey, Lord Blanesburgh, Lord Macmillan), **March 5, 8, 9, 11, 12, April 15, 1937.**]

Privy Council—Canada—Compulsory purchase—Compensation—Assessment—Public utility undertaking—Value of franchise excluded.

By an agreement made in 1891, and confirmed by a statute of the Ontario legislature, the appellant company was given the exclusive right to construct and operate an electric railway for a period of 40 years, with a right of renewal for a further period of 20 years, on the lands of the respondent commission. The agreement provided that, on its determination, the company, if unwilling to renew, was to be duly compensated by the grantors "for their railways, equipment, machinery and other works . . . but not in respect of any franchises for holding or operating the same," the compensation to be fixed by mutual agreement, or, in case of difference, by arbitration, the property of the company passing to the grantors of the franchise. The railway was operated by the company for 40 years in accordance with the terms of the agreement, but it was not a commercial success. The franchise having terminated, an arbitration was proceeded with to determine the amount of compensation payable to the appellant company, and the majority of the arbitrators were of the opinion that the railway, at the time it was handed over to the respondent commission, "was of no value for operation as a railway to the railway company or the parks commission or to anyone else," and that the compensation payable was the "scrap value," an amount which they fixed at $179,104. In case this should be held to be the wrong basis of assessment, they fixed the value of the undertaking calculated on the basis of cost of reconstruction, less depreciation, as at Sept. 1, 1932, at $967,592:—

HELD: there was no justification under the agreement or the confirming statute for assessing the compensation at scrap value. It was fundamental that it was a railway complete with equipment, machinery, and works, which the appellant company was bound to hand over to the respondent commissioners and for which it was to be duly compensated, and the proper basis of the compensation was the cost of reconstruction, less depreciation. It is well established that the reconstruction cost, less depreciation, is a correct method of valuing a public utility where the value of the franchise is excluded from consideration.

[**EDITORIAL NOTE.** Where a franchise for a public utility is granted to private undertakers for a limited period, coupled with an obligation to transfer the undertaking to a public authority at the end of the period, there is no compensation for the loss of profit, since any profits they had a right to receive have on the terms of the agreement come to an end. In the present case the railway had become practically valueless as a going concern, and it was suggested that the compensation therefore should be the scrap or break-up value of the undertaking. Their Lordships rejected this proposition upon the principle stated above that the profit or loss from carrying on the undertaking does not enter into the computation of the compensation.

As to Assessment of Price of Undertaking, see HALSBURY, 1st Edn., Vol. 27, Tramways and Light Railways, pp. 802, 803, para. 1395; and for Cases, see DIGEST, Vol. 43, pp. 354, 355, Nos. 113-119.]

Cases referred to:

(1) *Caledonian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.* (1874), L.R. 2 Sc. & Div. 347; 2 Digest 354, *288*.

(2) *Toronto (City) Corpn.* v. *Toronto Railway Corpn.*, [1925] A.C. 177; Digest Supp; 94 L.J. P.C. 25; 132 L.T. 401.

(3) *Re Kirkleatham Local Board & Stockton & Middlesborough Water Board*, [1893] 1 Q.B. 375; 2 Digest 462, *1082*; 62 L.J. Q.B. 180; 67 L.T. 811.

(4) *London Street Tramways Co.* v. *London County Council*, [1894] A.C. 489; 43 Digest 355, *115*.

(5) *Melbourne Tramway & Omnibus Co., Ltd.* v. *Tramway Board*, [1919] A.C. 667; 43 Digest 354, case *q*.

(6) *Oldham, Ashton & Hyde Electric Tramways, Ltd.* v. *Ashton Corpn.*, [1921] 3 K.B. 511; 43 Digest 355, *119*; 90 L.J. K.B. 828; 125 L.T. 391.

(7) *Rhys* v. *Dare Valley Ry. Co.* (1874), L.R. 19 Eq. 93; 11 Digest 232, *1208*.

(8) *Re Pigott & Great Western Ry. Co.* (1881), 18 Ch. D. 146; 11 Digest 226, *1125*; 50 L.J. Ch. 679; 44 L.T. 792.

(9) *Hamilton Gas Co., Ltd.* v. *Hamilton Corpn.*, [1910] A.C. 300; 43 Digest 81, *855*; 79 L.J. P.C. 76; 102 L.T. 372.

(10) *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.*, [1894] A.C. 456; 43 Digest 354, *113*; 63 L.J. Q.B. 769; 71 L.T. 301.

(11) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 11 Digest 127, *169*; 77 L.J. K.B. 1009; 99 L.T. 767.

(12) *Re Peterborough City & Peterborough Electric Light & Power Co.* (1916), 52 O.L.R. 9; 20 Digest 217, case *b*.

(13) *Re Berlin & Waterloo Street Ry. Co. & Berlin Town* (1908), 19 O.L.R. 57; 43 Digest 365, case *ee*.

(14) *National Telephone Co., Ltd.* v. *Postmaster-General*, [1913] A.C. 546; 38 Digest 370, *721*; 82 L.J. K.B. 1197; 109 L.T. 562.

(15) *Milnes* v. *Gery* (1807), 14 Ves. 400; 2 Digest 385, *459*.

(16) *Irwin* v. *Campbell* (1915), 51 S.C.R. 358; 43 Digest 1042, case *c*.

(17) *Port of Spain (City)* v. *Trinidad Electric Co., Ltd.* (Privy Council, No. 16 of 1936), unreported.

Appeal from a judgment of the Court of Appeal of Ontario (Mulock, C.J.O., Masten, Middleton, Fisher and Henderson, JJ.A.), dated Dec. 31, 1935, dismissing (subject to a variation) an appeal from a majority award of arbitrators (Hon. Robert Smith and G. W. Mason, K.C., R. S. Robertson, K.C., dissenting) appointed under an agreement dated Dec. 4, 1891. The facts of the case are set out in the judgment of their Lordships delivered by Lord Macmillan.

W. N. Tilley, K.C., and *D. L. McCarthy, K.C.*, for the appellant company.

Arthur G. Slaght, K.C., *F. W. Griffiths, K.C.*, and *Wilfrid Barton* for the respondent commission.

Lord Macmillan: The main question to be determined in this appeal relates to the basis on which the appellant company is entitled to be compensated on the transfer to the respondent commission of an electric railway constructed by the appellant company on the Canadian bank of the Niagara River. The Niagara Parks Commission is a statutory body which controls for the Government of Ontario a large area of land on the bank of the Niagara River, above and below the Falls, which has been developed as a public park. The appellant company is the successor of the Niagara Falls Park and River Railway Co., which A was incorporated in 1892 by a statute of the Ontario legislature (55 Vic. c. 96). By that statute an agreement, dated Dec. 4, 1891, entered into between the promoters of the railway in question and the parks commissioners, was ratified and confirmed. The agreement narrated that the promoters (who, and the company thereafter to be incorporated, are B designated "the company") desired to construct and operate an electric railway along the top of the west bank of the Niagara River; the company intended to apply for a charter of incorporation; and that the parks commissioners had agreed to grant on terms the requisite rights of way. The parks commissioners licensed and permitted the company to construct C a first-class electric railway in and through the park and their other lands, and the company undertook to construct, equip and operate the railway. The railway was required to be constructed of material, and according to plans and specifications, to be approved by the parks commissioners and by the Commissioner of Public Works of the Province. D The company was to pay $10,000 to the parks commissioners for the right of way over a strip of land along the river bank known as the chain reserve, and for the benefit of certain contracts made by the parks commissioners with various land owners. The parks commissioners agreed not to grant to any other persons any right to construct or operate E a railway or tramway within the park, and, so long as the agreement was in force, not themselves to engage in any such construction or operation.

Art. 16 of the agreement provides that the right to operate the railway:

F

> shall begin on Sept. 1 next or so soon (before or after that date) as the said railway or any section thereof has been constructed and shall extend to a period of 40 years from the said Sept. 1, 1892, and shall be renewable on the request by the company for a further period of 20 years as hereinafter provided.

By art. 17 it was provided that if, at the end of the 40 years, the parks G commissioners should demand from the company for the succeeding period of 20 years a larger annual sum than that agreed on for the 40 years, the amount to be paid, which was not to be less than that previously paid, should, if not agreed, be fixed by three arbitrators or a majority. The article went on to provide that:

H

> the award of such arbitrators shall be subject to the same provision of law as if the said arbitrators had been appointed by the said parties upon a voluntary reference under the Revised Statute of Canada respecting Arbitrations and References. Either party to such arbitration may appeal from the award upon any question of law or fact to the . . . provincial court of ultimate appellate jurisdiction for Ontario and the said court shall have the same jurisdiction therein as a judge has on an appeal from a report or certificate under sect. 4 of the aforesaid Revised Statute respecting Arbitrations and References.

By art. 19 the company was required to pay by way of rental an annual sum of $10,000 for every year of the period of 40 years, and, if the company should exercise its option of operating the railway for the further period of 20 years, such sum as might be agreed or fixed by arbitration for every year of such further period.

The articles material for the present purpose are arts. 26, 29, and their A terms are of so much importance, and have been subjected to such minute analysis, that it is necessary to set them out in full as follows:

> 26. If at the end of the said period of 40 years, the company are unwilling to renew, or at the end of the further period of 20 years, if the company continue to hold for such further period, the company shall be duly compensated by the commissioners for their railways, equipment, machinery and other works including the B low level railway, if the same shall have been constructed and then held by the company under this agreement, as also the high level railway from Chippawa to Queenston, and including also their works in Chippawa and Queenston, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as in para. 17 of this agreement, but the failure before the expiration of any such term, to fix such compensation in manner aforesaid, or to pay before such expiration, the C amount of compensation so fixed, shall not entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works, by this agreement to be constructed or operated, but the same shall nevertheless and notwithstanding that the commissioners may have taken possession thereof remain subject to such liens and charges save as to possession as aforesaid, as may exist in favour of bond-holders or debenture-holders of the company and the company shall retain a lien or charge thereon, save as to possession as aforesaid for the compensation of their railway, equipment, machinery and works to be agreed upon as aforesaid, D or so to be awarded to them provided, however, that all such liens and charges shall not exceed the amount that may be agreed upon or may be awarded for such compensation as aforesaid.
>
> 29. Subject always to the terms and provisions of this agreement and to the rights of the commissioners as the owners in fee simple of the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement E shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid be entitled to operate, manage and control the same, during the period or periods respectively above-mentioned, it being however hereby declared, understood and agreed that at the end of the said first or second periods as the case may be the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway if then held by the company under this agreement together with their equipment and the machinery and works aforesaid including the elevators or lifts F acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners subject to the payment of compensation to be agreed upon or awarded as the case may be and as is hereinbefore provided for.

The last article of the agreement provides that:

> The company's tariff for passenger fares shall be a reasonable one and shall be subject to the approval of the commissioners, provided however that the commissioners shall G not have the right to insist upon such a tariff as will prevent the company operating the said railway or railways at a fair profit, but it shall be their privilege to exact from the company the imposition of reasonable rates only.

The agreement was, as already stated, "approved, ratified, confirmed and declared to be valid and binding on the parties" thereto by an Act of the Ontario legislature, to which the agreement was scheduled. The H effect of this statutory confirmation was to render every provision and stipulation of the agreement as obligatory and binding on the parties "as if these provisions had been repeated in the form of statutory sections": *per* Lord Cairns, L.C., in *Caledonian Ry. Co.* v. *Greenock & Wemyss Bay Ry. Co.* (1), at p. 349.

By the statute, the appellant company's predecessors were incorporated with a capital stock of $1,000,000. Sect. 4 conferred on the company the requisite powers for the construction and operation of the undertaking, and sect. 27 imposed an express obligation on the company to operate the high-level railway during the existence of the agreement. A Sect. 18, which refers to the compensation payable under art. 26 of the agreement, is of importance for the present purpose; it enacts as follows:

> 18. The directors of the said company shall have power to issue bonds of the company for the purpose of raising money for prosecuting the said undertaking, the whole amount of the issue of such bonds not to exceed in all the sum of $45,000 B for each mile of the said railway and the actual cash value of the wharves, piers, docks, steamers, vessels and other water craft, incline railways, elevators and hotels of the company and the equipment thereof respectively, but such bonds shall be limited as a charge so as not to interfere with the terms of sect. 26 of the agreement; and the amount of compensation under sect. 26 for the railway, its equipment, machinery and works between Queenston and Chippawa shall not include the value of hotels, vessels, steamboats nor the value of any other equipment or works than C such as may be incidental to the use of electric power, nor any excess of the value of the class of work prescribed by the plans and specifications which shall have been approved by the Commissioner of Public Works, nor stocks in navigating companies or in companies building or operating elevators or incline railways, nor the cost or value of elevators or inclined railways, except the elevators or inclined railways expressly authorised to be built or acquired under the agreement, nor of any other works not expressly and specifically provided for by the said agreement set forth in the schedule hereto.

D

The 40-year period of the company's franchise was due to expire on Sept. 1, 1932. Before the arrival of this date, the company notified the parks commissioners that it did not desire a renewal of its franchise for the further period of 20 years. Consequently, on Sept. 1, 1932, "the whole of the company's said high-level railway from Queenston to E Chippawa," with its equipment, machinery and works, became, under art. 29 of the agreement, the property of the parks commissioners, subject to the payment of compensation. The parties failed to agree on the sum payable as compensation, and the question was referred, under arts. 17, 26, of the agreement, to three arbitrators. The arbitrators, F after hearing evidence and argument for the parties, differed in opinion as to the correct method of calculating the compensation payable to the company, two of them taking one view and the third another. The award was thus an award by a majority. On appeal under art. 17 of the agreement, the view of the majority was approved by the Court of G Appeal for Ontario (subject to certain variations in minor matters). A cross-appeal by the parks commissioners to the Court of Appeal was dismissed. The company has now appealed to His Majesty in Council.

For the present, their Lordships disregard the minor questions raised, and proceed to deal with the important matter of the proper method of H computing the compensation payable to the company. It appears, from the reasons annexed by the majority arbitrators to their award, that the contest between the parties was a contest between two rival principles:

> The railway company directed practically all its evidence to the compensation proper to be fixed on the basis of reconstruction less depreciation. The parks

> commission, while also submitting evidence as to compensation on that basis, contended from the outset that compensation on the basis of the cost of reconstruction less depreciation was wholly inapplicable to the present case because the railway when turned over had no value as such to either the railway company or the parks commission, its sole value, according to this contention, being the value that could be realised from the disposal of its component parts.
>
> Having concluded that the proper basis of fixing the compensation is not by ascertaining the reconstruction cost of the railway in 1932 as a whole, less depreciation, we think it is a question of law as to whether or not this conclusion is right, and we have thought it advisable, in order to prevent unnecessary expense to the parties, to fix the amount of the reconstruction cost and the depreciated value, should it later be determined that that basis should have been adopted.

Basing their award on the value that could be realised from the disposal of the component parts of the railway as at Aug. 31, 1932, or, in other words, on "scrap value" as at that date, the majority arbitrators fixed the compensation at $179,104.

In case this should be held to be the wrong basis, they also set out what they found to be the value on the basis of cost of reconstruction, less depreciation, as at Sept. 1, 1932, which they fixed at $967,592. There is thus a wide difference between the figure awarded on the scrap basis and the figure brought out on the basis of reconstruction cost, less depreciation. Their Lordships have not overlooked the fact that, with regard to a few items comprised in their award, the majority arbitrators have departed from the scrap basis, and have allowed either reconstruction cost, less depreciation, or what they otherwise thought to be the full value thereof, but the broad question of law argued at their Lordships' bar was whether, on a sound construction of the agreement and statute, the majority arbitrators were entitled to fix, on the basis of the scrap or residual value of the component parts of the railway, the compensation to be paid on the transference of the property in the railway to the parks commissioners on Sept. 1, 1932. If not, the only alternative, as recognised by all three arbitrators, and by counsel for the parties, is to assess the compensation on the basis of reconstruction cost, less depreciation. It is important to emphasise this point. Their Lordships recognise, as has more than once been said in previous cases, that arbitrators must in general have a wide discretion in selecting their methods of valuation, but where, as here, they have considered two methods, and two methods only, and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference, in this instance contained in the agreement and statute, their decision can be justified. The dissentient arbitrator has furnished a reasoned statement, setting out the grounds on which he differs from his colleagues, and justifying the adoption of the basis, which they rejected, of cost of reconstruction, less depreciation. The remaining facts which it is necessary to state are few but important. The high-level railway was duly constructed, and opened for traffic at first as a single track, and, subsequently, under a supplementary agreement of Mar. 27, 1894, as a double track. For the whole term of 40 years it was operated by the company in fulfilment of the obligation assumed and imposed on it by the agreement and statute. Payment of the annual rental of $10,000 was duly and regularly made to the parks commissioners. The railway, as events have turned out, has proved financially a most unfortunate enterprise. This sufficiently appears from figures which the majority arbitrators, in the reasons for A their award, have abstracted from a statement put in by the company:

> During the last 13 years of operation, the annual loss, after allowing for depreciation and after paying 5 per cent. interest on the $600,000.00 bond issue, ranges from $25,980.42 in 1921 to $112,303.72 in 1931 which was the last full year of operation, and for the last eight months the loss was $78,350.34. . . . The evidence establishes beyond question that there was no prospect of any change in this condition for B the future.

They accordingly reach the conclusion that the railway:

> at the time that it was handed over to the parks commission was of no value for operation as a railway to the railway company or the parks commission or to anyone else.

C The cause of the disappointment of the high expectations entertained at the inception of the project is to be found in the advent of automobiles, and the construction of improved roads to serve this new form of traffic. To an increasing extent visitors have preferred to use private automobiles or public buses to reach and to view the Falls, and the electric D railway as a mode of transportation has been effectively superseded, with no prospect of revival. Notwithstanding the calamitous falling off in its receipts, the company continued to the end of the term of 40 years to maintain and operate the railway. As the majority arbitrators find:

> the railway as a whole when turned over to the parks commission was capable with E proper maintenance of performing its functions as an operating railway and up to that time was in fact performing these functions.

But they also find that:

> it was obsolete as a whole in the sense that by reason of the changed conditions already referred to it became incapable of earning the cost of operating it and F competing satisfactorily with other modes of transportation.

Put briefly, the main ground on which the majority arbitrators discard the principle of assessing compensation on the basis of reconstruction cost, less depreciation, and adopt the principle of breaking up the undertaking into its component parts and valuing them separately, is to be G found in their interpretation of the agreement as not excluding consideration of profits and losses, and as justifying them in fixing compensation on the principle applicable to the case of a landlord taking over his tenant's buildings at the expiry of a lease, namely, on the basis of the value to the taker. As the railway had not been earning, and could not H in the future earn, profits, they consequently held that it possessed for the parks commission only a break-up value. The Court of Appeal unanimously agreed with the view of the majority arbitrators.

Their Lordships have reached a different conclusion. They agree that in the terms of the agreement of 1891, to which they would also add the provisions of the confirming statute, are to be found the principles on which the company is to be compensated, but they can find in these terms no justification for assessing the compensation at break-up value. In the first place—and this is fundamental—it is a railway complete with equipment, machinery and works, which the company was bound to hand over to the parks commissioners on Sept. 1, 1932, and not the components of a railway. The company maintained and operated the railway, as it was bound to do, up to midnight on Aug. 31, 1932, and it was this railway, capable of being at once operated by the parks commissioners, that it in fact handed over, as it was bound to do. It could not legally, if it had been possible in fact, have dismantled the railway at the end of the 40 years, and tendered the broken-up material to the parks commissioners in fulfilment of its obligation. That for which it is to be duly compensated is the same thing as that which it was bound to hand over, namely, its railway, with its equipment, machinery, and other works, a going concern, and not a mere collection of materials. Their Lordships know of no instance in which the compensation, payable by the transferee of a public utility undertaking, as a going concern, to the transferor, has been fixed at the break-up value to the transferee, and they find no indication of any such intention in the documents before them. It would require very clear language indeed to lead to such a result. The legislature of Ontario, in authorising, by sect. 18 of the confirming Act, the issue of bonds by the company, makes express reference to the bonds being made a charge on the compensation payable to the company at the expiry of its franchise, as contemplated in art. 26 of the agreement. If intending bondholders had been informed that the compensation on which they were asked to rely as security for repayment of their capital "need amount to no more than" the break-up value of the railway material, it is not likely that there would have been much response to the issue. Neither the agreement nor the Act contains any such warning, either in the plain language which would have been proper, or implicitly. If the terms of transfer rightly construed "may" entitle the company only to the break-up value of its railway at the termination of its franchise, sound accounting would have indicated the propriety of building up an amortisation fund out of earnings during the currency of the franchise. It is at least questionable whether, under the last article in the agreement, requiring the imposition of reasonable passenger fares only, the parks commissioners would have approved of the cost of such a fund being represented in the fares. It is significant that, notwithstanding the large number of cases which have come before the courts in which many different formulæ of compensation have been construed, counsel were unable to refer their Lordships to any case in which the acquiring authority has been found liable only *in quantum lucrati*, as it has been by the majority arbitrators in the present case. A result so contrary to practice and doctrine would require, for its justification, the clearest directions in the terms of transfer.

With all respect to the judges of the Court of Appeal and the majority arbitrators, it would appear that they have allowed themselves, in construing the terms of transfer, to be unduly influenced by the unfortunate financial experience of the company. But the interpretation of the terms of transfer cannot be affected by the events that have happened. The majority arbitrators held that "consideration of profits is not A excluded as an element in fixing value," and the Court of Appeal agreed that, as it had been demonstrated that the railway had not been, and could not be, worked so as to make any profit, the basis of compensation must be the value of its component materials to the parks commissioners. But the meaning of the agreement must be the same whether the railway B proved a success or a failure. Let it be assumed that, instead of being a financial disaster, it had been highly prosperous. In that event, according to the reading of the terms of transfer adopted below, the compensation payable by the parks commissioners would have had to have regard to the large profits which the company was earning, and the parks commissioners C would have had to compensate the company, not for the value of its railway as a structure, but for the loss of the profits which it was making by it. The compensation might thus be out of all proportion to the value of the railway as a structure, which was all that the parks commissioners acquired, and would be based upon an estimate of future D profits in which, as its franchise had expired, the company had no interest whatever. Their Lordships are of opinion that such an interpretation is a misreading of the terms of transfer. It is a familiar feature, common to all cases in which a franchise for a public utility is granted to private undertakers for a limited period, coupled with an obligation to transfer E the undertaking to a public authority at the conclusion of the period, that the undertakers must look to reap the reward of their enterprise in the profit which they may make during the currency of their franchise, and on its expiry shall receive only the value of the structure which they have created, without any compensation either for the profits or the losses F which they may have made or sustained while in the enjoyment of their franchise. This is plainly just, for, with the termination of the franchise, the power to make profits or the liability to incur losses simultaneously terminates. The promoters have had their chance to make what they can out of their undertaking in the knowledge that it was of limited G duration and that they must part with it at a fixed date. To compensate them on the basis of the profits which they have made and are surrendering would be to assume that they had a right to go on making profits although *ex hypothesi* the franchise which gave them that right had come to an end.

H It is these considerations which, in their Lordships' view, render it erroneous in principle to have regard to profits earned or losses sustained when what is in question, as here, is the compensation to be paid to a private undertaker at the expiry of its limited franchise for the physical structure which it has created and which has then to be transferred to a public authority. In the present case, the agreement expressly stipulates that the company is not to be compensated "in respect of any franchises for holding or operating" its railway. That is to say, it is to receive nothing in respect of the loss of the right to make profits which the franchise conferred upon it. The effect of these words is equivalent to the exclusion of any allowance for past or future profits. As the dissentient arbitrator states : A

> A long line of cases has approved this [i.e., the principle of reconstruction cost, less depreciation] as a correct method of valuing a public utility where the value of the franchise is excluded from consideration.

It is said that the present is not a case of compulsory acquisition, and that this circumstance affects the nature of the compensation payable. B The company, it is said, is thankfully relinquishing a *damnosa hereditas*. But again it has to be remembered that the terms of transfer must be read as equally applicable to a transfer of the railway in 1952, when the company's franchise definitely expired, and also to a transfer in the height of prosperity. If the company had been highly prosperous, and C had applied for, and obtained, an extension of its franchise to Sept., 1952, it would, on the arrival of that date, have had compulsorily to relinquish, however reluctantly, its profitable undertaking to the parks commissioners, and the same terms of transfer, construed in the same way, would have been applicable. Their Lordships are accordingly of D opinion that the majority arbitrators have misdirected themselves in law in their interpretation of the terms of transfer, and that the judgment of the Court of Appeal in affirming that interpretation is erroneous. The company has transferred to the parks commissioners its railway as a complete entity, duly equipped and capable of performing its functions E as an operating railway, and in that sense capable of earning a profit. That it cannot in fact earn a profit, owing to the development of motor transport, is not a relevant consideration in assessing the compensation to be paid for the railway under the terms of transfer. It follows that the alternative method of valuation which the majority arbitrators F rejected must receive effect, and the company must be compensated on the basis of reconstruction cost, less depreciation. Fortunately, the majority arbitrators contemplated this possibility, and have provided the necessary figures which they fixed, as they tell us, after making "proper allowance for the age and obsolete type of the machinery and G equipment."

Next arises the question of interest on the compensation money. The majority arbitrators state that they :

> have not included any sum for interest on the amount of the compensation, being of opinion that this is a matter beyond our jurisdiction.

H

The question is apparently not dealt with in the judgment of the Court of Appeal. In the case of *Toronto* (*City*) *Corpn.* v. *Toronto Railway Corpn.* (2), this Board, while recognising "the general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid," held that arbitrators whose only duty was "to ascertain the actual value of certain property at a certain time" had no power to include interest in their assessment of value: see *per* VISCOUNT CAVE, at p. 193. Their Lordships are of opinion that this principle applies to the present case, and that the company must seek enforcement of its claim to interest, if any, outside the present arbitration.

The last question relates to costs. The majority arbitrators awarded to the company its:

> taxable costs of this arbitration excluding therefrom such costs as have been the subject of agreement between the parties.

The Court of Appeal varied the award in this respect so as to give the company:

> its costs of the arbitration incurred with relation to matters upon which it succeeded.

In view of their Lordships' opinion that the company ought to have been substantially successful in the arbitration, and in view of the relatively unimportant points on which it has been unsuccessful, their Lordships think that the award of the majority arbitrators as to costs should be restored.

Their Lordships accordingly will humbly advise His Majesty that the appeal be allowed; that the order of the Court of Appeal of Dec. 31, 1935, be recalled, except in so far as it ordered the Niagara Parks commission to pay to International Railway Company its costs of the cross-appeal and motion for leave to cross-appeal; and that the case be remitted to the Court of Appeal with a direction to pronounce an order that the award of the majority arbitrators be varied and as varied be as follows:

> (1) We fix, award, adjudge and determine the amount of the compensation to be paid to International Railway Company to be the sum of one million, fifty-seven thousand, four hundred and thirty-six dollars ($1,057,436). (2) We fix, award, adjudge and determine that the Niagara Parks commission does pay to International Railway Company its taxable costs of this arbitration, excluding therefrom such costs as have been the subject of agreement between the parties.

The appellant company will have the costs of its appeal to the Court of Appeal, and of its appeal to His Majesty in Council.

Appeal allowed with costs.

Solicitors: *Charles Russell & Co.* (for the appellant company); *Gard, Lyell & Co.* (for the respondent commission).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

DAVIES AND ANOTHER *v.* HOSKEN.

[King's Bench Division (Porter, J.), **May 27, 28, 1937.**]

Insurance—Solicitor's indemnity policy—Indemnity in respect of loss arising from neglect, omission or error committed by solicitors or their employees—Fraud on clients by employee—Resulting loss by solicitors—Whether covered by policy.

Certain solicitors had taken out an insurance policy against loss arising from any claim which might be made against them by reason of any "neglect, omission or error" committed on the part of the solicitors, or any person employed by them, in or about the conduct of any business conducted by or on behalf of the solicitors in their professional capacity as solicitors. A clerk employed by the solicitors received sums of money from clients of the solicitors for investment in securities, which did not, and were not intended to, exist and these sums the clerk had applied to his own purposes. The facts being discovered, the solicitors paid their clients' claims and sought to be indemnified under the insurance policy :—

Held : the wording of the policy was not apt to cover the loss sustained by the solicitors as a result of the clerk's fraudulent acts.

[**EDITORIAL NOTE.** A policy to indemnify a person against any neglect, omission or error, does not extend to a positive act of fraud by that person or his agent ; still less to an act of the agent when he is exceeding his authority and acting outside the scope of his employment.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 18, pp. 542-544, paras. 862-865 ; and for Cases, see DIGEST, Vol. 29, p. 422, Nos. 3285-3289.]

Case referred to :

(1) *Haseldine* v. *Hosken*, [1933] 1 K.B. 822 ; Digest Supp. ; 102 L.J. K.B. 441 ; 148 L.T. 510.

Action upon a policy of insurance in respect of certain losses incurred by the plaintiffs in their business as solicitors.

The plaintiffs had taken over the business which had been carried on by a Mr. Ashford, a solicitor, who had died, and they had continued to employ a clerk, Digby, who had been in Ashford's employment. Certain clients of the plaintiffs had handed sums of money to Digby for investment on mortgage, and Digby had in some cases put the money so received into his own pocket, and in others he had paid it into the firm's account and had then fraudulently induced the plaintiffs to draw cheques, which he applied to his own purposes. The facts being discovered, the plaintiffs paid their clients' claims, prosecuted Digby and secured a conviction, and then sought to be indemnified under a solicitors' indemnity policy which they had taken out with the defendant and other Lloyd's underwriters.

H. D. Samuels, K.C., and *Frank Soskice* for the plaintiffs.

A. T. Miller, K.C., and *W. L. McNair* for the defendant.

Porter, J. : [His Lordship referred to the facts.] The main question which I have to decide is : Does the loss come within the terms of a policy which has been effected by the firm with Mr. Hosken ? There is no doubt about it that it is a serious loss, and there is no doubt that everyone has the greatest possible sympathy with Messrs. Davies in a matter which was no fault of theirs. But the question which I have to determine is a much narrower one, whether it comes within the terms of a policy called a solicitors' indemnity policy. The insurance is against loss arising from any claim which may be made against the firm by reason of any neglect, omission or error committed on the part of the firm, or any person employed by the firm, in or about the conduct of any business conducted by or on behalf of the firm in its professional capacity as solicitors. The first problem which was raised by Mr. Miller was, does this wording include fraud, and, in particular, does it include the class of fraud in this case, namely, the obtaining of sums of money for pretended investment in securities which did not, and were not intended to, exist ? *Prima facie,* I should not think the words " neglect, omission or error " were words apt to cover a case of that kind. I should have more difficulty, I think, if the words were " any act, neglect, omission or error." But the word " act " is carefully left out of the wording of the policy, and it is confined to " neglect, omission or error." *Prima facie,* I should have thought that these words do not point to a fraudulent act, such as the obtaining of money ; they point to an omission. Broadly speaking, if one were asked what Mr. Digby did in this case, one would have said that he concocted a scheme for obtaining money from persons with whom his previous firm had dealt, and who were clients, also, of his present firm, and obtained money from them by false pretences or by fraud. But, looked at broadly, that is not neglect, omission or error ; it is a positive act of fraudulently obtaining money from third parties. But it is said that Digby omitted, fraudulently, to obtain or provide valid security for the money advanced. Now, is that such an omission as the policy covers ? To my mind it is not. The policy deals rather with leaving undone the things one ought to have done than with doing things which one ought not to have done. In substance, what Mr. Digby did was to obtain money by fraud, not to fail to provide the security. I think that that view is supported by the words of SCRUTTON, L.J., which, as I understand it, the rest of the court approved, in *Haseldine* v. *Hosken* (1). SCRUTTON, L.J., says, at pp. 832, 833 :

> It is puzzling to know what the neglect, omission or error was. Mr. Haseldine knew what he was doing in this sense that he made the agreements which clearly expressed what he intended. It is quite true that he appears to have been unaware that what he was doing was illegal or that he was committing a criminal offence ; that, however, is not the kind of neglect, omission or error contemplated by the policy. I approach the consideration of the policy in two ways.

He puts the first, which I need not trouble with, and then he says :

> The other view is, and I think this is the more likely view, that the commission of a criminal act, knowing what the act is that is being committed, does not come within the words, " neglect, omission or error."

That, of course, in terms, would cover the omission in this case, were it not for an argument which Mr. Samuels put before me, and with which

I ought to deal. Mr. Samuels rightly pointed out that those words were applied in a case where the principal was the person who had done the act, and not some agent on his behalf. I do not think that argument ought to prevail, because, as I follow the wording of the policy, it seems to put the principal and the agent on the same footing. It does not cover the principal only and then leave out the agent, but there is express wording in the policy which covers neglect or omission of the agent, and it seems to me that, if it be true that the words "neglect, omission or error" are not apt to cover such actions as these in the case of a principal, then neither are they apt to cover such actions as these in the case of an agent.

But various other matters have been argued, upon which I think I ought to express some view, although I do not propose to decide the case upon them. Mr. Digby had no authority to arrange mortgages. He had authority only to receive money, and, despite the strenuous argument of Mr. Samuels, I still think that it does not follow that, because a man has authority to receive money, he therefore has authority to receive money upon terms that it was to be advanced, and to bind his principals by those terms. I gave the illustration, in argument, of some member of a business firm having the right to receive money, and said that, in my view, that did not give him the right to make bargains which might involve his principals in heavy loss, because that was not part of his duty.

Then there remains the other position which I was asked to assume. Suppose that Mr. Digby had authority to make a bargain. Then comes the question whether the client could sue, in that case, for negligence, and, if so, what would be the negligence which would have to be put forward. I am not sure that this is not another view of the first part of my answer. No doubt they could sue for fraud; they could say he forged it; that Mr. Digby, or his principals through Mr. Digby, had fraudulently obtained the money. Let me say at once that it would be Digby's fraud. Mr. Samuels' answer was that he fraudulently omitted to procure or provide valid securities. I do not think I need necessarily finally decide this; but my own view is that that is not the kind of omission which is here covered.

That leaves this one question: In any case, did the omission to procure the valid security cause the loss? It is possible to say that there was a loss to the claimant. One position is plain, that there was a claim, and my own view is that it would be much too subtle to say that the right to recover depends upon what form of action the clients chose to take—I do not think the English law is so narrow as that. But there was a claim, and, I assume, a claim for negligence in not providing a proper security. Here, again, I do not propose to decide the matter. Mr. Samuels' argument, by which I am attracted, is that, if Digby had authority, to sell and bargain and receive the money in that behalf, there would be a loss to the extent of the money he had received. But I do not propose to decide that; it might give rise to a good deal of calculating as to what the amount of damage in this case was. It might give rise to this kind of question: Digby promised to provide such and such a security, and that security is worth £5,000. He in fact found a security worth nothing, but he put £4,000 into his pocket. Is there a loss of £5,000 or one of £1,000? It may give rise to questions of that kind, but I do not propose to decide them. It is open to both sides if they should decide to take this case further. My own general view is that to analyse up to that extent is probably wrong, because the real position is not a division of Mr. Digby's activities. He really set out to make a positive act, to make money by false pretences; that was an act, and not a neglect, omission or error, and therefore does not fall within the terms of the policy.

For those reasons, I think the claim fails. It is unfortunate for Messrs. Davies that that should be so, but it is, of course, a question of what the actual words cover. I will not say what they are meant to cover, because neither party thinks exactly, nor can be expected to think exactly, the same about what the words intended to cover. If the words do not cover a particular matter, the insurers are entitled to take the point. In those circumstances the claim fails.

Action dismissed.

Solicitors: *Cropley Davies & Son* (for the plaintiffs); *Hair & Co.* (for the defendant).

[*Reported by* MALCOLM LOGAN, ESQ., *Barrister-at-Law.*]

LAMBERT AND ANOTHER *v.* F. W. WOOLWORTH & CO., LTD. (No. 2).

[CHANCERY DIVISION (Simonds, J.), **June 2, 3, 4, 7, 1937.**]

Landlord and Tenant—Improvements—Unreasonable withholding of licence—Compensation substantial but uncertain in amount—Right of landlord to consider self interest—Covenant against making alterations—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 19 (2).

The plaintiffs were the lessors and the defendant company the lessee of certain shop property. The defendant company desired to convert this property together with other property of which it had secured a lease into a composite shop. In previous proceedings the Court of Appeal had by a majority expressed the view that what was intended to be done was an improvement within the Landlord and Tenant Act, 1927, but dismissed the appeal upon other grounds. The defendant company after the conclusion of the appeal wrote to the plaintiffs stating it was desirous of executing the works and offering an undertaking to reinstate the premises upon the determination of the lease, an undertaking to pay all costs and expenses and to provide security for the performance of the undertaking to reinstate. The plaintiffs withheld their consent to the execution of the works upon these terms and refused to go to arbitration upon the question of the amount of the compensation or to place that question before any tribunal. The plaintiffs then brought this action claiming a declaration that the proposed works were breaches of certain covenants in the lease and that the licence to perform such works had not been unreasonably withheld within the Landlord and Tenant Act, 1927, s. 19 (2). The defendant company counterclaimed for a declaration that the proposed works were improvements within the Act :—

Held : (i) following the opinion expressed by the Court of Appeal, the proposed works were improvements within the Act.

(ii) the plaintiffs were not acting unreasonably (*a*) in refusing to name any sum as compensation as the result of naming a wrong sum would make it possible for the defendant company to carry out the works without licence and without any payment of compensation ; (*b*) in refusing to give their licence to execute the works subject to the proposed terms as to reinstatement and a payment of compensation which the defendant company was at all times alleging should be purely nominal.

(iii) a lessor in considering whether he will withhold his consent or not is to act reasonably, not arbitrarily nor capriciously, but prudently in his own self interest.

(iv) a covenant in the lease "not without the previous consent in writing of the lessors to erect or suffer to be erected any other building upon the premises nor to make or suffer to be made any structural alterations thereto" is a covenant condition or agreement against the making of improvements without licence or consent within the Act.

[**EDITORIAL NOTE.** This is a continuation of the litigation upon improvements under the Landlord and Tenant Act, 1927, in relation to multiple shops. The point of the present decision is that the lessor is put in this dilemma : if he asks the wrong amount of compensation for the improvements, the tenant upon establishing the fact that he has done so, may proceed to execute the works without licence and without paying any compensation to the landlord. If placed in such an impossible position, it is here held that the lessor will not in refusing his licence have acted unreasonably. It seems to be necessary for this result that there must be a finding that the damage to the reversion will be serious although the exact amount is speculative and difficult to quantify. It will be noted, too, that the judge decides that although an alteration not beneficial to the landlord may be an improvement within the Act, yet the landlord in deciding whether or not to give his licence has only to consider, as a prudent man of business, his own self interest.

As to Improvements, see HALSBURY, Hailsham Edn., Vol. 20, pp. 212, 213, para. 231 ; and for Cases, see DIGEST, Supp., Landlord and Tenant, Nos. 2995*a*, 2995*b*.]

Action for declarations that proposed works were breaches of covenants contained in a lease granted by the plaintiffs to the defendant company and that a licence to carry out such works had not been unreasonably refused by the plaintiffs. The defendant company counterclaimed for a declaration that the proposed works were improvements within the meaning of the Landlord and Tenant Act, 1927. The facts and the previous history of the case are fully set out in the judgment, and the earlier proceedings are reported in [1936] 1 All E.R. 333, and [1936] 2 All E.R. 1523.

Cyril Radcliffe, K.C., and *Roger W. Turnbull* for the plaintiffs.

Fergus D. Morton, K.C., and *S. P. J. Merlin* for the defendant company.

Simonds, J. : The plaintiffs in this suit are the owners of certain shop property, Nos. 18 and 20, Commercial Road, Bournemouth, which has a valuable frontage upon Commercial Road, and which, in its present state, is a property easily available for sale or for raising money by way of mortgage. It is held by the plaintiffs as partnership property. They carry on business as builders and dealers in property. That property was, in 1931, demised in its then state to the defendant company. That lease, dated Feb. 27, 1931, was for a term of 42 years, at a rent of £3,500 a year, to be increased to £3,750 a year as from June 24, 1945. The lessees were to carry out certain alterations upon the premises, which had the effect of producing the buildings which are now upon the site. That lease also contained a number of covenants, of which only two or three are material for the present purpose. It contained a covenant:

> Not without the previous consent in writing of the lessors to erect or suffer to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises [except that the alterations might be carried out].

Then there was a proviso, which is not material for the present purpose. Then there was a covenant, which is in cl. 2 (xi) of the lease:

> Not to carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade business or calling whatsoever but to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood.

Then there was a covenant, which is cl. 2 (xii):

> Not to do or permit anything in or upon the demised premises or any part thereof which may be or become a nuisance annoyance disturbance or damage to the lessors or their tenants or occupiers of other property or the neighbourhood nor to commit or suffer to be committed any waste spoil or destruction on the demised premises.

Finally, a covenant, which is cl. 2 (xiv):

> Not to stop up darken or obstruct any windows or lights belonging to the demised premises and not knowingly to permit any new window light opening doorway path passage drain or other encroachment or easement to be made into against or upon the demised premises.

That was the lease, granted in 1931, of Nos. 18 and 20, Commercial Road, to the defendant company, F. W. Woolworth & Co., Ltd.

In the year 1935, F. W. Woolworth & Co., Ltd., acquired a leasehold interest in premises immediately in the rear of Nos. 18 and 20, Commercial Road. The company got a lease, from one Commander Monro, of those premises for a term, which expired at the same time as the term of Nos. 18 and 20, Commercial Road. The rent payable was a sum of £500, and by that lease the defendant company covenanted to carry out certain alterations and works, with a proviso that the covenant should not become operative unless the consent of the landlord of Nos. 18 and 20, Commercial Road, had been obtained. Having obtained that lease of the premises in the rear, F. W. Woolworth & Co., Ltd., was minded to carry out certain alterations, which would have the effect of making Nos. 18 and 20, Commercial Road, and the premises in the rear, one composite building, highly convenient for its own purposes, but it could not do that without the consent of its landlords of Nos. 18 and 20, Commercial Road, the plaintiffs. Accordingly, the defendant company applied for their consent, and, in doing so, relied upon the Landlord and Tenant Act, 1927, s. 19 (2), which I will now for convenience read:

> In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

After a good deal of correspondence and negotiation, it appears that F. W. Woolworth & Co., Ltd., made its application for leave to make its proposed alterations, which, as I say, involved the throwing of the demised premises into one composite building, the removing of the back wall, and the removing, amongst other things, of the proper lavatory accommodation. It applied for leave to make those alterations, and offered, as a term, that it would give a covenant for reinstatement at the determination of the term, that that covenant for reinstatement should be supported by the guarantee of a proper insurance company, and, further, finally, it offered that it would pay a reasonable sum in respect of any damage to or diminution in the value of the premises, if any, such sum to be ascertained by the court if not agreed. Those proposals were rejected by Messrs. Lambert, who, however, had in their turn offered that they would consent if a sum of £7,000 was paid to them and the other conditions were observed. They had then been advised by two gentlemen, eminent in their profession, that £11,000, as one of them said, and £7,000, as another of them said, would be proper compensation to be paid.

In that state of deadlock the previous action was commenced, in which F. W. Woolworth & Co., Ltd., contended that there had been an unreasonable refusal by the Lamberts of a licence to make these alterations, and, accordingly, it was entitled to go on with them without such consent. That action came, in the first place, before Clauson, J., who decided that the alterations proposed by the defendant company were not improvements at all within sect. 19 of the Landlord and Tenant Act. Accordingly, if that were so, no question of any unreasonable refusal arose at all. But he further held that, even if he were wrong upon that point, the plaintiff company had not established that there had been an unreasonable withholding of consent. F. W. Woolworth & Co., Ltd., appealed from that decision of Clauson, J., to the Court of Appeal, who held, in the first place, that the appellant company had not established that there had been any unreasonable withholding of consent, because it had not been established that the sum of £7,000 was an unreasonable sum to ask as a condition of such assent, and, for that reason, the appeal was dismissed. But their Lordships went on, by a majority of two to one, to decide that the alterations were improvements within the Landlord and Tenant Act, 1927, s. 19. They held in effect that an alteration is an improvement if, as a result of it, the tenant will, during the period of his lease, obtain a more beneficial user of the demised premises, whatever the result may be to the landlord at the end of the term. The result, of course, of that was, amongst other things, that Messrs. Lambert were unable to contend, as they proposed to contend, if necessary, in the highest court, that these alterations were not improvements.

I want to call attention to just one passage in the judgment of Lord Wright, M.R., as it has some bearing upon the future action of the parties. At p. 1535, Lord Wright, M.R., said this :

> If it [£7,000] had been proved that it was an unreasonable sum to demand, then I think the tenant [Woolworths] would have succeeded in proving that consent was unreasonably withheld. I have not come to that conclusion. On the evidence before me, I apprehend that the matter will be open now. Attempts have been made to induce the defendants to agree to submit this one issue to arbitration. They are not bound to submit it to arbitration, and the plaintiffs, therefore, if they desire to proceed in this matter, and if my view of the construction and application of the section to the facts of this case prevails, will be able to take such action as they think fit in order to meet this serious difficulty about the question of the reasonable sum. I do not pretend to follow out the various possibilities, some of which have been considered in the course of the argument. It is enough to say that, for the reasons I have given, however unsatisfactory the result may appear, this appeal fails and should be dismissed with costs.

That judgment was given on July 29, 1936, and within a few days the solicitors for F. W. Woolworth & Co., Ltd., reopened the matter. On Aug. 11, 1936, they wrote to the solicitors for Lamberts a letter, in which, after referring to certain aspects of the judgment, they said this :

> As we have repeatedly indicated, our clients have always been ready and willing to pay a reasonable sum in respect of any diminution in value of the demised premises, which would ensue by reason of the carrying out of the proposed works, and we think that you will agree that the only question now outstanding between the parties in view as stated of the opinion of the Court of Appeal is the amount which our clients should pay as compensation for any diminution in value of the premises. In view of this, and bearing in mind the statement of Mr. Cyril Radcliffe [counsel for Lamberts in the previous proceedings] as to the amicable relations between the parties and the desire of your clients to assist their tenants so far as possible without damage to themselves we suggest that a reasonable method to dispose of the difficulty would be for the question of the amount of compensation (which method was indeed expressly suggested by Lord Wright, M.R., in the appeal) to be referred to an arbitrator to be agreed between the parties whose decision as to the amount payable, if any, would be final and binding. If your clients agree to this suggestion we will submit to you the names of six gentlemen for selection as arbitrators from among the ex-presidents of the Chartered Institute of Surveyors for your choice, or leave the choice to lot if preferred.

There was some short delay, owing to the fact that the member of the firm who dealt with the matter was away on vacation, but finally, on Sept. 18, 1936, that proposal was unequivocally rejected. By letter of that date the solicitors for Lamberts say :

> We of course appreciate that there is a difference of judicial opinion as to the effect of the Landlord and Tenant Act but we cannot agree that the only question

> now outstanding between the parties is the amount which your clients should pay as compensation for any diminution in value of the premises. Our clients do not consider that the proposals are improvements within the Act or that their objection to them is unreasonable. Quite apart from the question of compensation they object to the proposals and they wish to preserve their premises as one unit rather than be compensated for the diminution in value to the demised premises which would ensue by reason of the carrying out of the proposed works. We do not think it necessary to deal more exhaustively with the grounds of their objections now. For the reasons given our clients cannot see how the matter can be disposed of by arbitration in the way you suggest.

That was on Sept. 18, 1936. The letter was acknowledged, and the matter dropped. For three and a half months there was no communication between the parties, so far as appears from the correspondence, but, on Jan. 4, 1937, as I say, some three and a half months later, the matter was reopened by the solicitors for F. W. Woolworth & Co., Ltd., who on that date wrote to the solicitors for Lamberts a letter, which is a formal application for leave or licence to make the alterations then proposed. Let me say that the alterations then proposed were alterations substantially the same as those which had been the subject of the previous litigation, but not in all respects identical. This is the letter:

> Our clients Messrs. F. W. Woolworth & Co., Ltd., are desirous of making certain alterations to the above premises and we hereby apply for a licence from your clients Messrs. G. T. Lambert and W. R. Lambert to make such proposed alterations. We enclose herewith a complete set of our clients' working drawings for these proposed alterations and a copy of the specifications for approval by your clients. We also enclose a copy of the agreement with Messrs. Munro, dated Dec. 31, 1936, and endorsed upon the lease, dated July 4, 1935, which shows the arrangement come to between our clients and Messrs. Monro with regard to their property adjoining that of our clients. Our clients are prepared as a condition of such licence to execute a deed containing: (i) an undertaking to reinstate the said premises in the condition in which they were before the proposed alterations were executed; (ii) a provision for satisfactory security for the performance of the said undertaking; (iii) an undertaking to pay all your clients' legal and other expenses properly incurred in connection with such licence. As this matter is somewhat urgent we should be obliged if you would kindly take your clients' instructions on the matter at your early convenience. Should you desire further copies of the working drawings and specifications, we shall be happy to supply the same.

It will be observed that that application, while it contains an offer of an undertaking to reinstate, and that of a provision for satisfactory security for the performance of that undertaking, and an undertaking in regard to costs and expenses, contains no suggestion whatever of paying any sum by way of compensation for damage to the demised premises. I think it is impossible, reading that letter in connection with what has gone before, to come to any other conclusion than this, that F. W. Woolworth & Co., Ltd., hoped by that letter to put Messrs. Lambert in what counsel for F. W. Woolworth & Co., Ltd., has agreed was a perilous position. It hoped to place them in this position, that the Lamberts, being, as they well knew, advised that they were likely to suffer grave, though unpredictable, loss, would demand payment of a sum which F. W. Woolworth & Co., Ltd., would ultimately be able to establish was excessive, and, accordingly, it hoped by that means to establish that there had been an unreasonable refusal of the same, and so it would have been able to go ahead with its alterations without consent, and without making any payment.

That letter was duly received and acknowledged, and I need not go through the ensuing correspondence in any detail. The result of it was that the Messrs. Lamberts declined to give that assent. They did not put forward any kind of proposal for the payment of a particular sum by way of compensation, nor any proposal for an assessment of compensation by any tribunal. The course which they took was to withhold consent, for that is what, in my judgment, their action amounted to, although they put it in the form of postponing their decision until the question which they wished to have adjudicated upon should be determined, if necessary, by the highest tribunal, whether these proposed alterations were in fact improvements within the statute.

Accordingly, in order to carry out their policy, Messrs. Lambert commenced these proceedings by writ on Feb. 3, 1937, claiming a declaration that the said works were not "improvements" to the demised premises within the meaning of the Landlord and Tenant Act, 1927; claiming further a declaration that the works, if carried out, would constitute or involve a breach of the covenants by the defendant company contained in the lease referring not only to cl. 2 (xi) and cl. 2 (xii), which had been the subject of the previous proceedings, but by amendment to subcl. (xiv) also. They further claimed a declaration:

> That the covenant by the defendants in cl. 2 (v) of the said lease is not on the true construction thereof a "covenant condition or agreement against the making of improvements without licence or consent" within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2).

They claimed further that:

> in the event of the withholding by the plaintiffs of licence or consent to the execution by the defendants of the said works such licence and consent would not thereby be unreasonably withheld within the meaning of sect. 19 (2) aforesaid.

To that claim there was a counterclaim, by which F. W. Woolworth & Co., Ltd., claimed for a declaration that the alterations were improvements; a declaration that the covenant was, on the true construction, a "covenant condition or agreement against the making of improvements without licence or consent" within the meaning of the Act, and a declaration that:

> the plaintiffs have unreasonably withheld their licence or consent to the execution by the defendants of the said alterations.

Now, the matter coming before you upon those pleadings, the first question which I have had to consider was this, whether it was really open to me to consider the questions raised by the claim and the counterclaim so far as they had already been observed upon by the Court of Appeal. At an early stage in the course of these proceedings, I came to the conclusion that, whether or not it could be argued that the opinions of the Court of Appeal upon those matters formed part of the *ratio decidendi*, it would not be consistent with seemliness, or the respect which is due from me to the Court of Appeal, to allow to be canvassed whether the opinion of the majority or of the minority of the Court of Appeal was right.

Accordingly, I propose, without expressing any opinion of my own, simply to follow the Court of Appeal upon those matters. I hold consistently with what they held, that these alterations are improvements within the Landlord and Tenant Act, 1927, s. 19 (2). I hold further that the landlords, the Lamberts, cannot rely upon cl. 2 (xi) or cl. 2 (xii), and, although an argument was addressed to me, which was not addressed A
to the Court of Appeal, upon the effect of subcl. (xiv), I hold further that it is only consistent with the finding of the Court of Appeal upon subcls. (xi) and (xii) that I should hold that the lessors cannot rely upon the provisions of subcl. (xiv). I further hold, upon para. 3 of the claim, that the covenant by the defendant company in cl. 2 (v) is, on the true B
construction thereof, a covenant condition or agreement against the making of improvements without licence or consent within the Act.

Accordingly, it remains for me only to determine the question raised both by the claim and by the counterclaim, whether upon those premises the landlords, the Lamberts, have unreasonably withheld their licence C
and consent to the alterations. In considering that question, although I follow, of course, what the Court of Appeal has said, that an alteration may be an improvement, although in the result it may not be beneficial for the landlord, yet the landlord, in considering whether he will withhold his consent or not, need look only at his own self interest. He must D
act reasonably in his own interest; that means, he is to act as a reasonable man, not arbitrarily, not capriciously, but prudently, in his own self interest. I must, of course, further consider all the relevant circumstances in determining whether he has so acted or not. Upon that footing, this is the way, as it appears to me, in which I must look at E
the matter. Upon this application of Jan. 4, 1937, being refused, there were, I suppose, three courses open to the landlords. They might have said, "Yes, we assent"; they might have said, "No, we refuse," or they might have given a qualified answer; they might have said, "Yes, we assent if you will give us adequate compensation." F

Now, having been advised by one of the most eminent gentlemen in the profession, an estate agent and surveyor, and having, as I am entitled to assume, accepted his advice, that the damage to their reversion arising from the proposed alterations would be serious, although the exact amount was speculative and difficult to quantify, it is clear that they G
were not unreasonable in refusing to give an unqualified assent to the proposals. Were they, then, unreasonable in not giving a qualified assent, that is to say, an assent subject to adequate compensation being paid? I am not proposing to lay down any general rule for the construction and application of sect. 19 (2) of the Landlord and Tenant Act. H
There may be cases in which the tenant can leave it to the landlord, if he thinks fit, either to demand compensation in general, or to demand a particular sum by way of compensation as a condition of his assent; and it may be that, in such cases, the landlord would be unreasonable if he gave an unqualified refusal to the tenant's application, not availing

himself of the opportunity which the statute affords of requiring compensation, but, in the present case, I do not think that the landlords were unreasonable. They knew that, while they had been advised that their loss would be substantial, though difficult to quantify, the defendant company had been advised, and would maintain the view, that they had suffered, and would suffer, no loss at all. They knew if they named, as a condition of their assent, such a sum as £11,000 or £7,000, or any other sum which their responsible adviser suggested might be estimated as the measure of their loss, and it was held that this sum was excessive, they stood in peril of recovering nothing, even though the amount of their loss might be only a little less than the sum for which they had stipulated. Then it might be said that they had unreasonably withheld their assent, and F. W. Woolworth & Co., Ltd., would be entitled to go on without it; nor have I any doubt, as I have already said, that the company intended to place them in this position of peril, and that they knew it. I do not think the Lamberts were in any way unreasonable in refusing to run such a hazard. On the contrary, I think no reasonable man, with a careful consideration of his own self interest, would have done so. But, assuming that the Lamberts reasonably declined to make the payment of a named sum as the condition of their assent, were they unreasonable in not giving their consent subject to a more vague condition, such as, that there should be paid such compensation as some independent arbitrator should determine. The answer seems to me plain. I wholly fail to see why, in such a case, Messrs. Lamberts should submit the matter to the risk of arbitration. They were advised, and were entitled to believe, that the alterations would cause them grave loss. Why should they face the trouble, delay, and anxiety of proceedings, in which, as they well knew, the whole resources of F. W. Woolworth & Co., Ltd., would be ranged against them. The result might, in terms of money, be satisfactory, but, equally, it might not, and, unfortunately for them, if it were not, the opinion and award of the arbitrator would have no influence whatever in determining, when they come to realise the property; they would in fact suffer loss. The conclusion to which I come is this: Messrs. Lambert acted reasonably in not giving any such qualified assent as I have indicated.

There remains the course which they in fact took of withholding their assent without any qualification, for that is what, in my judgment, their action amounted to, though, as I have said, in form they purported to postpone the decision until the termination of these proceedings, in which they hope, if necessary, to establish in the highest court their view as to the meaning of "improvements." I hold that they have acted reasonably in refusing to have substituted, for a self-contained shop property, a building which will not be self-contained, but will be a part of a composite building, together with a guarantee, a covenant for reinstatement, and a sum of money by way of compensation, which they are advised should be substantial, but which the defendant company up to the last moment has maintained, and will in all circumstances maintain, should be nominal. The prudent consideration of his own interest would, in my judgment, lead any lessor to the same opinion.

In those circumstances, I think I must make a declaration on the claim that the plaintiffs have not acted unreasonably in withholding their licence and consent to the defendant company's application, and it will be sufficient upon that if I dismiss the counterclaim. With regard to these declarations, in which I merely follow the Court of Appeal, I do not think it is necessary for me to say anything.

Solicitors: *Robins, Hay & Waters*, agents for *Lacey & Son*, Bournemouth (for the plaintiffs); *Lovell, White & King* (for the defendant company).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

Re MORLEY'S ESTATE, HOLLENDEN *v.* MORLEY.

[Chancery Division (Simonds, J.), **April 23, 30, May 4, 1937.**]

Executors—Legacies—Settled legacies—Payment by instalments—Apportionment of instalment between principal and interest.

A testator's estate was mainly money invested in a partnership firm, and under the deed of partnership the purchase price of his share was payable by instalments. The testator by his will gave a very large number of legacies, some of which were settled legacies. By an order of the court made in consequence of certain proposals of the executors, the latter were directed to pay forthwith in full all legacies not exceeding £500, together with interest, to make certain annual payments to several annuitants, and to pay all the remaining legatees and trusts 2½ per cent. upon their respective legacies, such payments to be made generally on account of such legacies and any interest due or to become due thereon. The question was asked how the latter payments, and similar payments made later by the trustees, were to be apportioned between principal and interest:—

Held: such payments were to be treated in all cases as having been made in the first place in satisfaction of interest due to the date of each payment, and subject thereto in satisfaction of the principal.

[EDITORIAL NOTE. There has been an undoubted rule that where a payment is made generally on account of a legacy, it is to be applied first in discharge of interest. Tha trule applies as between the estate and the legatee. The question in the present case is whether the same rule applies as between the residuary legatee and the beneficiaries under a settled legacy, and it is held that the same rule applies.

As to Interest on Legacies, see HALSBURY, Hailsham Edn., Vol. 14, pp. 354-356, paras. 662-666; and for Cases, see DIGEST, Vol. 23, pp. 405, 406, Nos. 4754-4764; and Vol. 24, p. 796, No. 8259.]

Cases referred to:

(1) *Thomas* v. *Montgomery* (1830), 1 Russ. & M. 729; 24 Digest 796, *8259*.

(2) *Re Prince, Hardman* v. *Willis* (1935), 51 T.L.R. 526; Digest Supp.

Adjourned Summons to determine the appropriation as between principal and interest of certain payments made generally in part satisfaction of legacies and interest due thereon. The question asked by the summons and the facts are set out in the judgment. By an order made on Mar. 2, 1922, an instalment of 2½ per cent. was paid upon the larger legacies bequeathed by the will. The trustees subsequently paid further instalments without any order of the court, and had now either paid or had sufficient in hand to pay all the legacies and interest in full. Further orders were made by the court in 1926 and 1930, but these dealt only with the position as between the life tenants and the reversioners of the settled legacies.

J. Neville Gray for the plaintiffs as trustees.

F. R. Evershed, K.C., and *D. Ll. Jenkins* for the defendant, John Morley, and the plaintiff, Charles Morley, residuary legatees.

C. R. R. Romer, K.C., for the defendants, Mrs. M. E. Layard and infants.

R. R. A. Walker for the defendant, Frederick William Morley.

Charles Harman, K.C., and *Wilfrid Hunt* for the trustees of a settlement made by Mrs. Trench and the trustees of a settlement made by Mrs. Phibbs.

L. S. Falk for the defendant, Charles Neary Mann Keeble.

Gray : The question is, where legacies bearing interest are not paid within a year, and payments in respect of them are made by instalments, how such instalments are to be attributed towards satisfaction of principal and of interest. The matter does not seem to have been specifically decided. It is a matter of some importance in the present case, as most of the testator's money was invested in a firm, and, under the terms of the deed of partnership, was payable out by instalments. The testator had over £1,000,000 in the firm, and he left 922 legacies altogether, many of them being for large sums. The sooner the principal is paid, the smaller will be the amount of interest payable, and, therefore, if there is first an appropriation in payment of principal, the sum which the legatees will ultimately get will be smaller than would be the case if the appropriation in the first place was in the payment of the interest.

Evershed, K.C. : It is not correct to say that the position of a legatee is the same as that of a creditor. A legatee has not a right to immediate payment and the trustee has a discretion. If there were a true analogy between a legacy and a debt, the executor would be entitled to make an appropriation when he made a payment. [Counsel referred to *Re Prince* (2); *Thomas* v. *Montgomery* (1).]

SIMONDS, J. : The question before the court arises in the administration of the estate of one Howard Morley, who died on Feb. 1, 1920, and in respect of whose estate an order for administration was made on July 12, 1920. The present question is this, and I will state it from the summons :

> Whether in the events which have happened payments made to the several persons entitled to legacies under the will and codicils of the said testator on account of such legacies respectively ought to be treated as having been made : (*a*) in the first place on account of the principal of the said legacies and only when all principal

has been satisfied on account of interest thereon, or (*b*) in the first place in satisfaction of interest on the said legacies accrued due down to the date of each such payment and subject thereto in satisfaction of the principal thereof, or (*c*) each payment rateably on account of the principal and interest due in respect of the said respective legacies at the date of each such payment.

The testator, as I have said, died on Feb. 1, 1920, having made a will, by which he gave a very large number of legacies. He gave in fact 922 legacies in all, of which 852 did not exceed £500 in amount, but he gave certain legacies which were of a very large amount, and the question which is raised here in fact involves a very large sum of money. His estate was of such a character that it was impossible, within one year after his death, or indeed within many years after his death, to pay in full the pecuniary legacies which he had bequeathed. His estate consisted for the great part, if not entirely, of his interest in a firm of I. & R. Morley, from which, both under the terms of the articles of partnership and otherwise, as a matter of convenience, it was impossible to withdraw sums large enough to pay the legacies.

Now, the question before me is really this: first of all, what is the rule of administration, which otherwise guides the court in determining whether payments made on account of principal and interest are first to be ascribed to principal, or first to interest, or upon some, and what, other basis? Secondly, having assumed the rule, is there anything, either in the terms of this will or in any orders that have been made, which prevents me now from applying that rule? Now, I take it that the rule is beyond question, both, indeed, on principle and on authority: *Thomas* v. *Montgomery* (1). That authority is now over a hundred years old, and has never been departed from. It is that, where a payment is made on account of principal and interest of a legacy, it is to be ascribed, first to interest, and next to principal. To take the simplest possible case, supposing that a testator dies on May 1, 1935, having by his will bequeathed a legacy of £100 to A. B., to whom he does not stand as parent or *in loco parentis*; that legacy is payable on May 1, 1936, one year after the testator's death, and, if it is not paid on that date, interest at 4 per cent. begins to run. So that, on May 1, 1937, there is payable to the legatee the sum of £100 for his legacy, and £4, less income tax, which I ignore, in respect of interest. Supposing £54 be paid to him on May 1, 1937, it is clear beyond question, on the authority to which I have referred, that, of that £54, £4 is ascribable to interest and £50 is ascribable to principal. That is the rule which I must apply in this case, treating that which is paid as, first, in satisfaction of interest, and then in satisfaction of principal, unless in the administration of this estate something has happened which precludes me from so holding.

So far as the terms of the will are concerned, there is nothing which prevents the ordinary rule from applying. I was, indeed, referred to the terms of cl. 32 of the will, by which the trustees were given, in common form, the power of determining certain questions and, amongst others, whether certain payments were of capital or of income; but they do not purport to have exercised any powers under that clause, and if they had I should have had seriously to consider whether they had exercised them. Nothing turns, then, on the language of the will. Has anything happened in the administration of this estate which prevents the ordinary rule from applying? Here there is greater difficulty, because there has been made a series of orders which I have to consider. The first order which has any bearing is an order made on Mar. 2, 1922, where the question of payment of legacies was brought before the court upon certain proposals. I need not refer to those proposals, because the language of the order is clear, and it is conceded that it does not follow the terms of the proposals precisely, either in one way or in another. That order directed the applicants:

> as executors and trustees of the testator's will . . . to carry out the proposals contained [in a certain exhibit] for payment forthwith in full of all legacies not exceeding £500 each in value together with interest from Feb. 1, 1921, and the legacy duty thereon and to make the annual payments to the several annuitants named in the said exhibit and further to pay forthwith to all the remaining legatees and trusts a sum calculated at the rate of 2½ per cent. upon their respective legacies, such payments to be made generally on account of such legacies and any interest due or to become due thereon.

I find nothing in the language of that order which in any way precludes me from saying that now, when matters can finally be adjusted, the ordinary rule of the court ought to be followed. The payments were made on account of legacies and interest, and it appears to me that they were paid in due course of administration, and the ordinary rule to which I have referred should apply. In regard to authority, I would add only that the rule so stated is repeated in WILLIAMS ON EXECUTORS, 12th Edn., Vol. 2, p. 910. Then, although the case was not cited, the principle was referred to recently in *Re Prince, Hardman* v. *Willis* (2), and, as I say, it has never been questioned or doubted.

That was the order made in 1922. After that, what happened was this: payments were made from time to time, and it became necessary, in the case of certain settled legacies, to determine how, as between the tenant for life and reversioner in those settled legacies such payments should be treated, and orders of this kind were made in 1926 and in 1930. For the purpose of determining that question as between the tenant for life and reversioner, the question how those payments should be treated as between the residuary legatee and pecuniary legatee was never argued, and necessarily was not argued, and, at the time when those orders were made in respect of those settled legacies, it could not be said with any certainty that the whole of the amount of the legacies would be paid. All that the court was concerned to do was to see how those sums, as and when they were received, should be treated in the way that was fairest, as between the tenant for life and reversioner. I cannot find, and I have been taken through the transcript of the shorthand note of the proceedings at which one of the orders was made, any trace of the point which I now have to determine being argued before the court. Accordingly, though, of course, I should faithfully follow any judgment in which the matter being determined by me had been adjudicated upon, I cannot find anything in those orders which precludes me from following my own judgment in this matter. Accordingly, I find, neither in the will nor in the course of administration, nor in the judgments which have been delivered for the purpose of determining the rights of tenant for life and reversioner, anything which would justify me in departing from the ordinary rule of administration which has been so long established. Therefore I must answer the question raised in this summons by saying that the payments, which have been made on account of the principal and interest in respect of the legacies, are to be treated as having been made in the first place in satisfaction of interest on the said legacies accrued due down to the date of each such payment, and subject thereto in satisfaction of the principal.

Solicitors: *Biddle, Thorne, Welsford & Gait* (for the plaintiffs, for John Morley, and for Charles Neary Mann Keeble); *Morten, Cutler & Co.* (for Mrs. M. E. Layard and infants); *Robins, Hay & Waters* (for Frederick William Morley); *Pennington & Son* (for the trustees of the settlement made by Mrs. Trench and the trustees of the settlement made by Mrs. Phibbs).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BENNET (INSPECTOR OF TAXES) *v.* MARSHALL.

[KING'S BENCH DIVISION (Lawrence, J.), **May 10, 11, 1937.**]

Income Tax—Income from possessions out of the United Kingdom—Employment by foreign company—Work partly in United Kingdom—Residence in United Kingdom—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case V, r.* 2.

The respondent, who was resident in the United Kingdom, was vice-president of a company incorporated in the United States of America. The American company was a parent company having subsidiary companies all over the world, and the respondent supervised the activities of the subsidiary companies everywhere except in the United States of America and Canada. The respondent spent about 8 weeks in each year in America, conferring with the other officers of the American company, and for some months in each year he travelled all over the world supervising the work of the subsidiary companies. There was no reason, apart from his residence, for the respondent to be in England except when in his own discretion he considered that the English subsidiary company required supervision. The Crown contended that as the respondent was resident in the United Kingdom and carried on an employment partly in the United Kingdom, he was chargeable to tax under Sched. E in respect of the whole of the profits of his employment whether carried on in the United Kingdom or elsewhere, and whether remitted to the United Kingdom or not:—

HELD: the source of the respondent's employment was in the United States of America and not in the United Kingdom, and he ought, therefore, to be assessed under Sched. D, Case V, r. 2, on remittances actually received in the United Kingdom.

[EDITORIAL NOTE. There is a distinction between a trade carried on abroad and an employment carried on abroad. In the case of a trade the source of income is the trade, but in the case of an employment, the source of income is the contract of employment. It is here held that if the contract is made out of England then the income from it is only assessable upon remittances actually received in the United Kingdom.

As to Case V, r. 2, see HALSBURY, Hailsham Edn., Vol. 17, p. 199, para. 410; and for Cases, see DIGEST, Vol. 28, p. 81, Nos. 446-450.]

Cases referred to:

(1) *Foulsham* v. *Pickles*, [1925] A.C. 458; 28 Digest 25, *131*; 94 L.J.K.B. 418; 133 L.T. 5; *sub nom. Pickles* v. *Foulsham*, 9 Tax Cas. 261.

(2) *Davies* v. *Braithwaite*, [1931] 2 K.B. 628; Digest Supp.; 100 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198.

(3) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 28 Digest 79, *433*; 59 L.J.Q.B. 53; 61 L.T. 518; 2 Tax Cas. 490.

(4) *Eaton-Turner* v. *McKenna*, [1937] A.C. 162; [1936] 3 All E.R. 215; Digest Supp.; 106 L.J.K.B. 11; 155 L.T. 515; 20 Tax Cas. 566.

Appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the division of St. Giles-in-the-Field and St. George Bloomsbury in the County of London allowing an appeal against assessments on £4,000 for the year 1933/34 and £6,000 for the year 1934/35 made upon the respondent under Sched. E in respect of his remuneration as vice-president in charge of overseas sales for the National Cash Register Co. of Dayton, Ohio, incorporated in the United States of America. The facts and arguments are set out in the judgment.

The Solicitor-General (*Sir Terence O'Connor*, *K.C.*), and *Reginald P. Hills* for the appellant.

Cyril Radcliffe, *K.C.*, and *J. H. Bowe* for the respondent.

Lawrence, J.: In this case, the general commissioners have held that, though Mr. Marshall, the respondent, was resident in the United Kingdom for the two years ending Apr. 5, 1935, yet the source of his employment, by which I take the commissioners to mean the source of his income, was in the United States, and that, therefore, he should be assessed under the Income Tax Act, 1918, Sched. D, Case V, r. 2. The Crown appeals from that decision, and contends that, in the circumstances of this case, the respondent is assessable by virtue of Sched. D (1) (*a*) (ii) of the Act of 1918, and, under sect. 18 of the Act of 1922, is assessable to tax under Sched. E in respect of the whole of the profits which he derives from his office or employment. The question is whether or not his income falls to be taxed under Sched. E by virtue of sect. 18 read in conjunction with Sched. D (1) (*a*) (ii) and Case II, or falls within Sched. D, Case V, in which case it is expressly excluded from the operation of sect. 18, and does not fall to be assessed under Sched. E.

The facts of the case are that the respondent, who is a domiciled Canadian, but, as I have said, was resident in the United Kingdom during the two years in question, residing at Beaconsfield, was appointed vice-president of the National Cash Register Co. of the United States on May 31, 1933. That is a parent company, which has a number of subsidiary companies in most countries of the world, and the office of the respondent was vice-president of that company. His particular work was to supervise the activities of the company's subsidiaries everywhere except in the United States of America and Canada. He actually spent about 7½ months in England during 1933/34, and 6 months during 1934/35, and in each of those years he spent about 8 weeks in the United States of America, where he had his head office, and where he had 16 clerks or employees under him. During those 8 weeks he spent his time in conferring with the other officers of the American company, and going into the work of his office, and keeping himself up to date in technical matters. In England, he had 5 employees, only 2 of whom were full time employees. In his return for assessment, he claimed relief in respect of entertaining in England, and the use of a car in England for foreign business associates. But it is conceded on his behalf that, if he is properly assessable under Case V only in respect of the amounts which were remitted to him in the United Kingdom, on the footing that his office or employment is a possession out of the United Kingdom, this claim for relief could not be made. He spent the rest of the year in travelling about the continent of Europe and other parts of the world, including South America, supervising the work of the subsidiary companies of the parent company in the United States. It is entirely a matter for his own discretion as to what countries he visits, and, apart from his residence in the United Kingdom, there does not appear to be any reason for his making that a headquarters, or a subsidiary headquarters, in the way that he does. He might have his subsidiary headquarters anywhere else, and he might not come to the United Kingdom if he did not think it was necessary to supervise the work being done there; but in fact he does, as I have said, reside in the United Kingdom, and does supervise the work of the subsidiary in London, and he has these 5 employees, 2 of whom only are whole-time employees. In those circumstances, it is contended by the Crown that the decision of the commissioners is wrong, and that this is not income arising from a possession out of the United Kingdom, because it is said that, in order to be income arising from a possession out of the United Kingdom, if that possession is an office or employment, the whole of the exercise of that office or employment must be out of the United Kingdom in order to bring it within Case V. Reliance was placed by the Solicitor-General upon the words of Viscount Cave, L.C., in *Foulsham* v. *Pickles* (1), where he said, at p. 287:

> But, assuming this to be so, it does not follow that the appellant is entitled to succeed in his appeal. For that purpose [to bring himself within Case V] it is necessary for him to show that the respondent's employment was wholly out of the United Kingdom, and that (to use Lord Macnaghten's expression) the whole source of his income was overseas; and this, in my opinion, he has not shown. I will assume—although I feel some doubt on the point—that the respondent's services to the company were to be rendered in West Africa only, and that he had no duties to his employers while he was in England; but it remains true that the

> commission, which was the principal remuneration for his services, was, under the terms of his employment, payable in England only, and that he was precluded by the express terms of his agreement from drawing or claiming payment of that commission in the colony. In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom. In these circumstances I do not think it can be said that his source of income was wholly outside this country, so as to bring him within Case V.

The Solicitor-General argues that there VISCOUNT CAVE, L.C., was laying down that, in order that it should come within Case V, not only should the actual income by the contract be payable and paid outside the United Kingdom, but also the work performed for that income should be outside the United Kingdom, and he contends that that is the basis of the speech of VISCOUNT CAVE, L.C., which was concurred in by LORD SUMNER. He also relies upon the decision in *Davies* v. *Braithwaite* (2). That was a case of Miss Braithwaite, the actress, who was contending that income derived from performances which she had given in the United States was a possession out of the United Kingdom within the meaning of Case V, and it was held that it was not. FINLAY, J., in dealing with the matter, said this at p. 210:

> The leading case of *Colquhoun* v. *Brooks* (3) shows that some restriction is to be placed upon them [the words of Sched. D, Case II], but it is quite clear that if anything is done in the profession in the United Kingdom, then the case of *Colquhoun* v. *Brooks* (3) has no application; and it is quite clear here that Miss Braithwaite, during part of the year in question, acted in the United Kingdom and in that way exercised her profession here. It is not less clear that she here made the arrangement for the visit to America, and I think that it is impossible to say that this American contract can be a foreign possession of Miss Braithwaite under Case V, or to say, in the alternative, that the American acting could be a separate profession carried on by Miss Braithwaite.

The Solicitor-General also referred to *Eaton-Turner* v. *McKenna* (4), but that case does not appear to me to assist the argument very much, because it was there conceded by counsel for the taxpayer that the case fell outside Case V. On the other hand, Mr. Radcliffe, in a very able argument, has contended that, although, if the possession which is said to come within Case V is trade, as in *Colquhoun* v. *Brooks* (3) or a profession, as in *Davies* v. *Braithwaite* (2), it is true that it must be exclusively and wholly outside the United Kingdom in order to fall within Case V, yet, if the alleged possession is an office or employment there, there is a distinction, because, in the case of the trade or the profession, the source of the income is the trade or the profession, but, in the case of an office or employment, the source of income, he contends, is not the performance of the work in the office or employment, but the contract with the corporation from which the income springs, of which the taxpayer is the officer. Mr. Radcliffe contends that that is the rule which is deducible from the authorities, *Colquhoun* v. *Brooks* (3) and *Foulsham* v. *Pickles* (1), and he relies upon the words of LORD DUNEDIN and also of LORD BUCKMASTER, the speech of LORD DUNEDIN being concurred in by LORD ATKINSON. The passage in the speech of LORD DUNEDIN upon which he relies is at p. 289. LORD DUNEDIN says:

> Two propositions are here involved; this income must be income from a possession, and the possession must be out of the United Kingdom.

Then the next passage is not on the point exactly, and he goes on:

> When, however, I come to the second proposition I find myself unable to affirm that this is income arising from a possession out of the United Kingdom. This income comes from the contract of employment made in the United Kingdom. When I say, "made in the United Kingdom," I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit, which is the payment which the employers covenanted to make. This was payable A
> and paid in Liverpool.

Lord Buckmaster said, at p. 291:

> The real test that was laid down by Lord Herschell and Lord Macnaghten [in *Colquhoun* v. *Brooks* (3)] was that you were to ascertain what was the source of income, and, if the source of income was a trade, profession, employment or vocation carried on outside the United Kingdom, only the amount of income actually received B
> in the United Kingdom would be taxed. In the present case I do not think that the source of income was the employment of the respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country.

Mr. Radcliffe contends that that passage, coupled with the passage in the speech of Lord Dunedin, was the basis of the decision of the House C
of Lords in that case, and that, in seeing whether a particular case is a possession out of the United Kingdom, you have to see what is the source of the income, and that the speech of Lord Buckmaster in particular lays it down that the source of the income is not where the officer exercises his function or the employee does his work, because D
according to the view of Lord Buckmaster, and according to the assumption of all the Lords in *Foulsham* v. *Pickles* (1), the employee in that case did his work in West Africa. He says in terms that that is not the source of the income. The source of his income was the money paid by the English company into an English bank in pursuance of an E
agreement for service made in this country. Thus, it is said in this case that the source of Mr. Marshall's income is not the work which he does in the United Kingdom, nor the work which he does in any other part of the world, but the source of his income is the contract which he has made with an American company, under which his income is payable F
outside the United Kingdom—in fact, in this case, in Canada. In this state of the authorities, it seems to me that the commissioners were right in deciding that this case falls within Case V, and I therefore dismiss the appeal with costs.

Appeal dismissed with costs. G

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Sheard, Breach & Co.* (for the respondent).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

H

Re PILKINGTON'S WILL TRUSTS, PILKINGTON *v.* HARRISON.

[CHANCERY DIVISION (Farwell, J.), **May 7, 1937.**]

Will—Trust fund—Reversionary life interest—Forfeiture on alienation—Assignment for benefit of creditors of "whole means and estate"—Subsequent death of prior life tenant.

Bankruptcy—Deed of arrangement—Executed in Scotland according to Scots law—No registration—Property in England—Deeds of Arrangement Act, 1914 (*c.* 47), *s.* 2.

Subject to a life interest in favour of his widow, a testator, who died in 1932, directed his trustees to hold a certain fund upon trust "if at the time of this present trust taking effect in possession no act or event shall have happened whereby the life interest hereby given to F. C. H. if belonging to him absolutely would have become vested in or charged in favour of some other persons or person or a corporation," to pay the income to F. C. H. during his life. A discretionary trust was created in favour of F.C.H., his wife and issue, in the event of a forfeiture. In 1933 F. C. H. executed a document for the benefit of his creditors whereby he assigned to a trustee his "whole means and estate heritable and movable real and personal wherever situated now pertaining and belonging or due and indebted to me or over which I have any power of disposal or to which I may succeed during the subsistence of this trust together with the writs vouchers and instructions thereof dispensing with the generality hereof and declaring that these presents shall be as effectual as if every particular of my means and estate were herein specially enumerated." F. C. H. was at that time resident in Scotland, although he was domiciled in England. The document was not registered under the Deeds of Arrangement Act, 1914, s. 2. The testator's widow died in 1936 and the question arose as to whether or not the life interest of F. C. H. in the trust fund had determined:—

HELD: (i) the document of 1933 was wide enough to include the interest which F. C. H. took under the testator's will.

(ii) upon the construction of the document of 1933, the law of Scotland ought to be applied and by that law there was no necessity for registration in Scotland of such a document. The document was accordingly valid in England, and the life interest of F. C. H. in the trust fund had determined and the discretionary trust in favour of F. C. H., his wife and issue had come into operation.

[**EDITORIAL NOTE.** The main interest in this matter is whether the deed of arrangement was valid in this country. Such deeds have to be registered in England, but there is no such provision in relation to Scotland. The debtor being at the time resident in Scotland though domiciled in England, it is held sufficient for the validity of the deed in England, that it complied with the law of Scotland.

AS TO REGISTRATION OF DEEDS OF ARRANGEMENT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 432-437, paras. 588-595; AND FOR CASES, see DIGEST, Vol. 5, pp. 1072-1075, Nos. 8773-8808.

AS TO FORFEITURE, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 840-842, paras. 1498, 1499; and FOR CASES see DIGEST, Vol. 5, pp. 650-653, Nos. 5810-5838.]

Cases referred to:

(1) *Re Waley's Trusts* (1855), 3 Drew. 165; 44 Digest 1235, *10674*; 24 L.J. Ch. 499; 25 L.T.O.S. 77.

(2) *Dulaney* v. *Merry & Sons*, [1901] 1 K.B. 536; 5 Digest 1073, *8779*; 70 L.J.K.B. 377; 84 L.T. 156.

ADJOURNED SUMMONS to determine the question whether or not, in the circumstances set out in the judgment, the life interest of Francis Charles Harrison in a certain trust fund had determined.

F. Farrer for the plaintiffs, the trustees of the will of C. W. E. M. S. Pilkington.

A. Guest Mathews for Francis Charles Harrison.

R. W. Goff for the trustees of the deed of arrangement.

Gerald Upjohn for the Bank of New South Wales, mortgagees of certain chattels.

F. C. Watmough for the wife and children of Francis Charles Harrison.

A. L. Ungoed-Thomas for Sir Thomas Pilkington, Bart., interested as an object of the discretionary power.

Guest Matthews: The question is what was intended by the words "for the benefit of his creditors generally" contained in the Deeds of Arrangement Act, 1914, s. 1. The deed comes within sect. 1, and the maxim *mobilia sequuntur personam* applies, because this gentleman was a domiciled Englishman. [Counsel referred to *Dulaney* v. *Merry & Sons* (2).]

Watmough: Dulaney v. *Merry & Sons* (2) is expressed to be decided on domicile. But that is not the real principle of the decision in that case. This is an assignment of movable property. In a sense it has situation in England in the hands of English trustees. These goods are validly assigned by the *lex loci sitae.* If the assignment is valid in the place where the property is situated it is valid for all purposes. Although this decision is expressed to be based on domicil the result would have been the same wherever the domicil was if the assignment was valid in the place where the things were.

Farwell, J.: The testator, Claude William Egerton Milborne Swinnerton Pilkington, made his will on Jan. 8, 1920. He died on Jan. 4, 1932. By his will, having appointed certain persons to be executors and trustees, he made certain bequests, to which I need not refer, and he directed his trustees to sell his property and pay his debts in the ordinary way. Then he directed:

> The trustees or trustee shall hold the investments above directed to be made or authorised to be retained (hereinafter called "the trust fund") upon trust to pay the income of the trust fund to my said wife during her widowhood.

The testator's wife died a widow in 1936. The will goes on:

> From and after the death or remarriage of my wife, whichever first happens, the trustees or trustee shall forthwith raise and appropriate out of the trust fund a clear sum of £20,000 (hereafter for brevity called "the wife's fund") and shall out of the residue left of the said trust fund after raising the said clear sum of £20,000 hereinbefore directed to be raised raise and appropriate a clear sum of £15,000 if and so far as such residue shall suffice for that purpose, but if the same shall be insufficient then shall appropriate such residue (and such secondly mentioned clear sum of £15,000 or residue left of the trust fund as the case may be is hereafter for brevity called "the nieces' fund") and shall appropriate and hold the residue (if any) left of the trust fund after raising the said two clear sums of £20,000 and £15,000 respectively (which said residue of the trust fund is hereafter for brevity

called "the Chevet fund") and the income thereof upon the trusts hereafter declared.

Cl. 12 provides:

> If there shall be no child of mine living at my death who being male attains the age of 21 years or being female attains that age or marries, then, subject to my wife's interest during widowhood in the whole of the trust fund and her life interest in the wife's fund in case she remarries and to the powers by law vested in the trustees or trustee and to any exercise of such powers the trustees or trustee shall from and after my wife's death and the failure or determination of the trusts hereinbefore contained in favour of my children appropriate and hold one moiety of the wife's fund and the investments representing the same (hereinafter for brevity called "the Charles Harrison fund") upon trust if at the time of this present trust taking effect in possession no act or event shall have happened whereby the life interest hereby given to my wife's nephew the said Francis Charles Harrison in the Charles Harrison fund or any part thereof if belonging to him absolutely would have become vested in or charged in favour of some other persons or person or a corporation then to pay the income of the Charles Harrison fund to the said Francis Charles Harrison during his life or until some such act or event as aforesaid shall happen.

A discretionary trust was created in favour of Francis Charles Harrison, his wife, and issue in the event of a forfeiture. There is a provision after the death of Francis Charles Harrison for his children as therein provided, that is, one moiety of the wife's fund. The other moiety of the wife's fund is upon similar trusts for Ralph Harrison, who in fact is dead. He died in 1934 without issue, and, under the will, that fund becomes subject to the trusts of the other fund. Difficulty arises owing to the fact that, in 1933, Francis Charles Harrison executed a document for the benefit of his creditors, and the question which I have to determine is whether that operates so as to create a forfeiture of his interest in these funds. It is not in dispute that Francis Charles Harrison was a person domiciled in this country. I am told that he was educated in this country and joined the Navy, and was for a year or more resident in Scotland, either in the course of his duties or in some other way. There is no suggestion that he abandoned his English domicil. Therefore, I must treat this matter on the footing that he is a domiciled Englishman. The first question is whether the document itself, on its true construction, could operate to create a forfeiture. The document is in these terms:

> I Francis Charles Harrison Lieutenant Commander Royal Navy retired presently residing at Darnless Melrose [in Scotland] considering that my affairs have become embarrassed do hereby dispone assign and convey to Charles John Munro chartered accountant in Edinburgh as trustee for behoof of my whole creditors at the date hereof and who shall accede hereto and to his assignees my whole means and estate heritable and movable real and personal wherever situated now pertaining and belonging or due and indebted to me or over which I may have any power of disposal or to which I may succeed during the subsistence of this trust together with the writs vouchers and instructions thereof dispensing with the generality hereof and declaring that these presents shall be as effectual as if every particular of my means and estate were herein specially enumerated substituting the said Charles John Munro as trustee aforesaid in my full right with power to him to take immediate possession of my estates and without any advice of me or my creditors to carry on for such periods as he may think fit any business in which I may be engaged and to sell my whole estates or any part thereof by public or private sale in whole or in lots and on such conditions and at such prices as he shall think fit to sue for and recover the debts due to me and in general to do everything necessary for the recovery and realisation of my means and estate to re-let the premises occupied by me at such rent as he may think proper or keep them in his own hands to renounce

> and discharge any leases or right of possession with power to borrow money on the security of my said estates or any part or portion thereof and with power to the said trustee to compound and compromise claims and also to submit and refer any questions or differences that may arise between him and any other person or persons and also with power to my trustee to sue insist in and defend all actions and in general every other thing to do which I could have done before granting hereof declaring that purchasers from my said trustee and all others transacting with him shall not be concerned with the application of the sums payable by them or with anything herein contained but the simple receipt of my trustee shall be a complete discharge and I bind myself and my heirs executors and successors to execute and deliver all writs and deeds necessary for vesting in the said trustee and his assignees the whole estates hereby conveyed. A

The document continues :

> But these presents are granted only in trust for the following purposes, namely first—the said trustee shall apply the proceeds of the said estate and effects in payment of the expenses hereof and of realising and recovering the said estate and effects and in general the whole expenses that may be incurred or are already incurred in relation to this trust or to the management or execution hereof including a remuneration for his own trouble as the same may be fixed and determined by a committee of the creditors duly appointed in terms of the Bankruptcy (Scotland) Act, 1913, s. 185, failing which by the accountant of court in terms of the said section which committee or failing them the accountant of court shall audit the accounts of the intromissions of the trustee and ascertain and declare the balance available for division and distribution among the various classes of creditors preferable and ordinary it being however provided that it shall be in my power at any time during the proceedings of said trustee to settle with my said creditors by composition or otherwise. B C

It is said that, as a matter of the construction of this document and of the will, it does not operate, apart altogether from the next question, which I will deal with in a moment, so as to create a forfeiture. The case upon which that argument is based is a decision of KINDERSLEY, V.-C., in *Re Waley's Trusts* (1). In that case : D

> Under a will F. S. was entitled on the death of A. to a certain share of a fund. By deed made by him, living the tenant for life, he assigned stock-in-trade, scheduled, and all his real and personal estate, using very general language, to a trustee, to sell for the payment of his creditors. No creditors were parties, but some were paid under it. Afterwards the trustee sold the residue. The will contained a clause that on any legatee becoming bankrupt, or mortgaging or selling or anticipating his share, or compounding with his creditors, his share should go over. E

The terms of the deed were wide. By it there were assigned to a trustee : F

> all the stock-in-trade, goods, wares, merchandise, pictures, paintings and property of him Frederick Salamonson then remaining at 21, New Street, New York ; and all notes, accounts, debts, choses in action, property and estate of him the said Frederick Salamonson, both real and personal, in law or equity, of which he was possessed or to which he was entitled, except such articles of property as by law were exempt from execution— G

in trust to make an inventory and to sell for the payment of his creditors. KINDERSLEY, V.-C., held that the deed was not a composition deed, and, therefore, did not create a forfeiture under that portion of the will which provided that, if a legatee should compound with his creditors, the legacy should be forfeited. He held further that, as a matter of construction of the deed, it did not create a forfeiture, because the interest which the legatee took under the will was not included in the deed itself. The reason, as I understand his judgment, for that conclusion was that, the interest not being in terms included in the document, he could not impute to the legatee an intention to include in the document something H which, if included, would create a forfeiture, and thus prevent the property coming within the scope of the document itself. Far be it from me to say that KINDERSLEY, V.-C., did not correctly construe the relevant words in that case, but, after all, that was a question which turned on construction, and the words which he was construing were not the same A as the words which I am construing here. If that decision were to be applied in all the cases, it would really make it impossible for a forfeiture to be created in any case unless the actual interest in question was in terms specified in the document. In my judgment, KINDERSLEY, V.-C., never meant to go so far as that, and, treating that case as a decision B on the construction of that document, it does not appear to me that I am bound to follow it when I have to construe other words in a different document. I cannot doubt, myself, that this document is amply wide enough to include the interest which this gentleman took under the will in question. I was referred, by Mr. Guest Mathews, when arguing the C case, to the words "that these presents shall be as effectual as if every particular of my means and estate were herein specially enumerated." I asked him whether, if he had to put into a schedule what those means and estate were, he would be bound to include the interest under this will. He was driven to admit that he would have to include it, but he D said that he would try to safeguard himself by putting in brackets the reference to a forfeiture. Notwithstanding that, on the language of this document, it is plain, in my judgment, that the legatee here was including in it all his estates and interest, and that there was an estate or interest in him under the will, notwithstanding that he might forfeit E it by the result of this document, seems to me to be really beyond all argument. If this be a valid document at all, it appears to me that it must have the effect of having produced a forfeiture of the interest given under the will.

That brings me to the second question, which, in my judgment, is a F more difficult question than the first. That question is this. It is said that this is a deed of arrangement and that by virtue of the Deeds of Arrangement Act, 1914, s. 2, it is void, because it had not been registered. It is admitted that it has not been registered, and, if it be not registered, it is void altogether, and, therefore, cannot have any operation, G and so is not an effective document, and does not create a forfeiture. Sect. 1 of the Act of 1914 provides:

> A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal or not—(*a*) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally.

H That definition is wide enough undoubtedly to include this deed. Sect. 2 of the Act provides:

> A deed of arrangement shall be void unless it is registered with the Registrar of Bills of Sale under this Act within 7 clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England, then within 7 clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted within one week after the execution thereof, and unless it bears such ordinary and *ad valorem* stamp as is provided by this Act.

I do not know that I need refer to any other section of the Act beyond sect. 32, which provides, in terms, that the Act shall not extend to Scotland or Ireland. If this particular document is a deed of arrangement within the meaning of this Act, and it has not been registered, it is void, and cannot be effectual to create a forfeiture. The first thing that one notices, in reading the document, and it is perfectly plain on the face of it, is that the law which was intended to be applied in dealing with this document is the law of Scotland, and not the law of England. The language of it is legal language more familiar to those who are familiar with Scottish law than to those who are familiar with the law of this country. Moreover, there is the reference to the Bankruptcy (Scotland) Act, 1913, and it is clear, in my judgment, that the intention of Mr. Francis Charles Harrison, when he signed this document, was that the law of Scotland should be the law applicable in dealing with the property under this document. So far as I am aware, there is no such necessity for registration in Scotland of such a document as this as there is in England under the Deeds of Arrangement Act. The question, therefore, comes to this. This is a document signed by a person domiciled in this country but temporarily residing in Scotland. The property is movable, not immovable, and there is a right to receive income under a trust which was created in England and is subject, no doubt, to the law of England. Is it, then, necessary, in order that the trustee under this document should be able to assert his title to property in this country, that he should have had this document registered under the Deeds of Arrangment Act, 1914, s. 2 ? Or is he entitled to say : " This was an instrument signed in Scotland. It is a perfectly valid document according to Scottish law, and I, as the person claiming under it according to the law of Scotland, claim now to recover the property which is situate in England " ? Or is it a good defence to such a claim for the person in whose hands the property is in possession to say : " You cannot sue me in this country on this document, because, according to the law of this country, the document is void, and will not be recognised by the courts, and you have no title whatever to it " ? In my judgment, although I think that the question is one of considerable difficulty, the answer is that this is a document which is valid in this country to the extent that, according to the law of Scotland, it is a valid document, and, if the trustee sought to recover property in this country from the persons in whose hands it was, he would be entitled to rely on this document as constituting his title to recover. There would be no necessity for him to get the document registered in England, because it is one which was intended to, and does in fact, operate according to the law of Scotland, and not according to the law of England, and it is, therefore, not such a deed of arrangement as is referred to in the Act, and required by the Act to be registered.

The result is that this document is an effective document, and its language is wide enough to include the interest which Francis Charles

Harrison took under the will. There has been a forfeiture of his interest under the will, and, therefore, the discretionary trust in favour of himself and wife and children has come into operation.

Solicitors: *Farrer & Co.* (for the trustees of the will and for Sir Thomas Pilkington, Bart.); *Norris, Allens & Co.*, agents for *W. & H. Considine*, Edinburgh (for Francis Charles Harrison); *Torr & Co.* (for the trustees of the deed of arrangement); *Waltons & Co.* (for the Bank of New South Wales); *A. F. & R. W. Tweedie* (for the wife and children of Francis Charles Harrison).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

ALDERTON *v.* ESSEX COUNTY COUNCIL.

[CHANCERY DIVISION (Luxmoore, J.), **June 4, 8, 10, 1937.**]

Education—Elementary education—County councillor representing local education authority—Member of education committee of county council—Right to vote at committee meetings—Education Act, 1921 (*c.* 51), *s.* 9—*Local Government Act,* 1933 (*c.* 51), *s.* 75.

Local Government—Maternity and child welfare—County councillor representing separate district for purpose of Maternity and Child Welfare Act, 1918—*Member of public health and housing committee of county council and of maternity and child welfare sub-committee—Right to vote at committee and sub-committee meetings—Local Government Act,* 1933 (*c.* 51), *s.* 75.

A county councillor representing part of a borough, whose council was a local education authority for the purposes of elementary education within the Education Act, 1921, and was a separate district for the purposes of the Maternity and Child Welfare Act, 1918, was also a member of the education committee of the county council and of the education finance sub-committee. She was also a member of the public health and housing committee of the county council and of the maternity and child welfare sub-committee:—

HELD: (i) on the construction of the Education Act, 1921, s. 9, and the Local Government Act, 1933, s. 75, the prohibition contained in each of those sections against voting in respect of matters relating to elementary education only was not limited to voting at meetings of the county council itself, but applied also to voting at meetings of the education committee of the county council and any sub-committee thereof.

(ii) on the construction of the Local Government Act, 1933, s. 75, the prohibition against voting comprised in the proviso to that section was not limited, in the case of questions relating to maternity and child welfare, to voting at meetings of the county council itself, but applied also to voting at meetings of the public health and housing committee of the county council, and the maternity and child welfare sub-committee of that committee.

[**EDITORIAL NOTE.** The practice has varied in different counties upon the matter here in question, i.e., the right to vote upon committees of the county council of members elected for a borough or district which is the local authority dealing with the same subject. It has always been admitted that they were prohibited from voting at meetings of the council and the dispute is only as to voting at meetings of committees and sub-committees of the county council. The court has now decided that the proper practice is against such voting.

B

As to Education Committees, see HALSBURY, Hailsham Edn., Vol. 12, pp. 24-26, paras. 42-45; and for the Local Government Act, 1933, s. 75, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 346.]

Cases referred to:

(1) *Young* v. *Cuthbert*, [1906] 1 Ch. 451; 19 Digest 555, *13*; 75 L.J.Ch. 217; 94 L.T. 191.

(2) *Richardson* v. *Abertillery Urban District Council, Thomas* v. *Same* (1928), 138 L.T. 688; Digest Supp.

Adjourned Summons to have determined the questions:

(1) Whether, on the true construction of the Education Act, 1921, s. 9, and the Local Government Act, 1933, s. 75, the prohibition contained in such sections, or either of them, against voting in respect of matters relating to elementary education is limited to voting at meetings of the council itself, or also applies to voting at meetings of the education committee, or any sub-committees thereof.

(2) Whether, on the true construction of the Local Government Act, 1933, s. 75, the prohibition against voting comprised in the proviso to that section is limited, in the case of questions relating to maternity and child welfare, to voting at meetings of the council itself, or applies also to voting at meetings of the public health and housing committee, and the maternity and child welfare sub-committee of that committee.

The facts are set out in the judgment.

Wilfrid Hunt for the plaintiff.

C. S. Rewcastle, K.C., and *Geoffrey C. Hutchinson* for the defendant council.

Hunt: County councillors are prevented by sect. 9 from voting if the area they represent is not affected, and does not come into the matter being dealt with. But that does not apply to a meeting of a committee. If Parliament had meant the Local Government Act, 1933, s. 75, to apply to committees, one would have expected that it would have been repeated with the modification necessary, as has been done with regard to sect. 76. Sect. 96 provides that a chairman of a committee may have a casting vote in the event of an equality in voting, which is an indication that sect. 75 does not apply to committees. Also, sect. 63, which deals with vacation of office by failure to attend meetings, shows a marked distinction between meetings of a local authority and meetings of a committee.

Rewcastle, K.C.: As the education in the borough is left to the borough council, and that in the county to the county council, the representatives for the electoral divisions consisting of boroughs should not deal with questions affecting elementary education in the county, because their constituents are not interested, and are not going to be charged for what is done. The distinction is preserved, throughout the Local Government Act, 1933, between the local authority and the committees of the local authority, and there is no such distinction drawn in the Education Act, 1921. One is entitled to treat county council in the Act of 1921 as including its committees. That is the plain purpose of the Act. "Arising before" the county council is not the same thing as "coming before" a meeting of the county council. If this prohibition applies to the acts of the county councillors only, the co-opted members are in a separate position as experts, and they are intended to be in that position. The matters which come before the committee of the council are either delegated matters, or they stand referred to the education committee under the standing orders. The education committee can have no jurisdiction except by the process of a matter standing referred, or by the process of delegation, and these latter matters can come before the committee only if they have first come before the county council. A thing cannot stand referred or be delegated until it has arisen before the council, and " arisen " before the council does not mean " been discussed " at a meeting. It means a matter which the county council has had to consider, even though it be but for a moment of time. It would be surprising if sect. 9 meant that the members elected to represent the boroughs and who are representing an interest which is not going to pay, should not vote at meetings of the council, and should vote at meetings of the committees. The discussion is mostly in committee, and the confirmation is usually an informal proceeding. It would be an odd thing if Parliament had decided to take away the right to vote at the more or less formal stage, and had preserved it at the stage where the discussion takes place. With regard to the Local Government Act, 1933, in the section dealing with disqualification, the provisions are not the same in the council as they are in the committees. In the committees, the section applies with certain distinctions. But in the present case there are no distinctions, and it is intended that the same rule should apply. There is, therefore, no reason for repetition with modification. Therefore, it is all put together in sect. 75, in the simplest possible language. The provisions governing the proceedings of the education committee contained in the Act of 1921 are repealed by the Local Government Act, 1933, which repealed the provisions of the first schedule (Parts II and III) of the Act of 1921. The result is that the meetings and proceedings of education committees are put upon the general basis contained in Sched. 3, and, in the Local Government Act, 1933, s. 75, there is a direct reference to that schedule. How, in face of that, it can be said that sect. 75 does not apply to proceedings in committee, it is difficult to say. There is nothing here, either in the section itself or in any part of the schedule, which contradicts the plain words of the section : " meetings and proceedings of local authorities and of committees thereof." That clearly means that this prohibition operates both at the committee meetings and at meetings of the council. It has been pointed out that, although this section has been enacted, it has not been thought necessary to repeal sect. 9 of the Act of 1921. But the position of the education committee is exactly as it was before. The prohibition was not quite the same. The Act of 1933, by sect. 75 says " shall not vote on any matter involving only expenditure," while sect. 9 of the 1921 Act says any matter " which relates only to elementary education." They are both applicable to county council meetings, and stand side by side. They are applicable, not only to meetings of the council, but also to meetings of the committees of the council. [Counsel referred to *Young* v. *Cuthbert* (1), *Richardson* v. *Abertillery Urban District Council* (2).]

Hutchinson, following on the same side : The legislature has deliberately used language of the widest possible significance, making the Education Act, 1921, s. 9, apply to any question which may arise in any way before the council. If the legislature had desired to limit the operation of A the section to meetings of the county council, it would have said so. In the Local Government Act, 1933, when the legislature desires to restrict voting at a particular meeting, it does so, as will be seen from several sections of which sect. 76 is an example.

Hunt, in reply : The words in sect. 9 of the 1921 Act, " vote in respect B of any question arising before," mean voting at a meeting of the county council. With regard to sect. 75 of the 1933 Act, the only provision in the third schedule which bears upon voting is voting at meetings of the county council. Therefore, the natural meaning is a qualification to the third schedule, which relates to the voting. Sect. 76 of the 1933 C Act is repeated, with modification, whereas sect. 75 is not.

Luxmoore, J. : The plaintiff is a member of the Essex County Council, having been elected in Mar., 1928, for the Colchester south electoral division, which is wholly within the borough of Colchester. She D is also a member of the education committee of the Essex County Council, and of the education finance sub-committee, which is a sub-committee of the education committee. She is also a member of the public health and housing committee of the county council and of the maternity and child welfare sub-committee of the last named committee. The Essex E County Council has challenged the plaintiff's right to vote at any meetings of these committees and sub-committees, and contends that the plaintiff is precluded from voting at any such meetings by reason of the provisions, in the case of the education committee and the education finance subcommittee, of the Education Act, 1921, s. 9, and the Local Government F Act, 1933, s. 75, or either of those sections. It contends that she is not entitled to vote at meetings of the public health and housing committee, or the maternity and child welfare sub-committee of that committee, in respect of matters dealing with maternity and child welfare, by reason of the provisions of the Local Government Act, 1933, s. 75. G

The questions raised are of general importance, and this summons has, I am told, been issued with the approval of the Ministry of Health, in order to obtain the opinion of the court with regard to the true construction of the two sections to which I have referred. The question with regard to the meaning of each section is distinct, and the answers H to those questions depend on a consideration of the material sections of each Act. I propose to deal first with the Education Act, 1921, s. 9. The Education Act, 1921, constitutes as separate local education authorities for the purposes of elementary education only the respective councils of county boroughs, non-county boroughs with a population in excess of a specified number, urban districts with a population in excess of a larger specified number, and county councils. In the latter case, the respective areas of boroughs or urban districts constituting separate local education authorities are excluded from the jurisdiction of each county in respect of elementary education. The borough of Colchester is a non-county borough, with a population in excess of the specified number, and is, therefore, the local authority for the purposes of elementary education, and its area is consequently excluded from the jurisdiction of the defendant county council with regard to elementary education. Sect. 4 of the Act provides that every council—that is, whether of a county, county borough, non-county borough, or urban district—having powers under the Act, shall have an education committee or education committees constituted in accordance with the Act, and that, with certain exceptions not material to the questions now stated, all matters relating to the exercise by the council of its powers under the Act, or of any powers connected with education, conferred by or under any other Act, scheme or order on the council expressly as a local education authority, or as a council having powers under the Education Act, 1921, except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers, shall, unless, in its opinion, the matter is urgent, receive and consider the report of the education committee with respect to the matter in question. It also provides that the council may delegate to the education committee, with or without any restrictions or conditions, as it thinks fit, any such powers, except the power of raising a rate or borrowing money. It is material to notice the distinction between matters referred and powers delegated. In the former cases, the committee reports and the council will decide, while, in the latter cases, the decision is left to the committee itself. Sect. 4 (3) provides for the constitution of the education committee of a council. It is constituted by a scheme made by the council and approved by the board of education in accordance with the provisions set out in the first schedule to the Act. The scheme, when approved, has statutory effect. By sect. 4 (5), an education committee may, subject to the directions of the council, appoint such and so many sub-committees, consisting either wholly or in part of members of the committee, as the committee thinks fit. Sect. 9, which is the section to be construed, provides that:

> The county councillors elected for an electoral division consisting wholly of a borough or urban district whose council are a local education authority for the purpose of elementary education, or of some part of such a borough or district, shall not vote in respect of any question arising before the county council which relates only to elementary education.

It is admitted that, whatever this section may mean, the plaintiff is within the prohibition. She contends that the prohibition extends only to voting at meetings of the county council in respect of questions relating to elementary education, and does not extend to voting at meetings of the education committee, or any sub-committee thereof. The defendant council contends that the prohibition is general, and extends, not only to voting at meetings of the council, but also to voting at meetings of the education committee, or any sub-committee thereof, on questions relating to elementary education. Whatever may be the extent of the prohibition, it appears to be directed against a county councillor elected to represent a borough or urban district, or part of a borough or urban district, which is a local education authority so far as elementary education is concerned. Moreover, the reason for the prohibition appears to be that the county councillor's constituency makes no contribution to the expenses of, or rates imposed by, the county council in respect of elementary education in the area under the jurisdiction of the county council.

The first schedule to the Act contains provisions for the constitution of the education committee, which require that the majority of the committee shall be appointed by the council, and that the persons so appointed shall be persons who are members of the council, unless, in the case of a county, the council otherwise determine, and that the council shall appoint, on the nomination or recommendation of other bodies, persons of experience in education, and persons acquainted with the needs of the various kinds of school in the area over which the council acts, and shall provide for the inclusion of women as well as men among the members of the committee. Part II of the first schedule contains provisions as to meetings of the education committee. These provisions confer on the county council power to make regulations as to quorum, proceedings, and place of meeting of the education committee, but, subject to any such regulations, the committee itself is empowered to determine these matters. By cl. 2 of that part of the schedule, the chairman of the education committee is given a casting vote. Part III of the first schedule disqualifies a person from being a member of the education committee if he is disqualified from being a member of the council appointing the education committee by reason of holding an office, or place of profit, or having any share or interest in a contract or employment. The Essex County Council propounded a scheme under the Act which was duly approved by the Board of Education. The scheme has been amended from time to time, and, as so amended, the education committee of the council to-day consists of 48 members, of whom 32 are members of the Essex County Council and the remaining 16 are not members of the council. These 16 members who are not members of the council represent educational bodies, and have been respectively recommended for appointment by those bodies. No. 55 of the standing orders of the Essex County Council provides that the powers and duties of the council under, among other Acts, the Education Act, 1921, except the power of raising or borrowing money, are delegated to the education committee.

It is admitted that the plaintiff cannot, by reason of the provisions of sect. 9, vote at a meeting of the Essex County Council on any question relating to elementary education, but it is argued that she is entitled to vote on any such question at a meeting of the education committee. It would certainly be anomalous to find that the plaintiff is entitled to vote on a question relating to elementary education which has been delegated to the education committee, although she would be prohibited from voting on that same question at a meeting of the council itself, if the question had not been delegated. Mr. Hunt, on behalf of the plaintiff, has argued that this is the necessary construction of the words in sect. 9. It is to be observed that the material words of sect. 9 are: "shall not vote in respect of any question arising before the county council which relates only to elementary education." Mr. Hunt says that these words are equivalent to the words: "shall not vote at any meeting of the county council on any question relating only to elementary education." If the decision is delegated to the committee, the same considerations which led the legislature to prohibit the person in question voting at a meeting of the county council apply with equal force to the prohibition of voting on the same question at a meeting of the education committee. It seems to me that the words "arising before the county council" are more apt to define the question on which the voting is prohibited than the place where the voting is to be prohibited. Any question to be considered by the education committee, be it referred or delegated in the ordinary meaning of the word, arises, in the first instance, with the county council, and, although the word "before" may suggest locality, I do not think it is necessarily confined to such a meaning. Mr. Hunt has further argued that the Act has provided a separate code for meetings of the committee, and that, as the council, and not any committee of it, is referred to in sect. 9, the provisions of that section cannot be imported into the separate code. He further argued that the prohibition extended only to those members of the education committee who were county councillors, and did not extend to those additional members of the education committee who were not members of the county council, although each of them, apart from the fact that they are not members of the county council, might be in the same position as those said to be prohibited from voting. In my judgment, the force of this argument ceases to be of significance when it is remembered that the non-county-council members are the representatives of educational bodies, and are, therefore, in the position of educational experts on the education committee. In my judgment, on the true construction of the Education Act, 1921, s. 9, the plaintiff, by reason of her position, as an elected representative of part of a borough which is itself a local education authority in respect of elementary education, is precluded from voting on questions relating only to elementary education at meetings of the education committee, and any sub-committee thereof, as well as at meetings of the county council.

If, however, I am wrong in the conclusion at which I have arrived with regard to sect. 9, I think the plaintiff is precluded from voting on matters of elementary education only at any meeting of the education committee, and the sub-committees thereof, by reason of the provisions of the Local Government Act, 1933, s. 75. That section contains provisions with regard to meetings and proceedings of local authorities, and committees thereof, which appear to be of general application, and to govern all the meetings and proceedings of local authorities, and committees thereof, including county councils and county boroughs, non-county boroughs and urban districts: see the definitions of "local authority" and "county district" contained in the Local Government Act, 1933, s. 305. Although the Education Act, 1921, s. 9, is not repealed by that Act, Parts II and III of the first schedule of the Education Act, 1921, to which I have already referred, are specifically repealed. Sect. 75 is in these terms:

> The provisions of Parts I to V of the third schedule to this Act shall have effect as respects the meetings and proceedings of local authorities and of committees thereof: Provided that a county councillor elected for an electoral division consisting wholly of a county district or of some part of a county district shall not vote on any matter involving only expenditure on account of which the county district is not, for the time being, liable to be charged.

So far as county councils are concerned, the provisions relating to their meetings and proceedings are to be found mainly in Part I of the third schedule. There is no specific mention of the proceedings of committees in it. Part V of the third schedule deals with meetings and proceedings of local authorities generally. There are, I think, three specific references to committees in it, but the proceedings of committees are dealt with in a different part of the Act from that in which sect. 75 is to be found. Sect. 75 is in Part II of the Act, that is, sects. 57-84, inclusive, and this part of the Act is headed: "General provisions as to members and meetings of local authorities and elections." The provisions relating to committees are to be found in Part III of the Act, sects. 85-97 inclusive, and this part is headed: "Committees and joint committees." It is true that the provisions with regard to the proceedings of meetings of a local authority, and of committees of a local authority, are dealt with separately, but I do not think that this fact is sufficient to enable me to construe the proviso to sect. 75 as applicable only to meetings of local authorities, and not to committees thereof. The reason for the prohibition is the same, whether the vote is tendered at a meeting of the local authority or at a committee of it, and, having regard to the express reference in sect. 75 to the proceedings of committees in the first part of that section, I am unable to come to any conclusion other than that, on the true construction of the Act, the proviso must be construed as being of general application. The words in the section are plain, and must, in the absence of some sufficient context, be construed in their ordinary grammatical sense. Notwithstanding Mr. Hunt's able argument, I am unable to find such a construction.

The conclusion at which I have arrived applies to the plaintiff, not only in her capacity as a member of the education committee of the Essex County Council, and of any sub-committee of that committee, but also in her capacity as a member of the public health and housing committee and the maternity and child welfare sub-committee thereof, so far as matters relating to maternity and child welfare are concerned, for the Colchester Borough Council is a separate district for the purposes of the Maternity and Child Welfare Act, 1918. It raises its own rate, and is A not liable to be charged with any part of the county rate for that purpose, and the position is, therefore, for all practical purposes, the same with regard to this committee, so far as it deals with maternity and child welfare, as the position of the questions with regard to elementary education under the Education Act.

B I hold that, on the true construction of the Education Act, 1921, s. 9, and the Local Government Act, 1933, s. 75, the prohibition contained in each of those sections, against voting in respect of matters relating to elementary education only, is not limited to voting at meetings of the council itself, but applies also to voting at meetings of the education C committee, and any sub-committee thereof, and that, on the true construction of sect. 75 of the Local Government Act, the prohibition against voting comprised in the proviso to that section is not limited, in the case of questions relating to maternity and child welfare, to voting at meetings of the council itself, but applies also to voting at meetings of the public D health and housing committee, and the maternity and child welfare sub-committee of that committee.

Solicitors: *Hugh-Jones & Flinn*, agents for *L. G. Lewis*, Chelmsford (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *E. S. Holcroft*, Chelmsford (for the defendant council).

E [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

McMANUS v. BOWES AND OTHERS.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **June 2, 3, 4, 7,**
F **1937.**]

Lunatics—County mental hospital—Officers—Dismissal—Notice—Lunacy Act, 1890 (*c.* 5), *s.* 276.

Public Authorities—County mental hospital—Visiting committee—Assistant medical officer—Action for wrongful dismissal—Action for return of superannuation contributions—Public Authorities Protection Act, 1893
G (*c.* 61), *s.* 1.

A county mental hospital was maintained by a joint visiting committee under the Lunacy Act, 1890. This committee engaged the plaintiff as assistant medical officer, but no terms as to the termination of the appointment were settled. Friction arose between the plaintiff and the superintendent of the hospital, and the committee dismissed H the plaintiff, with 3 months' salary in lieu of notice, not for misconduct, but on the ground that his retention on the staff was not in the interests of the hospital. Sect. 276 of the Act empowers a visiting committee to remove any person appointed under the section. The plaintiff had been paying contributions towards a superannuation fund under the Asylums Officers' Superannuation Act, 1909. For some years he had been claiming a superannuation allowance, and the Secretary of State had decided the claim against him in 1930. The plaintiff claimed, *inter alia*, (i) damages for wrongful dismissal and arrears of salary; (ii) the repayment of his contributions to the superannuation fund. He at first claimed also a superannuation allowance, but withdrew the claim, with others, during the trial:—

Held: (i) [Greer, L.J., dissenting] the words "may remove" in the Lunacy Act, 1890, s. 276 (3), mean "may remove at pleasure," and the committee was therefore entitled to dismiss the plaintiff without notice. A

(ii) the plaintiff's contract of employment was not one made voluntarily by the committee, but as a direct execution of a statutory duty, and, therefore, as the action for wrongful dismissal had not been brought within 6 months of the dismissal, the Public Authorities Protection Act was a good defence.

(iii) failure to pay the plaintiff his superannuation contributions was B a neglect of a statutory duty imposed by the 1890 Act, and the action under that head should also have been brought within 6 months of the cause of action, which arose when the Secretary of State made his decision in 1930.

Appeal from Macnaghten, J. ([1936] 2 All E.R. 665) *dismissed.*

[**EDITORIAL NOTE.** Here the Court of Appeal has affirmed the decision of the C court below that, under the Lunacy Act, 1890, s. 276 (3), an officer may be dismissed at pleasure; though this position in some cases may now be modified by the Local Government Act, 1933, s. 121 (1). The questions raised upon superannuation payments have not been decided upon the appeal, since the court held these claims to be barred by the Public Authorities Protection Act, 1893.

As to Dismissal under the Lunacy Act, 1890, s. 276, see HALSBURY, D Hailsham Edn., Vol. 21, p. 393, para. 675; and for the Section, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 111.]

Cases referred to:

(1) *Brown* v. *Dagenham Urban Council*, [1929] 1 K.B. 737; Digest Supp.; 98 L.J.K.B. 565; 140 L.T. 615.

(2) *Nelson* v. *Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 9 Digest 529, *3492*; 83 L.J.K.B. 823; 110 L.T. 888. E

(3) *Bradford Corpn.* v. *Myers*, [1916] 1 A.C. 242; 38 Digest 110, *784*; 85 L.J.K.B. 146; 114 L.T. 83.

(4) *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; 38 Digest 109, *783*; 73 L.J. Ch. 777; 91 L.T. 739.

(5) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 34 Digest 168, *1307*; 22 L.J.Q.B. 463. F

(6) *R.* v. *Darlington School (Governors)* (1844), 6 Q.B. 682; 13 Digest 317, *512*; 14 L.J.Q.B. 67; 4 L.T.O.S. 175.

(7) *Ex p. Teather* (1850), 1 L.M. & P. 7; 34 Digest 68, *453*; 19 L.J.M.C. 70; 14 L.T.O.S. 355.

(8) *Clarke* v. *Lewisham Borough Council* (1902), 67 J.P. 195; 38 Digest 109, *781*.

(9) *Lyles* v. *Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 38 Digest 102, *733*; 74 L.J.K.B. 484; 92 L.T. 568. G

(10) *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J.P. 483; 38 Digest 109, *780*.

(11) *Bennett* v. *Stepney Borough Council* (1912), 107 L.T. 383; 38 Digest 101, *730*.

(12) *R.* v. *Carpenter* (1866), L.R. 1 C.C.R. 29; 15 Digest 925, *10197*; 35 L.J.M.C. 169; 14 L.T. 572. H

(13) *R.* v. *Lew (Inhabitants)* (1828), 8 B. & C. 655; 34 Digest 53, *274*; 7 L.J. O.S.M.C. 18.

(14) *M'Gougan* v. *Belfast Guardians* (1885), 18 L.R. Ir. 89.

(15) *Lloyd* v. *Bermondsey Union* (1912), 108 L.T. 716; 37 Digest 213, *94*.

(16) *Edwards* v. *Metropolitan Water Board*, [1922] 1 K.B. 291; 38 Digest 111, *795*; 91 L.J.K.B. 210; 126 L.T. 300.

(17) *Midland Ry. Co.* v. *Edmonton Union,* [1895] A.C. 485 ; 37 Digest 207, *47* ; 64 L.J.Q.B. 710 ; 72 L.T. 811.

APPEAL from a judgment of MACNAGHTEN, J., dated May 19, 1936, and reported in [1936] 2 All E.R. 665.

D. N. Pritt, K.C., and *Gerald Gardiner* for the appellant.

F. J. Tucker, K.C., and *Walter Lloyd* for the respondent Bowes.

R. P. Croom-Johnson, K.C., and *W. Blake Odgers* for the respondent, the Hampshire Joint Mental Hospital Committee.

Pritt, K.C.: The words "may remove" in the Lunacy Act, 1890, s. 276 (3), mean "may remove in accordance with the terms of his contract"; they do not mean "may remove at pleasure." The court should lean against a construction which would deprive a valuable class of officers of all security of tenure. [Counsel referred to *Nelson* v. *James Nelson & Sons, Ltd.* (2) and *Brown* v. *Dagenham Urban Council* (1).] The Public Authorities Protection Act, 1893, is never applied to cases of breach of contract. [Counsel referred to *Bradford Corpn.* v. *Myers* (3), *Clarke* v. *Lewisham Borough Council* (8), *Lyles* v. *Southend-on-Sea Corpn.* (9), and *Milford Docks Co.* v. *Milford Haven Urban District Council* (10).] The failure to repay the plaintiff his contributions was a neglect of a public duty; it was a continuing neglect, and so the Public Authorities Protection Act did not begin to run. Alternatively, it was not a public duty, but a duty to the plaintiff personally, a sum of money due, and the Act is never applied to a debt. It is submitted that the decision in *Bennett* v. *Stepney Borough Council* (11) is wrong.

Croom-Johnson, K.C.: The duty conferred on the committee to appoint officers is a positive duty, not an enabling power. The committee is compelled by the statute to do certain acts. If there is a contract based on the statute, there must be read into it the powers conferred by the statute, which include the power of removal. The cases cited on contracts and the Public Authorities Protection Act were all cases of voluntary contracts, contracts which the authority could make or not. This case is different; this is a contract which the authority had to make. The plaintiff is seeking to assert a statutory right, and so the Public Authorities Protection Act is a complete answer. The expression "remove an officer" connotes unilateral action, not the determination of a contract by giving notice. There is no room for the court to imply into this contract a term of giving notice. The appointment can be subject only to the regulations and to sect. 276. [Counsel referred to *R.* v. *Carpenter* (12), *R.* v. *Lew* (*Inhabitants*) (13), *R.* v. *Darlington School* (*Governors*) (6), *M'Gougan* v. *Belfast Guardians* (14), *Lloyd* v. *Bermondsey Union* (15), and *Ex. p Teather* (7).] Cases under the Companies Act are quite different; there is no question there of carrying out a public duty. [Counsel referred to *Bradford Corpn.* v. *Myers* (3), *Edwards* v. *Metropolitan Water Board* (16), and *Lyles* v. *Southend-on-Sea Corpn.* (9).]

Gardiner in reply: It has never yet been held that the Public Authorities

Protection Act applies to a mere non-payment of money, except in *Bennett* v. *Stepney Borough Council* (11). [Counsel also referred to *Milford Docks Co.* v. *Milford Haven Urban District Council* (10).] Mere neglect cannot be the performance of a duty. The Poor Law Act, 1859, applies to this claim for contributions ; either the Public Authorities Protection Act, 1893, s. 2, has repealed such sections of the 1859 Act, or, if not, proceedings under the 1859 Act are not proceedings to which the later Act applies. Now, in fact, the Public Authorities Protection Act did not repeal these sections ; *Midland Ry. Co.* v. *Edmonton Union* (17) ; they were not repealed until the Poor Law Act, 1927. Therefore this is a debt, claim or demand due by the asylum board, and the 1893 Act does not apply. Furthermore, there was here a continuing cause of action. If "remove" means "remove at pleasure," that would mean that the employees of all public bodies, except those under the Public Health Act or the Education Act, could, before the passing of the Local Government Act, 1933, all be dismissed without notice. It is said that the committee had to employ this officer ; that is wrong. Under sect. 276 there are only four officers the committee has to appoint ; the plaintiff was not one of those. The Public Authorities Protection Act does not apply to actions for wrongful dismissal. [Counsel referred to *Sharpington* v. *Fulham Guardians* (4) and *Clarke* v. *Lewisham Borough Council* (8).]

Greer, L.J. : This is an appeal by the plaintiff, who was employed as an assistant medical officer of the Park Prewett mental hospital at the material times, to have judgment in the appeal or an order for a new trial. The plaintiff, from June 14, 1906, to Aug. 31, 1922, was assistant medical officer to the Lancaster county mental hospital under an agreement under which he was entitled to 3 months' notice. He received his 3 months' notice, and his service terminated on Aug. 31, 1922. After some temporary employment in connection with matters relating to lunacy or insanity, he obtained, on May 1, 1923, an appointment by the defendant committee as second assistant medical officer to Park Prewett mental hospital. There was no express agreement as to the notice to which he was entitled, and, therefore, unless the long argument which was addressed to us by Mr. Croom-Johnson is right, he would be entitled, on an implied agreement, to a reasonable notice. He, in fact, was appointed by the committee, in which, under the Lunacy Act of 1890, was vested the asylum. He was appointed on May 1, 1923, at a salary of £400, with amenities, which were valued at £150, consisting of board and lodging. On Aug. 12, 1926, he was appointed pathologist to the asylum, at an additional salary of £100 per annum. On Oct. 21, 1927, the plaintiff was orally dismissed by the committee, which, contrary to his contention, was willing to hear anything that he had to say, but, in consequence of his refusal, no representations were made by him to the committee, because he preferred to say what he had to say to the chairman of the committee, the Duke of Wellington. On the same date, Oct. 21, 1927, written notice was given to him, purporting to be in accordance with his contract, on the assumption that 3 months was an appropriate period of notice. Instead of giving him the 3 months' notice, the committee suspended him for the time being from his duties, and gave him 3 months' salary in lieu of notice, a course that it was entitled to take if 3 months' notice was a proper notice to be given, in the circumstances of the case. But, there being no express agreement as to notice, under the law which is applicable to cases of this sort, he was entitled to a reasonable notice, and it would be for the jury, if the case were tried by a jury, to decide what was a reasonable notice. Owing to some difficulty with reference to the continuance of the case, and some difficulty in getting a jury back again, the question as to what was a reasonable notice was never determined. The judge, however, came to the conclusion that he had adequate material to dispose of the case without any finding by the jury as to what was the period of reasonable notice. He gave his decision on the two questions which arose for decision, the first question being as to whether or not, his dismissal having taken place so long ago as Oct. 21, 1927, and being rendered final by a decision, in the appeal that he had made to the Ministry of Health, more than a period of 6 months before he brought his action, his action was determined by the Public Authorities Protection Act. The judge decided that part of the case on the ground that the statute applied.

The other part of the case was concerned with a claim that he made, in the alternative, to be paid the sums due to him in respect of his contributions to the pension fund. That second claim can be disposed of quite simply, because, admittedly, it was a claim that could be made, and that could be made only, under the provisions of the Act of 1890, and, inasmuch as it could be made under the statute only, the failure to pay was a neglect of the duties imposed by the statute, and, therefore, the statutory period having elapsed, he could not make any claim. It was that part of the case that the judge decided on a ground that does not appeal to me as correct, namely, on the ground that, inasmuch as the plaintiff had put forward the alternative claim to be paid the full amount of his pension, he could not also claim the return of the amount of his contributions. That seems to me to be quite wrong, if I may say so, with respect to the judge, because the plaintiff is entitled to put his claims in the alternative, and he did claim in the alternative that, if he was not entitled to his pension, he was at least entitled to the return of his contributions. In order to decide this case, it is necessary to examine some of the sections of the Lunacy Act, and especially sect. 276. I should say that the asylum is never the property of the committee. It is not the occupier of the asylum. An asylum in many cases belongs to one local authority, which is the occupier, and in this particular case it was an asylum which belonged to two combined local authorities, and it was necessary, in order that the business of the asylum should be carried on, that somebody should be appointed to manage the asylum, and the statute provides that that is to be done by a committee, called the visiting committee. Sect. 276 provides :

> (1) The visiting committee of every asylum shall appoint . . . (*b*) A medical officer, who shall reside in the asylum and shall not be the clerk or treasurer of the asylum ; (*c*) A superintendent of the asylum, or, if there is more than one division, a superintendent of each division of the asylum, who shall be the resident medical officer or one of the resident medical officers of the asylum, or of the division of which he is appointed superintendent, unless a Secretary of State authorise the committee to appoint some other person than a medical officer to be superintendent ; (*d*) A clerk ; (*e*) A treasurer ; (*f*) Such other officers and servants as they think fit.

It was contended by Mr. Croom-Johnson that that merely meant that the visiting committee was to nominate the various officers and servants referred to in the section, but did not confer upon it any power to make any agreement whatever with those officers and servants so appointed. To my mind, that is an impossible argument, and it is not an argument that has ever appealed to these authorities, because they invariably make agreements, and, in the instance which we have from Lancashire, they had made an agreement for 3 months, and there is an agreement with Dr. Bowes for a 3 months' notice. It would not be possible for the business of the hospital to be carried on if the visiting committee had not power, when it nominated an officer, also to agree the terms on which he was to carry out his duties. I read sect. 276 as meaning that the visiting committee is to have the power, which it would not have if it was not given to it by the statute, to appoint officers on such terms as it found it necessary to agree to, in order to obtain the officers and servants that it was bound to have in order that the asylum could be carried on, but I do not think that that is a matter of any very great importance, because, in making the agreement, just as in nominating the officer, it was acting under the provisions of the Act of Parliament ; it had no power to do it except under the Act of Parliament, and the agreement that it made was an agreement made under the powers given to it in sect. 276, and, if it broke that agreement, then it was doing something contrary to the powers which had been entrusted to it under the Act of Parliament, and it can take advantage of the provisions of the Public Authorities Protection Act as if it had made no agreement at all. Then sect. 276 (3) provides : "The committee may remove any person appointed under this section." Then it goes on to deal with the chaplain, medical officer, superintendent, clerk and treasurer. It is unnecessary to read that part, but it was contended by Mr. Croom-Johnson that "remove" in that subsection meant remove at its pleasure, as and when, in its discretion, the visiting committee thought fit. I think that it means nothing of the sort. Our attention was called to several instances in which officers were appointed when it was expressly stipulated, under the statute which appointed them, that they were appointed at pleasure. I need not refer to them more in detail. One of them was under one of the Public Health Acts, and another under the Education Act, and, in other cases, such as the *Dagenham* case (1), which was tried by McCARDIE, J., the words were "may revoke." There is no such word here.

"Revoke" means to nullify the agreement that has been made, and, where the word is "revoke," I think that it would be right to say that, if the question arose as to whether that entitles the authority to revoke at pleasure, it does so entitle it, because "revoke" by its very meaning means put an end to an agreement which is in existence, but in this case the word is "remove," and there are not any words which make it necessary to put upon it the interpretation of "remove at will," or "at pleasure," which it did not in this case purport to do at all. The reason why the provision is there contained is that the power must be given to somebody to make the agreement, and the power must be given to somebody to put an end to the agreement under the terms of the agreement, and the section is required in order to give that power to appoint a man to begin his office and to determine the office, to the visiting committee, which otherwise might have been left with the difficulty that, although it might appoint, it was not the authority by statute to remove in accordance with the agreement that it had made.

For these reasons, I think that the appeal ought to be dismissed, because the words of the section of the Public Authorities Protection Act apply to the case. The Public Authorities Protection Act, 1893, s. 1, provides:

> Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of. . . .

If inadequate notice was given to the plaintiff, that seems to me to be a neglect or default in intended execution of an Act of Parliament. For these reasons, without referring definitely to any other authorities, I think it is quite clear that, in this case, the appeal fails, on the ground that the period provided for by the Public Authorities Protection Act had expired. With regard to the action against Dr. Bowes, in my judgment, there was no evidence which would justify us in finding that Dr. Bowes had procured the wrongful dismissal, if it was wrongful, knowingly and wilfully intending to procure a breach of contract.

SLESSER, L.J.: This case is a difficult one, and it raises two different subjects for consideration, first, a question of general application, namely, the meaning of the Lunacy Act, 1890, s. 276, and, secondly, the question of the application of the Public Authorities Protection Act to this particular case. It is convenient to approach the question by dealing with the Lunacy Act matter. In my opinion, though I say it with great hesitation, the word "remove" in the section which we have here to consider means remove at will, at pleasure, or at discretion. The actual section, to which GREER, L.J., has already referred, provides for the powers of the visiting committee of every asylum with regard, first, to the appointment to certain offices, one of which is a medical officer, and, secondly, to the removal of persons appointed under that section. Then it goes on to deal with other appointments beyond those which appear to be compulsory upon the visiting committee. It says:

> The visiting committee of every asylum shall appoint . . . : (*b*) a medical officer, who shall reside in the asylum . . . (*f*) such other officers and servants as they think fit.

It has been pointed out to us here that the plaintiff, Dr. McManus, was not the medical officer, but was a deputy medical officer. The medical officer was Dr. Bowes. Therefore, he is one of those persons who may be appointed, but, in my view, I do not draw any distinction in principle between the obligation compulsorily to appoint the medical officer and the optional power to appoint such other officers as the visiting committee thinks fit. As I have said, subsect. (3) provides for the removal of persons. It says: "The committee may remove any person appointed under this section." Then it says that, if certain offices fall vacant, "the committee shall appoint a person to fill the vacancy," and other vacancies it may fill in its discretion. Therefore, there is a power to appoint and a power to remove. The question which arises, and it is a very important question on this part of the case, is whether, when either a local authority or a visiting committee, which exercises the powers of a local authority, has made a contract, either for an express period or for a period of a reasonable term to be implied, its power to remove authorises it to get rid of a person appointed under sect. 276, notwithstanding the fact that it has in its contract purported to give him a contract of a certain duration. As GREER, L.J., has pointed out, the power to make these contracts at all is given them by the section, and, if the words "may remove" are properly to be construed as "may remove at pleasure," it would follow that any limitation on its power to terminate the contract in the individual agreement made with the particular officer would, to that extent, in so far as it was a fetter on its power to remove, be *ultra vires*. I think that that is the view which was taken by MCCARDIE, J., in *Brown* v. *Dagenham Urban Council* (1). There two matters fell for consideration: first, the effect of the Public Health Act, 1875, s. 189, and, secondly, the effect of the Local Government Act, 1894, s. 5 (1). So far as regards the Act of 1875, no question really arose. The power was that of an urban district council to remove its clerk from his office at pleasure, and without cause or notice. The other section, the Local Government Act, 1894, s. 5 (1), conferred on the local authority power to revoke the appointment of an assistant overseer at will, and without cause, notice, or hearing. By sect. 5 (1) of the 1894 Act, it was enacted:

> the power of appointing and revoking the appointment of an assistant overseer, for every rural parish having a parish council, shall be transferred to and vested in the parish council.

So that the parish council had the same powers with regard to the appointment, and revocation of the appointment, of an assistant overseer as were formerly held by the authorities from whom the power was transferred. The power in question was conferred by the Poor Relief Act, 1819, and, under that Act, which dealt with the appointment of assistant overseers, which made it lawful, by sect. 7, for the inhabitants of any parish in the vestry assembled to nominate and re-elect a discreet A person to be an assistant overseer or overseers of the parish, it was further provided:

> Every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled and no longer.

B Those words, in the opinion of McCARDIE, J., and I agree with him, were apt to give power to the local authority, whichever authority might, at the moment, be exercising the power, to remove the assistant overseer at will. He held office during pleasure, and a number of old authorities, to which it is not necessary to refer, and textbooks support that view. C In many of the statutes, the words "remove at will" have been specifically inserted. I have already referred to the Public Health Act, 1875, s. 189, which states in terms that certain officers "shall be removable by the urban authority at their pleasure." Apart from the addition of the words "at their pleasure," those words are not distinguishable from D the present ones, the words "shall be removable" being clearly stated. It is also to be found, that, in the Local Government Act, 1933, which to a large extent codifies and consolidates the existing legislation, it is provided by sect. 106: "the council of every parish shall appoint fit persons to be," and then follows a number of offices, including the E medical officer of health. Then in sect. 106 (2) it is provided that: "every such officer shall hold office during the pleasure of the council." With regard to county medical officers of health, by sect. 103 it is provided:

> (1) Every county council shall appoint one or more fit persons to be county medical officer or officers of health [at such salary as they may determine].

F Then it is provided:

> (3) A county medical officer of health shall not be appointed for a limited period only but shall hold office during the pleasure of the county council.

That section and the other section, to which I have referred, seem to me to contemplate that it is within the power of the local authority to make G contracts with its officers dealing with all subject matter other than that which is expressly limited by the language of the Act. Thus it is said, the county medical officer of health is to perform such duties as may be prescribed, and that the county medical officer of health shall be paid such reasonable salary as the county council may determine. All H these matters may be the subject of contract, but, it being expressly provided that, subject to the consent of the Minister, he shall hold office during the pleasure of the county council, a term of a contract which provided a duration to the contract, which would conflict with the power of the county council to appoint during pleasure, would be *ultra vires*. Therefore, I see no difficulty in assuming that, even where an officer may be removed, and may be removed at pleasure, if the two things mean the same thing in the context, nevertheless, it would be competent for the local authority, in all matters not specifically dealt with in which its powers were limited, to make such agreement as it thought fit, and I am unable to understand the argument of Mr. Croom-Johnson that those words, as I understood him, make it incompetent for the local authority to make any contract with its officers. Another example to the same effect is to be found in the Education Act, 1921, s. 148:

> (1) A local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority and may assign to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers.

That section I find instructive, in this sense, that, unlike some of the other sections, which speak specifically of removal, with some qualification or revocation, that section, sect. 148 (1), first says that they are to hold office during the pleasure of the authority, and then goes on to say "and may remove any of those officers," which seems to indicate, to my mind, that the legislature thought that the power of removal was a necessary consequence of the power to hold office during pleasure. Two of these sections are in slightly different language, and one comes back to the original problem, whether the words here mean "remove at pleasure," although the words "at pleasure" are not specifically mentioned. For myself, I find very little assistance from the cases which depend upon the interpretation of the articles of association of a limited liability company, which have been cited to us, except one passage which I read from the judgment of KENNEDY, L.J., in the case of *Nelson* v. *James Nelson & Sons, Ltd.* (2). He is speaking of the word "revoke," which, with every respect, I think means, in this sense, nothing other than "remove." KENNEDY, L.J., says, at p. 777:

> The word "revoke" must be read with its context. "Revoke an appointment" means, no doubt, to put an end to an appointment, but not necessarily to put an end to it without giving any notice where, for example, by the terms of the agreement it is provided that notice shall be given.

I understand KENNEDY, L.J., there to be saying that, where, in a series of articles forming the constitution of a limited company, one finds other articles, inconsistent with giving that general application to the word "revoke," one has to have regard to the context, but here I find, in the language of the Lunacy Act, 1890, s. 276, no such language. I am not therefore precluded from giving to the word "remove" what I believe to be, in contradistinction to the word "appoint," its natural meaning, which is, as I see it, to remove at pleasure, or remove at will. I think that those words "at pleasure," "at will," and the like, are surplusage in this connection, and appear to be used in the Education Act without any specific qualification.

I would add one other argument which Mr. Pritt addressed to us on this point. He indicated that there were statutes to be found in which the power of removal was vested in somebody other than the power of appointment. He instanced the County Courts Act, 1888, s. 27, which provides :

> It shall be lawful for the Lord Chancellor, or the Chancellor of the duchy of Lancaster (as the case may be) when such Lord Chancellor or chancellor of the duchy shall in his discretion think fit, to remove the registrar of any court from his office.

He points out that, by sect. 25, the appointment of the registrar is vested in the county court judge, subject to the approval of the Lord Chancellor, there being, therefore, one authority which appoints and another which removes. For myself, I am unable to see how this helps this argument. We are to consider the meaning of the word "remove," and, if it be a fact, as I think it is, that, under sect. 27, the Lord Chancellor may remove the registrar at pleasure, the mere fact that he is not himself the appointing authority does not, in my mind, put any gloss or qualification on the absolute power to remove. The same observation I would make with regard to any other statute, where the appointing authority and the removing authority are not the same.

I start, therefore, with the assumption that the word "remove" in the Lunacy Act, in the section which we have here to consider, means to remove at pleasure, and that, therefore, any term of a contract which purports to give to an officer any duration of his contract inconsistent with that power is outside the ambit of the statute. If that be so, it is an end of the case, so far as regards Dr. McManus's claim against this local authority for wrongful dismissal. I agree with GREER, L.J., that, when the resolutions and the notices sent to Dr. McManus are considered, it is clear, from the letter of Oct. 21, 1927 (in which Mr. Spooner, the clerk to the committee, said : "I am instructed by the special sub-committee . . . to give you 3 months' notice of termination of your services . . . I am further instructed to give you notice of suspension") that, in fact, in this case, the visiting committee did purport to give to Dr. McManus 3 months' notice, and did not exercise the right which it had to dismiss him at its pleasure by removing him, but that would not in itself disentitle Dr. McManus, if it were the right view, to come to this court and say : "I dispute that 3 months is the proper notice. True it is that I may have received 3 months' notice, but I am entitled to have found by a jury what, from the consideration of my employment, is a reasonable notice." The fact that his superior, Dr. Bowes, was receiving remuneration, and that his contract was on the basis of a 3 months' notice, and the fact that Dr. McManus himself had, in a previous occupation, at the Lancaster asylum, received 3 months' notice, would not, in my view, be conclusive of the matter ; in other words, had I come to the conclusion that Dr. McManus was entitled to notice at all, and had not a contract holding office during pleasure, then I should have thought that the matter would have to be considered on a new trial, but, for the reasons that I have stated, I think that such an argument does not lie in his mouth at all.

The second point on this part of the case arises under the Public Authorities Protection Act, and I think it is necessarily involved in a decision of the first point. Had Dr. McManus, in fact, been employed under a contract of the kind which has been discussed in some of the cases dealing with the protection of public authorities, such as *Bradford Corpn.* v. *Myers* (3), it would have followed, I think, that the local authority could not have invoked the protection of the statute against him. As Lord Buckmaster, L.C., said, in that case, at p. 247 :

> In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority.

In other words, if the only connection between the employment of Dr. McManus and the statute had been that the local authority would have to point to the statute as an enabling statute to give it power to make contracts with doctors on such terms as it thought fit, then I think that it might well be argued that, this being an act which is not only within its power, but also an act in which it is free to make such contracts as it thinks fit, the case would be like the sale of the coal products in *Bradford Corpn.* v. *Myers* (3), and the Public Authorities Protection Act would not apply. Similarly, in *Sharpington* v. *Fulham Guardians* (4), where a local authority had power to build houses for the reception of the destitute, it was held that a building contract made under that power was not in itself an act done in pursuance, or execution, or intended execution, of an Act of Parliament. If the true view be that this appointment and removal are directly statutory, not by reason of any contract, but by reason of the operative language of the section itself, as I think is the case with such an office as this, where the officer holds office during pleasure, then I think that it follows that such a case is not a contract of the voluntary nature suggested in *Bradford Corpn.* v. *Myers* (3), or in *Sharpington's* case (4), or in several cases which are there discussed, but is a direct execution of the statute itself. Therefore, I think that also, for that reason—although it is more particular in its application to Dr. McManus than the more general view which I formed of the statutes affecting all officers appointed under sect. 276—this appeal fails.

It follows that I must say something about his claim under the statute of 1909. I agree with Greer, L.J., in differing from the view expressed by the judge, that this doctor could not claim effectually for a return of his contribution while he had upon the pleadings a claim for the pension. The fact is that, in 1932, by a decision of the Ministry of Health, it was finally determined that he was not entitled to his pension, and, from that moment, as I see it, if he were entitled, he came under the Asylums Officers' Superannuation Act, 1909, s. 10, which is to this effect :

> (1) An established officer . . . who has not become entitled to a superannuation allowance . . . shall be entitled to receive the aggregate amount of his contributions under this Act.

As from the moment when it had been finally and conclusively determined

that he was not entitled to a superannuation allowance, which decision took effect as from the time of the decision of the Ministry of Health, he did thereafter become entitled to the return of his contributions, and, in my view, the neglect to pay those contributions, to which I will assume that he was otherwise entitled, was a neglect within the language of the
A sections of the Public Authorities Protection Act coming directly within the words, the neglect of an "act done in pursuance, or execution, . . . of any Act of Parliament," namely, a neglect to do that which the Act requires the local authority to do, that is to say, to return his contributions. Therefore, that claim also is barred by reason of the Public
B Authorities Protection Act. In these circumstances, I do not think that it is necessary to consider, in this case, the difficult question whether, had he been validly entitled to ask for the recovery of the aggregate amount of his contributions, he could recover from this authority only the contributions which had been paid to that authority, or whether
C he could be entitled to aggregate all his contributions as against any particular authority. In my view, having regard to the operation of the Public Authorities Protection Act, that difficult problem does not arise for solution in the present case.

I would add only that I agree with GREER, L.J., respectfully, that,
D in the case of Dr. Bowes, against whom the action is brought on the *Lumley* v. *Gye* (5) principle, that he procured the breach of contract between the local authority and Dr. McManus, the first answer is that there is not a contract the breach of which he could procure, because, although, as I say, in my view there is a contract as to certain matters,
E the duration of the contract being at pleasure, and the procurement being the breach of that term that it should continue to employ him, it follows that there could not be a procurement of the breach of a contract when no contract as to the duration of his service existed. Secondly, even if there were, there is not a shadow of evidence in this case that he ever
F did procure any such breach of contract at all. The evidence, which has been read to us, and carefully considered, consists, in the most part, of complaints made by him about certain sisters and nurses, and discussions with Dr. Bowes, his superior, but, as to any specific evidence of any procurement of the whole or any member of this visiting committee
G to terminate this alleged contract, there is none whatever, and that part of the case, I agree, for the reasons stated by the judge in the court below, must necessarily fail. It follows, therefore, that the whole appeal must be dismissed with costs. I have given judgment at some length in this case, because I realise that the earlier part of my judgment, namely,
H the construction of the meaning of the word "remove," is of importance, affecting not only Dr. McManus, but also the whole class of persons holding office under the visiting committee under the Lunacy Act.

MACKINNON, L.J.: I agree that this appeal must be dismissed. It would indeed be lamentable if we had been constrained to come to any other conclusion, so as to lead to further acts in this litigation. The engagement of the plaintiff as assistant medical officer came to an end on Oct. 21, 1927. Five years and 364 days elapsed, and, on Oct. 20, 1933, he issued his writ against Dr. Bowes, his late medical superintendent, and a number of the members of the committee of the authority that was administering the hospital, and against the clerk of that hospital. He claimed, against these various defendants personally, five causes of action, including damages for conspiracy, for libel, for slander, for negligence, and for wrongful conversion. Against the defendant committee he alleged nine causes of action, and the whole statement of claim covered 17 pages, and included 45 paragraphs. Of that series of claims almost all were abandoned by his experienced counsel at the trial, and there remain now, and have been brought before us, only three very minor claims. The first is the claim that he was wrongfully dismissed, and was not given the appropriate period of notice. He was, in fact, given 3 months' notice, and he says that he ought to have had a longer notice. That has never been determined by a jury. Secondly, he claims the return of his superannuation allowances, and, thirdly, there is a claim against Dr. Bowes for procuring a breach of contract by the committee. That last claim, in the course of the reading of the evidence, was dismissed, we being perfectly satisfied that there was not a shred of evidence against Dr. Bowes supporting it. As regards the claim for the return of his contribution payments, that return, if it ever arose, arose on Nov. 8, 1930, when the Ministry of Health decided against his appeal for the granting of superannuation allowances. I am perfectly satisfied that, under the Public Authority Protection Act, any claim ought to have been made within 6 months of that date, Nov. 8, 1930. No claim was made until Oct. 20, 1933. To that claim, therefore, the Public Authorities Protection Act is a complete defence.

There remains only the question of whether the plaintiff has been deprived of the right of having decided by a jury whether the 3 months, which he had himself agreed was the proper period when he was engaged in Lancashire, and which was the time agreed by his superior officer, Dr. Bowes, was a sufficient period, or whether he ought to have had a longer notice. In regard to that, I agree that this appeal fails. I agree that the section of the Lunacy Act by which the committee was given power to appoint the plaintiff, and to remove him from his appointment, did give the committee, in effect, power to put an end to his employment at pleasure. I can see no real difference between the words "to revoke his appointment" and the words "remove him from his office." Quite apart from the mere words themselves, I think that the result of the three cases of *Brown* v. *Dagenham Urban Council* (1), in the decision of which I agree with the view of McCardie, J., *R.* v. *Darlington School* (*Governors*) (6), and *Ex p. Teather* (7) goes to show that the meaning of these various phrases used in different Acts is really the same, and that, where, under the Lunacy Act, 1890, s. 276, it is pro-

vided that the committee may remove any person appointed under this section, that is the same as a power to revoke his appointment, and it really amounts to a provision that he is employed at the pleasure of the committee. I further think that here again the action of the committee in revoking his appointment, or removing him from his office, or putting
A an end to his employment, was an act done in purported execution of its powers under the Lunacy Act, and that, therefore, here again the right of action, if any, in respect of that action on its part, must be exercised within the 6 months provided by the Public Authorities Protection Act.

B The result is that I am entirely in agreement with the proposition that this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *William P. Webb* (for the appellant); *Beamish, Hanson, Airy & Co.*, agents for *Shenton, Pain & Brown*, Winchester (for the
C respondent Bowes); *Robbins, Olivey & Lake*, agents for *F. V. Barber*, Winchester (for the Hampshire Joint Mental Hospital Committee).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

D PALMER *v.* WATTS, WATTS & CO., LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **April 28, 29, 1937**.]

Workmen's Compensation—Partial incapacity—Treated as total incapacity—
E *"Work in the same grade in the same class of employment as before the accident"—Whether employment other than employment at time of accident included—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 9 (4)—*Workmen's Compensation Act,* 1931 (*c.* 18), *s.* 1 (1).

A workman had, for several years before 1929, been employed as a shipwright, to which trade he had been apprenticed. In 1929, owing to depression in the shipbuilding industry, he obtained employment in
F the appellant company's colliery as a pumpsman and hitcher. In Mar., 1936, while engaged in this employment, he sustained an injury, and for a time received compensation on the basis of total incapacity. Payments were terminated in June, 1936, and the workman thereupon applied for arbitration on the question whether he was entitled to compensation on the basis of total incapacity under the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Act of 1931. The
G county court judge found that the workman would not have been able to obtain work as a pumpsman and hitcher, as the mine was closed down and there was no employment available in that capacity; but he found that the workman would have been able to obtain work as a shipwright but for the injury, and that work as a shipwright would be work in the same grade and in the same class of employment as
H before the accident. The county court judge accordingly made an award in favour of the workman under the amended sect. 9 (4) (i):—

Held: the words in the amended sect. 9 (4) (i), "work in the same grade in the same class of employment as before the accident," referred to the employment in which the workman was engaged at the time of the accident. In view of the judge's finding that the workman would not have been able to obtain work as a pumpsman and hitcher, no award could be made under the amended sect. 9 (4) (i).

[EDITORIAL NOTE. This case turns solely upon the construction of the words "work in the same grade in the same class of employment as before the accident" in sect. 9 (4) as amended by the 1931 Act. The words refer to the particular class of employment at the time of the accident and not to a previous form of employment which had then been discontinued.

As to Partial Incapacity treated as Total Incapacity, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 257-264; and for Cases, see A
DIGEST, Vol. 34, pp. 396-406, Nos. 3235-3306.]

Case referred to:

(1) *Addie (Robert) & Sons, Collieries, Ltd.* v. *McCracken*, [1936] 3 All E.R. 1039; Digest Supp.; 29 B.W.C.C. 378.

B

Appeal from a decision of His Honour Judge Davies given in the Haverfordwest County Court on Feb. 4, 1937. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

L. Herrick Collins for the appellant company.

Trevor Morgan, K.C., and *T. Jenkin Jones* for the respondent. C

Sir Wilfrid Greene, M.R.: This appeal relates to the case of an accident, which took place on Mar. 16, 1936, to the respondent, at a time when he was employed as a pumpsman and hitcher at the appellant company's colliery. He had been employed in that capacity at that D
colliery for 7 years, but, previously to the commencement of that employment, he had been employed for several years as a shipwright, which was the trade to which he was originally apprenticed. In 1929, owing to the depression in the shipbuilding industry, he left the shipyard, and obtained employment in the capacity which I have mentioned at E
the appellant company's mine. The accident was an accident to his index finger of the right hand, and, as a result of it, the finger had to be amputated. The result of that is that he is not fit to carry on work as a shipwright. He obtained an award, in the first place, on the basis of total incapacity, but the payment under that award was terminated F
on June 27, 1936, and he thereupon applied for arbitration on the question as to whether he was entitled to compensation on the basis of total incapacity under sect. 9 (4) of the 1925 Act, as amended by the 1931 Act. The case that was set up on behalf of the workman fell under both the paragraphs of that subsect. (4) as amended, but the county G
court judge came to a conclusion in his favour on the first paragraph, and the first paragraph alone, and on the second paragraph his judgment is silent. I shall deal first of all with the case as made out under the first paragraph. That paragraph reads as follows:

> If a workman who has so far recovered from the injury as to be fit for employment H
> of a certain kind has failed to obtain employment and it appears to the county court judge—(i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident . . . the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order.

The county court judge has found, in the present case, that the workman would not be able to obtain work as a pumpsman and hitcher, the reason for that being that the mine has been closed down, and there is no employment available in that capacity; but he has given the workman the benefit of that branch of the subsection by finding that he would have been able to obtain work as a shipwright but for the injury, and that work as a shipwright would be work in the same grade and in the same class of employment as before the accident. It is to be observed that, at the time of the accident, the man had not been working as a shipwright for the 7 years immediately preceding the accident, and it is said that the effect of the provision is that a man who has changed his employment one or more times before entering into the employment in which he was engaged at the time of the accident has, for the purposes of the subsection, a right to choose the class of employment to which he will ascribe himself.

The county court judge has approached the matter as though the problem which the section set for his decision were: What is the class of workman, what is the grade of workman, that the man is in? The section says nothing about that; the section is considering the work, and not the workman. The argument, as I have said, comes to this: taking the relevant words of the subsection, "work in the same grade in the same class of employment as before the accident," it is said that the county court judge is entitled to examine all the work which the man has ever done in the course of his employed life, and see whether he is able to obtain work in any of those kinds of employment, and, if he is, no matter how long it be since he left that kind of work, no matter how many times he has changed his employment, nevertheless, the result would be that that employment could be properly described as the same class of employment as before the accident. It is impossible, to my mind, to see any reason in justice or logic why the legislature should have made any such provision at all. But, what is more important, I can find nothing in the language of the subsection to justify such a construction. It appears to me that, when the subsection is read in its normal and clear meaning, as a piece of not very accurate English, its meaning is that you must look at the employment in which the man was before the accident, and discover whether work in that employment is work in the same class of employment as the work which the man now says he would be able to obtain. That does not justify an inquiry into work in which the man was engaged at some period before the accident, but which had ceased to be his work at the time of the accident.

We are not without some assistance from authority, because, in *Addie (Robert) & Sons, Collieries, Ltd.* v. *McCracken* (1), LORD ATKIN explains the object of this limb of the subsection, and he says this, at p. 1040:

> I think that provision plainly means that if a workman has been injured so that he is unfit to get his former employment but is fit for light work—in the words of the subsection "has so far recovered from the injury as to be fit for employment of a certain kind"—and if he has taken all reasonable steps to get light work

> and has failed to get it, possibly because of the condition of the market, but can show that notwithstanding any economic conditions generally prevailing in the labour market, yet in his own job there would have been room for him but for the accident, he is entitled to say: "I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages."

It is perfectly true that Lord Atkin, when he used those words, had not got before him the particular point which is raised before us, but the analysis which he gives of the meaning of the subsection appears to me to lead to the conclusion which he has expressed in the words which I have last quoted, and to demand that the matter which has to be looked at is the pre-accident work. As a matter of English, in a context of this kind "pre-accident work" cannot mean work at some period in the man's life which historically preceded the accident. "Pre-accident work," when dealing with accidents under an Act of this kind, must mean in its ordinary sense work which the man was in at the time of the accident, and, in my opinion, that is what this limb of the subsection means. It is worth noticing the very curious results to which the opposite conclusion would lead. In the first place, it would lead to historical inquiries as to the man's industrial history, going back, possibly, for a number of years, through a number of changes of employment. Mr. Trevor Morgan, when pressed, was constrained to admit that, in that examination of that historical matter, it would be relevant and essential to inquire what was the man's intention at the time he changed his employment, which might have taken place many times, because Mr. Trevor Morgan quite rightly conceded that, if it was the man's intention, on a change of employment, to leave that employment for good, then it could not be said that that employment was the same class of employment within the meaning of the subsection. Therefore, it would be necessary to inquire, not only into matters of historical fact, but also into the intention in the man's mind at the time he made the changes.

One further aspect of the matter is this, that the wages which the man was obtaining in the employment in which he was engaged as a shipwright have nothing to do with the measure of compensation which he claims. What I mean by that is this: the measure of compensation which he has to get on the basis of total disability would be based on his wages for the past 12 months. He was not employed as a shipwright during the past 12 months, and you would get this remarkable result, that, for the purpose of ascertaining whether the class of employment was the same, you would consider a trade, such as that of a shipwright, in which the wages were different, and yet, when you came to ascertain the measure of his compensation, you would not refer to the wages which he would have earned in that trade at all. That seems to me to be quite inconsistent with the passage I have just read from the speech of Lord Atkin, which I will repeat in this context:

> I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages.

If the pre-accident employment was the employment of a shipwright, which is what the respondent's argument is in this case, and what the county court judge has found, it would not be compensation based on the wages of that employment that the man would get, it would be compensation based on the wages of a different employment, namely, A that of a pumpsman and hitcher. In my opinion, there is no justification, in the language used, for the construction which the county court judge has placed upon it, and his judgment in that respect was wrong.

Now I come to the second paragraph of the subsection, under which B the workman, if he can show that his failure to obtain employment is a consequence, wholly or mainly, of the injury, is entitled to have his incapacity treated as total. The position with regard to that is a little difficult. The workman originally based his case on both paragraphs of the subsection, and he never abandoned either paragraph. The C county court judge has based his judgment entirely on the first paragraph, and we have no finding of fact by him one way or the other as to the second paragraph. Under that paragraph, of course, the workman is bound to show, not merely that he has failed to obtain employment—and, be it observed, that is not confined to employment in the particular D class in which he was employed before, but to any employment—but he must also show that the failure is a consequence, wholly or mainly, of the injury. The county court judge had that issue before him, but, taking the view, as he did, that the matter fell within the first paragraph of the subsection, he did not direct his mind, in his judgment, to dealing E with the second paragraph. Indeed, in the course of the case, taking the view that the workman was likely to succeed on the first paragraph, he in effect invited counsel for the workman to concentrate on that matter. As a result, he did not have the advantage of having the case fully placed before him with regard to the second paragraph. Mr. F Collins says, and says with force, that the employer ought not to suffer from that, and he then says that, if the evidence be examined, it will be found that there is no evidence on which the county court judge could have found that the failure was a consequence, wholly or mainly, of the injury. The county court judge has found quite clearly, and in G terms very creditable to the workman, that he has made every effort to obtain employment: he is anxious to get employment, but has failed to get it. It is true that the evidence as recorded does not state what the cause of that failure is, and the recorded evidence is consistent with one view or the other. That there was before the county court H judge a matter of evidence relating to the failure which is not recorded in the note is clear when one reads his judgment, but what exactly that was, or what it amounts to, is a matter on which we are unable to speculate. The matter is essentially one for the county court judge's finding of fact, and, in the circumstances, I am of opinion that it would be highly unfair to the workman not to give him the opportunity of having that case fully presented, if he wishes to have it presented, before the county court judge.

The effect will be that the appeal must be allowed, because the judgment cannot stand; but the question arising under the second paragraph of the subsection must go back to the county court judge. With regard to costs, the appeal having succeeded, the appellant company must have the costs of this appeal. With regard to the costs of the first hearing, the costs of that will be in the discretion of the county court judge when he comes to decide the matter which is referred back to him. In the event of the workman not proceeding with that application, and the matter not coming, therefore, before the county court judge, the present appellant company must have the costs of the first hearing.

ROMER, L.J.: I agree. On the second point with which SIR WILFRID GREENE, M.R., has dealt I do not wish to add anything, but on the first point, which is a point of considerable importance, arising under sect. 9 (4) of the 1925 Act, as amended by the 1931 Act, I should like to add a few words, more especially as we are differing from the decision of the judge in the court below. For the purpose of construing that subsection, I think it is essential to bear in mind the reason why it was enacted. When a workman is totally incapacitated by injury by accident arising out of and in the course of his employment, the compensation payable to him by his employer is calculated by reference to his pre-accident wages, that is to say—I am now reading from sect. 9 (2):

> the workman's average weekly earnings during the previous 12 months, if he has been so long employed by the same employer, but if not, then for any less period during which he has been in the employment of the same employer.

In other words, the compensation, in the case of total incapacity, is to be calculated not in the least by reference to any wages which, before the 12 months before the accident, the workman was in fact earning in the employ of another employer. In the case of partial incapacity, however—that is to say, in cases where the workman, although incapacitated to the extent that he cannot carry on his former work, is nevertheless able to earn a wage in some other suitable employment—the compensation payable by the employer is no longer based entirely upon the pre-accident wages, but it is based on the difference between the pre-accident wages and what the workman is able to earn in some other suitable employment. Subsect. (4) is addressed to the cases in which it is considered just that, notwithstanding that the workman is only partially incapacitated, his compensation should nevertheless be calculated by reference to his pre-accident wages. Subsect. (4) (ii) deals with the case where the workman, having taken all reasonable steps to obtain such other employment, has failed to do so, wholly or mainly because of his injury. It is not sufficient for the workman to show that he has failed to obtain that other employment because of the state of the labour market. He must show that his failure is due wholly or mainly to the accident. Those are the cases dealt with under para. (ii), and, where the workman can show that his failure to obtain this other employment is due wholly or mainly to the injury, the county court judge can award him compensation calculated on the basis of this pre-accident wage. There is also subsect. (4) (i) to be considered. The reason for the introduction of para. (i) into the section has been explained by Lord Atkin in the case to which Sir Wilfrid Greene, M.R., has already referred, *Addie (Robert) & Sons, Collieries, Ltd.* v. *McCracken* (1), where Lord Atkin said, at p. 1040:

> It was intended to meet the case, which was a case of hardship that had often been discussed in the courts, of a man who has lost his own special employment because of his injuries, and, though he was fit for light work, had been unable to obtain light work, sometimes because of the economic condition of the market, owing to which a man who was fit only for light work could get no employment at all [that, of course, would be a case in which the workman could not take advantage of para. (ii)]. That is why para. (i) of this subsection has been put in. With great respect to counsel for the appellants, who put his argument very plainly, I think that provision plainly means that if a workman has been injured so that he is unfit to get his former employment but is fit for light work—in the words of the subsection "has so far recovered from the injury as to be fit for employment of a certain kind"—and if he has taken all reasonable steps to get light work and has failed to get it, possibly because of the condition of the market, but can show that notwithstanding any economic conditions generally prevailing in the labour market, yet in his own job there would have been room for him but for the accident, he is entitled to say: "I have lost my earning capacity because of the accident, and, but for the accident, I should now be at work earning my pre-accident wages."

In other words, the subsection is introduced to meet the case of a workman who can adduce, as a reason for being compensated on the footing of his pre-accident wages, the fact that, but for the accident, he would now be earning those pre-accident wages. That reasoning does not apply at all to a workman who cannot show that, but for the accident, he would be earning his pre-accident wages, but that, but for the accident, he would be earning some wages which he was earning 15 years before the accident. I come, therefore, to the same conclusion as that arrived at by Sir Wilfrid Greene, M.R., that subsect. (4) (i) is not dealing with any employment other than the employment in which the man was engaged by his employers just before the accident. I think, further, that that conclusion could be arrived at by having regard to the language of the clause, without considering at all the reasons why the clause was inserted. It is to be observed that what has to be considered by the county court judge or the arbitrator is, "the same class of employment as before the accident," not, "any class of employment in which he was at any time engaged before the accident." It must be the same grade, the same class, as the grade and the class of employment that he was engaged in before the accident. That being so, there is only one class that has to be considered; obviously the one class of employment that has to be considered is the class of employment in which the man was engaged immediately before the accident. I agree with the order that has been proposed by Sir Wilfrid Greene, M.R.

Scott, L.J.: I agree, and I have nothing to add.

Appeal allowed. Case remitted.

Solicitors: *Barlow, Lyde & Gilbert,* agents for *F. E. Metcalfe,* Bristol (for the appellant company); *John T. Lewis & Woods,* agents for *Randell, Saunders & Randell,* Llanelly and Swansea (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

DAWSON AND ANOTHER *v.* COUNSELL (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence, J.), **April 14, 15, May 11, 1937.**]

Income Tax—Profits arising from occupation of land—Partnership—Brood mare—Some progeny sold as yearlings—Some sold after racing—Stud farm—One partner tenant—Income Tax Act, 1918 (*c.* 40), *s.* 20 (i), *Sched. B.*

The appellants carried on business in partnership, the partnership's sole asset being a brood mare and her progeny. The mare was kept on a stud farm of which one of the appellants was the tenant. A number of other animals were kept on the same farm, and no specific acreage was allotted to the mare and her progeny, nor to any other animals on the farm, which was used indifferently for all animals upon it. No part of the farm was ever assigned in writing to the partnership in connection with its activities. The mare's progeny were as a rule sent to yearling sales, but in some cases they were put into training to prove their merit on the race course with a view to sale:—

Held: (i) the profits of the partnership derived from the brood mare arose from the occupation of land within Sched. B.

(ii) the profits from racing and selling the racing progeny of the mare were not so closely connected with the occupation of the farm as to make the profits arise or accrue from the occupation of land within Sched. B, and such profits were taxable under Sched. D.

[EDITORIAL NOTE. In *Back* v. *Daniels* (2) certain potato growers were assessed under Sched. B, although they occupied land under very special agreements with neighbouring farmers. In the present case a brood mare was kept by the partnership upon the farm of one of the partners, and though the partners as such would seem to have no exclusive right to the occupation of any part of the land, yet the profits from the brood mare sufficiently arise from the occupation of land to be brought into assessment under Sched. B.

As to Occupation for Purposes of Sched. B, see HALSBURY, Hailsham Edn., Vol. 17, p. 65, para. 125; and for Cases, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to:

(1) *Glanely* (*Lord*) v. *Wightman,* [1933] A.C. 618; Digest Supp.; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634.

(2) *Back* v. *Daniels,* [1925] 1 K.B. 526; 28 Digest 15, *74*; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183.

(3) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.,* [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266.

(4) *Donald* v. *Thomson,* [1922] S.C. 237; 28 Digest 20, case *g*.

(5) *McKenna* v. *Herlihy, Woodburn* v. *Herlihy* (1920), 7 Tax Cas. 620 ; 28 Digest 81, case *r*.

(6) *R.* v. *Piddletrenthide* (*Inhabitants*) (1790), 3 Term Rep. 772.

(7) *R.* v. *Tolpuddle* (*Inhabitants*) (1792), 4 Term Rep. 671.

(8) *Burt* v. *Moore* (1793), 5 Term Rep. 329 ; 18 Digest 441, *1780*.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts affirming certain assessments to income tax made upon the appellant under Sched. D for the years from Apr. 6, 1927, to Apr. 5, 1931, and from Apr. 6, 1933, to Apr. 5, 1934, in respect of profits arising from the sale of horses.

The appellants, J. A. Dawson and his son J. Dawson, were carrying on business in partnership. The partnership's sole asset was the brood mare " Nice " and her progeny. At all relevant times, J. A. Dawson had occupied Marsh Stud Farm, near Newmarket, which had an area of about 50 acres of which half was grassland and half woodland. The farm was equipped in the usual way as a stud farm for the use of thoroughbred stock for the purpose of breeding, rearing and selling bloodstock. Occasionally animals belonging to outside owners were kept at the stud farm, but normally all the animals on the farm belonged to J. A. Dawson with the exception of " Nice " and her progeny, which belonged to the partnership. The profits of the stud farm were admittedly assessable upon J. A. Dawson by reference to the rules of Sched. B. The operations of the partnership were carried on upon this land. No part of it was ever assigned by J. A. Dawson in writing to the partnership in connection with its activities. J. A. Dawson was the person assessed as occupier under Sched. A and Sched. B. He was also the rated occupier. No specific acreage was allotted to the mare " Nice " and her progeny, nor to any other animals on the farm, which was used indifferently for all animals upon it.

J. A. Dawson also carried on the business of a trainer of racehorses at Newmarket until June 30, 1930. The object of the partnership being to sell its bloodstock at the best prices obtainable, its animals were normally sent to the Doncaster Yearling Sales, that being the best market. Occasionally, however, it was found that a yearling had some blemish or defect which made it useless to send it to these sales. In such case the animal would, if otherwise suitable, be put into training as a two-year-old to prove its merit on the race course with a view to its sale. Horses to be trained were sent to Newmarket, and were trained by J. A. Dawson, and, after he ceased to be a public trainer, the partnership horses were sent to Frank Butters for training and were raced in the name of J. A. Dawson. Under the rules of racing animals must be raced in the name of an individual and cannot be raced in the name of a partnership.

The Income Tax Act, 1918, s. 20, provides :

> The following persons having joint interests, that is to say : . . . (c) partners carrying on a trade, profession or vocation together who are entitled to the profits thereof

in shares, may claim any allowance or deduction according to their respective shares and interests, and any such claims which are proved to the satisfaction of the commissioners to whom they are made, may be dealt with in the same manner as in the case of several interests; Provided as follows:—

(i) Profits arising from the occupation of lands shall not be separately charged if the lands are let or underlet without the lessor relinquishing the possession thereof or if the lease is not exclusively in the possession and occupation of the lands.

J. Millard Tucker, K.C., and *Cyril L. King, K.C.*, for the appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: There are two questions in this case: first, whether the profits of the partnership between Mr. J. A. Dawson and Mr. J. Dawson derived from a thoroughbred brood mare named "Nice," as a brood mare, are assessable under Sched. B, and, secondly, whether the profits of the partnership derived from racing and selling her progeny after or in the course of racing are assessable under the same schedule. Mr. J. A. Dawson was the lessee of the farm on which "Nice" was kept as a brood mare, and was taxed and rated as occupier of that farm, but the commissioners have held that the appellant partnership was not the occupier of the farm, and that its profits from "Nice" and her progeny are taxable under Sched. D. In so far as this decision covers the profits from racing and selling the racing progeny of "Nice," I think it was a question of fact for the commissioners, upon which there was ample evidence upon which they might find that the business of racing her progeny and selling them after being raced was not so closely connected with the occupation of the farm as to make the profits arise or accrue from the occupation of land within the meaning of Sched. B.

On the first question, however, I am of opinion that the profits of the partnership did arise from the occupation of the farm, and are not taxable under Sched. D. It is, in my opinion, clear (see *Glanely* (*Lord*) v. *Wightman* (1)), and is admitted, that the profits derived from a brood mare owned by an occupier of land and kept on that land are profits arising from the occupation of land within Sched. B, but it is argued that there can be only one occupier of land at the same time, and that, unless that occupier is the owner of the brood mare, the profits derived from her do not arise from the occupation of land. In my opinion, this argument is unsound. I do not think the quality of the income can depend upon who receives it, nor can the amount of the income be increased by dividing it among two or more persons. The Income Tax Acts tax land in its ocupation quality under Sched. B on the notional basis of its annual value, and the whole income which is in reality derivable from the land in that quality is covered by tax under that schedule. The decision of the Court of Appeal in *Back* v. *Daniels* (2) and *Fry* v. *Salisbury House Estate, Ltd.* (3), coupled with the Income Tax Act, 1918, s. 20, appear to me to cover the present case. In the former case, the actual point decided was that a firm of potato-growers and salesmen, who grew potatoes upon the land of a farmer during a part of the year, was in occupation within the meaning of Sched. B, although the farmer did the major part of the cultivation of the land for the purpose of growing the potatoes, and was rated and assessed under Scheds. A and B as occupier.

The facts of the present case are, no doubt, different from those of *Back* v. *Daniels* (2), and there is, in the present case, no exclusive right to the land, or any part of it, but, in my opinion, the profits of the partnership arise from the occupation of land within the meaning of Sched. B, and are not separately chargeable only because of the Income Tax Act, 1918, s. 20 (i), which deals with this very point. The farm was, I hold, let to the partnership without the lessor, Mr. J. A. Dawson, relinquishing possession, and without the lessees, the partnership, being in exclusive possession and occupation, and, therefore, the profits are not to be separately charged. But they have already been charged under Sched. B on Mr. J. A. Dawson, and they cannot be charged again upon the partnership under Sched. D without double taxation, unless the partnership's activities produce profits which are too remote to be deemed to arise from the occupation of land: see *Back* v. *Daniels* (2), *per* Scrutton, L.J., p. 203. It is clear, from *Fry* v. *Salisbury House Estate, Ltd.* (3), in which *Back* v. *Daniels* (2) was approved, that there cannot be double taxation, and that, as the Crown cannot choose between schedules, it is necessary in each case to ascertain within which schedule the income in question falls. In my opinion, income from a brood mare used as such is income derived from the occupation of land, and the income from land in its occupation quality (see *per* Lord Tomlin in the *Salisbury House* case (3)), having been taxed under Sched. B, cannot be taxed again, nor can the tax be separately charged upon the partnership, because of sect. 20.

It was argued for the Crown that the Income Tax Act, 1918, s. 20 (i), was unintelligible and inapplicable, and that I am bound to hold that the appellant partnership was taxable under Sched. D because of the Scottish and Irish cases, *Donald* v. *Thomson* (4) and *McKenna* v. *Herlihy* (5). Whilst I should consider it right to follow the exact decisions of Scottish and Irish authorities, I do not consider myself bound by these cases in the present case because of *Back* v. *Daniels* (2) and the cases there cited by the Court of Appeal, and particularly *R.* v. *Piddletrenthide (Inhabitants)* (6), *R.* v. *Tolpuddle (Inhabitants)* (7), and *Burt* v. *Moore* (8), which are, in my opinion, inconsistent with the decisions in the Scottish and Irish cases referred to. The argument for the appellants was also put on a narrower ground, that, as one of the partners was the occupier, the profits of the partners must fall within Sched. B, but I am unable to see that the partnership is in any better position than a third party.

For the reasons stated, I am of opinion, on the first question, that the partnership was not assessable under Sched. D in respect of the profits derived from the mare "Nice" as a brood mare, and the case must be sent back to the commissioners to settle the figures. The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors: *Gibson & Weldon* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

Reported by Leslie Carnegie, Esq., *Barrister-at-Law.*]

LONDON & NORTHERN ESTATES CO., LTD. *v.* HARRIS (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence J.), **May 4, 1937.**]

Income Tax—Relief—Investment company—" Expenses as to which relief may be claimed or allowed under Sched. A, No. V, rr. 7 *and* 8 *"—Income Tax Act*, 1918 (c. 40), *s.* 33.

A company, whose business consisted mainly in the making of investments and therefore entitled to relief under the Income Tax Act, 1918, s. 33, such investments being mainly in real property, claimed relief under sect. 33 in respect of its expenses of management. Included in the claim were sums paid to the person who acted as the company's surveyor, valuer and rating expert, and to the company's assistant surveyor. No claim was made in respect of these sums under Sched. A, No. V, rr. 7 or 8:—

Held: in so far as the sums paid to the surveyor and assistant surveyor were sums expended for the company's maintenance in respect of which a claim for relief could have been made under Sched. A, No. V, r. 8, they were not admissible for relief under sect. 33.

[**EDITORIAL NOTE.** Income Tax Act, 1918, s. 33, gives relief to certain investment companies in respect of expenses of management. By subsect. (3) no relief can be given under the section which can be claimed under Sched. A, No. V, rr. 7 and 8. Upon its proper construction this subsection does not require that the company shall have actually claimed relief under rr. 7 and 8, it is sufficient that there can be a claim under the rules.

As to Restriction of Relief in Respect of Expenses of Management, see HALSBURY, Hailsham Edn., Vol. 17, p. 336, para. 677; and for Case, see DIGEST Supp., Income Tax, No. 283*a*.]

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing a claim by the appellant company for relief for the years 1932/33 and 1933/34 under the Income Tax Act, 1918, s. 33, in respect of its expenses of management.

The appellant company's business, it was admitted, consisted mainly in the making of investments within the meaning of the Income Tax Act, 1918, s. 33, such investments being mainly in real property. The company's properties were managed by the company's solicitors and by local agents. The company's revenue account for the years ended Mar. 25, 1933 and 1934, respectively, included an item for secretarial and other expenses which included a sum of £1,050, made up of £900 paid to one H. J. Wheatley and £150 paid to one A. W. H. Pool.

Wheatley acted as surveyor, valuer and rating expert to the company, and he was directly responsible to the company for the general duties of a surveyor giving advice on rating matters, empty properties, the lay-out of buildings, easements, air and light, valuations and dilapidations, alterations of premises and so on. Pool was assistant surveyor to the company and his employment was of a similar nature.

The company had only made one claim for relief from income tax under Sched. A, No. V, r. 8, in respect of one block of properties, and had no other in course of preparation. No part of the £1,050 was included in any such claim. The company's claim for relief under sect. 33 included this £1,050. The Special Commissioners held that nothing could be allowed under sect. 33 (1) which could lawfully be included in a claim under Sched. A, No. V, r. 8, without regard to whether such claim was allowed or not. They considered, however, that some part of the £1,050 might on the evidence be treated as in fact expended on purposes appropriate to the management of the company as distinct from the maintenance of its property, and £350 was allowed for each year. The company appealed.

The Income Tax Act, 1918, s. 33, provides:

> (1) Where . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom . . . claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Sched. D, Case I, the company . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year.
>
> (3) A company . . . shall not be entitled to any relief under this section in respect of any expenses as to which relief may be claimed or allowed under Sched. A, No. V, rr. 7 and 8.

A. M. Latter, K.C., and *Cyril King, K.C.*, for the appellant company.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: This case turns upon the meaning of the Income Tax Act, 1918, s. 33 (3). Under sect. 33 relief is granted to life assurance and other companies in respect of the expenses of management. The question is whether subsect. (3) means that the company is not entitled to any relief under sect. 33 in respect of any expenses as to which relief may be claimed or allowed under Sched. A, No. V, rr. 7 and 8, in the sense that relief is capable of being claimed or allowed under those rules, or means expenses as to which relief may in fact have been claimed or may be claimed as of right, or may in fact have been allowed under Sched. A, No. V, rr. 7 and 8. Mr. Latter contends that the subsection has either one or other of the last two meanings. He says that it is improbable and inconvenient that the matter should have to go before the special commissioners in the first instance under sect. 33 (3) and then afterwards to the general commissioners under rr. 7 and 8. The special commissioners have to deal with the relief to companies in respect of the expenses of management, and the general commissioners have to deal with relief under rr. 7 and 8. Under r. 7 relief is granted as of right under Sched. A in respect of repairs, but regardless of whether any repairs have been carried out, and under r. 8 relief is granted in respect of repairs, maintenance, insurance, and management where the sums expended have for a period of 5 years exceeded the amount allowed under r. 7. The Commissioners in this case have held that sect. 33 (3) prevents a company from claiming any relief under sect. 33 in respect of any expenses as to which relief may, in the sense of " can," be claimed or allowed under rr. 7 and 8, and they have held with reference to the particular relief claimed, which was in respect of the salary of a rating surveyor and his assistant who were employed by the appellant company, that a certain part of those salaries was attributable to the management of the company and relief could be claimed in respect of that part of their salaries under sect. 33 (3), but that with reference to the remainder of their salaries that was not expenses of management of the company within the meaning of sect. 33, but was money expended for the maintenance of the company's property and, therefore, fell within Sched. A, No. V, r. 8, and no relief could be claimed in respect of that part of the salaries under sect. 33 (3).

In my opinion the fair reading of the words of sect. 33 (3) is that which has been adopted by the Commissioners in this case. It seems to me that the reading contended for by Mr. Latter is not the ordinary meaning of the words and that his construction really involves the introduction of other words into the subsection. His construction of the subsection necessitates, in my view, the introduction of the words either " as to which relief may in fact have been claimed or in fact have been allowed," or the words " may in fact be claimed as of right or allowed in fact." There is further difficulty upon his construction of the words, or one of his constructions of the words, that he is constrained to say that the words mean that the company is not to be entitled to any relief under the section in respect of any expenses as to which relief may in fact have been claimed and a claim refused. As the expenses which are dealt with under rr. 7 and 8 are different from the expenses which are dealt with under sect. 33, I can see no reason for adopting such a construction which would involve a perfectly legitimate claim under sect. 33 being rejected because it has been perfectly properly rejected under rr. 7 and 8. Any interpretation of the Act which leads to such a conclusion as that seems to me to be one which must be scrutinised very carefully, and which it is improbable that the statute could have intended. The words seem to me, in their ordinary meaning, more naturally to import the meaning which is given to them by the Crown and to contemplate that the taxpayer, in the ordinary case, will get under r. 7, as of right, the allowance which is provided for by that rule. If he can prove a claim under r. 8 he will do so, and in respect of those claims or allowances he has to go to the general commissioners.

It is true that on that view the special commissioners may have to differentiate as they have in the present case between what are the expenses of management of the company and what are really expenses of maintenance of property as property, and it is true that their decision upon that matter will not be binding upon the general commissioners. But that is a difficulty which is, in my opinion, more a difficulty of theory than of fact, because I should imagine that the general commissioners, knowing, as they would know, or might know, the basis of differentiation which the special commissioners adopted, would in all probability accept that differentiation and would treat, for the purposes of r. 8, moneys which had been expended in that way and which had been regarded by the special commissioners as moneys expended upon the maintenance of the property, as property, as being moneys expended for the maintenance of the property within the meaning of r. 8, and would in fact accept the view of the special commissioners. But whether that is so or not I agree that they are not bound to do so. I cannot think that the interpretation which is contended for by the appellant company is the right one and I therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors: *Herbert Reeves & Co.* (for the appellant company); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

ANDREAE *v.* SELFRIDGE & COMPANY, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **May 25, 26, 28, 1937.**]

Nuisance—Noise—Rebuilding operations—Prepayment of purchase price of lease—Estoppel.

The plaintiff was the occupier of a hotel upon the northern side of an island site. The defendant company acquired the leasehold interests upon the site and, in the course of doing so, bought the residue of the plaintiff's term and proceeded to demolish first the building on the south-east corner of the island site, and later those in the south-west corner of that site and to build new buildings upon the site. The plaintiff complained that her business had been seriously interfered with by the demolition and rebuilding operations by reason of noise and dust. The plaintiff in a letter of complaint suggested that the defendant company should pay a further sum on account of the balance of the purchase price of the lease, and ultimately the defendant company paid £3,000 to be taken as a payment of £3,840 on account of payment being made before the due date, such prepayment being without any admission of liability, but "simply as an endeavour to make up to some extent for the inconvenience" said to have taken place and likely to occur in the future:—

HELD: (i) the letter did not amount to a binding agreement not to sue in respect of the nuisance caused by the operations of the defendant company.

(ii) in considering whether the development of property is abnormal, the methods of building must not be taken as stabilised, but the development of the day must be regarded; but the operations of demolition, excavation or building must be carried out with reasonable care and skill, which may require (*inter alia*) restriction of hours of work, limitation of amount of a particular class of work done simultaneously in a particular area, and the use of proper scientific means of avoiding inconvenience.

(iii) in estimating the damage done to a business by such operations, damage caused by the lawful operations of the defendant must be carefully excluded, and the plaintiff could only recover for loss caused by acts which were abnormal or not carried out with proper care and skill. The loss due to a change in the general amenities of the neighbourhood resulting from demolition, building, or rebuilding operations could not be recovered. A

Judgment of Bennett, J. ([1936] 2 All E.R. 1413) *varied.* B

[EDITORIAL NOTE. The Court of Appeal here considers in detail how far modern rebuilding operations amount to a nuisance. It is necessary to establish first that such operations having regard to modern conditions and knowledge, have not been carried out with reasonable care and skill, and, if it is found that there has been a want of such reasonable care and skill, then the damages must be carefully restricted to such as are due to so much of the operation as has been carried out without such care and skill. Damages which would have accrued from the proper carrying out of the operation must be excluded unless perhaps it can be shown that the whole operation is an abnormal user of the property. C

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 24, pp. 41, 42, para. 73; pp. 50, 51, paras. 87, 88; and for Cases, see DIGEST, Vol. 36, pp. 166-168, Nos. 78-98; pp. 201, 202, Nos. 428-432.] D

Cases referred to:

(1) *Harrison* v. *Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409; 36 Digest 162, *44*; 60 L.J. Ch. 630; 64 L.T. 864.

(2) *Stump* v. *Bywater & Sons, Ltd.* (1907), The Builder, July 20, p. 91; 36 Digest 202, *430*. E

Appeal from a judgment delivered by Bennett, J., on July 28, 1936, and reported in [1936] 2 All E.R. 1413, awarding the plaintiff £4,500 damages and costs for nuisance caused by rebuilding operations. The facts are fully set out in the judgments of Bennett, J., and of the Court of Appeal. F

Fergus D. Morton, K.C., and *Roger W. Turnbull* for the appellant company.

H. B. Vaisey, K.C., and *Laurence Tillard* for the respondent.

Morton, K.C.: If any nuisance was caused by the first operation, it was on a few isolated occasions only when night work was necessary in exceptional circumstances. The nuisance was transient, and the operation as a whole was temporary, lawful, and carried out with reasonable skill and care. No cause of action, therefore, arises. Although the second operation caused considerable discomfort by dust, it also was a temporary operation, carried out with reasonable skill and care. The third operation took place after the issue of the writ, and was not part of a continuing cause of action so as to enable the court to assess damages in respect of it in these proceedings. The court held, in *Harrison* v. *Southwark & Vauxhall Water Co.* (1), that a temporary and lawful annoyance does not amount to a nuisance in law. [Counsel also referred to G H

Stump v. *Bywater & Sons, Ltd.* (2).] If there was a cause of action at the date of the writ, the damages were excessive, and the judge in estimating them was wrong: first, in giving damages in respect of the whole of the operations instead of merely in respect of such part of them as constituted an actionable nuisance not justified by the principle in *Harrison's* case (1), and also in attributing to the defendant's operations a diminution in profits which the evidence failed to connect with these operations. The use of a pneumatic drill in demolishing ferro-concrete work is justifiable if it is confined to reasonable hours and any other method of demolition gives rise to at least as much noise.

Vaisey, K.C.: The damages are not excessive. Operations on so large a scale, and lasting so long, do not come within the principle laid down in *Harrison's* case (1).

Morton, K.C., in reply.

SIR WILFRID GREENE, M.R.: In this case we have had the advantage of a very full and detailed examination of the evidence. If, in the course of this judgment, I do not go into the details of the evidence, it must not be thought that, for that reason, they have not been understood and carefully considered; but the case is one in which I do not think it is desirable or necessary that the court should reserve judgment in order to enable it to go in detail through the various matters of evidence which are before it. The court is unanimous in the view which it takes in this case, and it is desirable that judgment should be delivered here and now. The appeal is an appeal by the defendant in the action, Selfridge & Co., Ltd., against a judgment of BENNETT, J., in the Chancery Division, whereby he awarded to the plaintiff a sum of £4,500 as damages for nuisance. The nature of the nuisance, stated quite broadly, was this, that, in the course of developing a large island site, or portions of it, Selfridge & Co., Ltd., had conducted its operations in such a way as by noise and dust to interfere with the reasonable and comfortable occupation by the plaintiff of her premises, whereby she suffered damage. The judge found that there was such interference, and that there was damage. The appeal is put in two ways. First of all, it is said that judgment ought to have been given in favour of the defendant company on the ground that no cause of action had been established at the date of the issue of the writ. The other ground on which it is put was this, that, assuming that view to be wrong, the judge misdirected himself in deciding that the acts of the defendant company were wrongful, and in attributing to the acts, which he held to be wrongful, matters of loss to the plaintiff, which, it was said, on the evidence, could not be shown to be attributable to anything done by the defendant company.

The matter arises in this way. At the south of Wigmore Street, between Wigmore Street and Somerset Street, there lies an island site, bounded on the east by Duke Street and on the west by Orchard Street. That site is one which the defendant company is minded to acquire, and its intention is to place upon it buildings, which it will use for the purposes of its business. The way in which it is doing this may, for present purposes, be stated with sufficient accuracy thus: It is obtaining, as and when it can, possession of the various premises which occupy the site at present, and demolishing them and constructing, in their place, new buildings, the general scheme being that, under an agreement with A the Portman Estate, it will receive a lease as and when it has succeeded in getting into its possession the whole of the site, and when it has constructed its buildings upon it. The plaintiff has for some time occupied two houses on the north of the site facing Wigmore Street, Nos. 119 and 121, Wigmore Street. She occupied those houses as a tenant of the B Portman Estate, and she, in connection with this scheme, agreed to sell her lease to Selfridge & Co., Ltd. She had, as a matter of fact, a current lease, which had a few years to run, and she also obtained a reversionary lease of some further ten years, the whole expiring in 1951. She agreed on Oct. 21, 1931, to sell those two leases, the current lease and the rever- C sionary lease, to Selfridge & Co., Ltd., for the sum of £14,750, completion to take place on Sept. 29, 1936. Therefore, at that date, her business as a hotel proprietor in connection with these houses was to come to an end, as, in fact, it did come to an end, when the purchase was completed. At those houses the plaintiff had for some years carried on with success D the business of a hotel proprietor. The nature of her business can be seen from one or two figures. In the year ending May 31, 1927, she made a profit of £2,248, and her profits for the three years following were round about £2,000 a year. In the year 1931 a serious drop took place and her profits were £463 only. I should add that her year ended on May 31. E In the next years, the year ending May 31, 1932, she made a loss of £592, in the year ending May 31, 1933, a loss of £102, in the year ending May 31, 1934, a profit of £103, and in the year ending May 31, 1935, a loss of £186.

One of the matters which falls to be dealt with in the action and this F appeal is the question as to what extent, if at all, the decline in her business profits, and the failure of her business profits to recover, are to be attributed to wrongful acts by the defendant company.

The nature of the defendant company's operations, so far as relevant to this appeal, is this. They fall into four operations. The first operation G consisted of the demolition of the buildings occupying the south-east corner of the site, and the erection thereon of a new building. The buildings demolished were many in number. There were Nos. 2-10, Somerset Street; there were Nos. 22-38, even numbers, Duke Street, and buildings known as Gray's Buildings at the back, Nos. 1-22. That H constituted a large block, and there was a further building, No. 22, Duke Street. That was the first operation. The first operation began on Nov. 21, 1931, when the demolition of the buildings occupying that portion of the site was begun, and continued until Feb. 13, 1932. At about that time, although the date is not clearly ascertained, but somewhere about Feb. or Mar., 1932, a further demolition operation took place in the neighbourhood. That was the demolition of St. Thomas's Church, which was a little to the west of the middle of this site, and occupied part of the space which Selfridge & Co., Ltd., was minded to acquire. That demolition was carried out by the Ecclesiastical Commissioners, and Selfridge & Co., Ltd., is in no way responsible for anything that was done in connection with it, but it has to be mentioned because it plays a certain part in the history of this case. The second operation consisted of the demolition of Nos. 16-20, Somerset Street, and Nos. 10, 11, and 12, Orchard Street, and the construction on those sites of certain other buildings. That operation began on July 1, 1935, when the defendant company began to demolish Nos. 10-12, Orchard Street. On July 8, 1935, it began to demolish Nos. 16-20, Somerset Street, and the actual work of demolition of those buildings, and some further demolition, which formed part of the same operation, namely, the demolition of the back additions of Nos. 131, 133, and 135, Wigmore Street, were completed by Sept. 28, 1935. It is to be noted at this stage that the writ was issued on July 16, 1935, that is to say, just over a fortnight after the second operation began. The third operation consisted in the installation of a lift in buildings which had formerly been carried on as a hotel, known as the Somerset Hotel, occupying Nos. 5-8, Orchard Street. That began on Apr. 25, 1936, and it continued for a comparatively short time. There was a fourth operation, the demolition of No. 125, Wigmore Street, with regard to which no complaint is made, and I need say no more about that.

It will be noticed that the first operation was completed, so far as is relevant to this appeal, some two and a half years before the issue of the writ. The second operation had been running for about a fortnight when the writ was issued. It was incumbent upon the plaintiff, if she was to succeed in the action, to establish that, at the date of the issue of the writ, she had a cause of action. In order to do so, she relies on the first operation principally as showing that she had suffered actionable damage in respect of that, and she seeks (and it is not seriously contested that she would not be right in seeking, assuming that she establishes her cause of action at the date of the writ) to bring in the damage which she has suffered from the entirety of the operations down to the date of judgment, on the footing that the nuisance, if established, constitutes a continuing cause of action. To get rid of one minor point upon that, it was submitted by Mr. Fergus Morton that, so far as the lift was concerned, as the whole of the operation took place after the issue of the writ, that ought to be treated as a separate matter, and not as part of a continuing nuisance. I myself do not accept that view. It seems to me, looking at this broadly and reasonably, that the operations of Selfridge & Co., Ltd., in respect of this site may fairly be treated as one operation, although, owing to the exigencies of the development and the nature of the site, it does not all take place at once, nor, indeed, does it take place absolutely continuously. In my judgment, it is legitimate to take into account, in assessing damages, the third operation.

With regard to the first operation, Mr. Fergus Morton, on behalf of the defendant company, says, in the first place, that there was no cause of action in respect of that. It is, therefore, necessary to examine the facts with more particularity.

The commencement of the demolition began, in the case of the first operation, as I have said, in Dec., 1931. The work consisted of pulling down the existing houses, and excavating to the depth of some 60 ft. into the ground, while the constructional part of the work consisted of erecting upon that site a steel-framed building, with three basements, a basement, a sub-basement and a sub-sub-basement, the framework of these subterranean parts of the building again consisting of a steel framework. The plaintiff first complained, in regard to what was being done in connection with that operation, on Mar. 14, 1932, that is to say, after the actual demolition work there had been completed, and at a time when the work of excavation and erection was under way. It appears, from her solicitor's letter of complaint of Mar. 14, 1932, that the matters in respect of which she was complaining at that stage were the demolition of St. Thomas's Church and the use of cranes during the night time. The demolition of the church was one in respect of which, as I have said, the defendant company cannot be held liable, but the working of the cranes was work which was being carried out by its own contractors. It appears that there were several cranes upon the premises, although the actual period during which they were working does not appear very clearly from any evidence. The records, coupled with the evidence that was given, satisfy my mind that for some weeks, two, three, or four weeks, before the complaint was made, the defendant company was using cranes at night in connection with its work. The nature of the noise caused by the use of those cranes appears in the evidence, and when, on Mar. 14, 1932, complaint was made, the defendant company agreed, in a letter dated Mar. 16, that the cranes should be stopped between the hours of 10 p.m. and 7 a.m. We are asked by Mr. Morton to infer, from the fact that no complaint with regard to the night work of the cranes was made until Mar. 14, that there was nothing to complain about. I am unable to attach that weight to that circumstance. It seems to me, looking at the history of this case as a whole, and the way in which the plaintiff and her son gave evidence, that they were people who were anxious to show forbearance in the matter, and that, at any rate, on their side, there was not in the history of this case any tendency to rush into making complaints before they felt themselves driven to do so. The first complaint takes place at a time when they felt themselves constrained to consult their solicitors on the matter, and the inference I draw is that, before that date, they were suffering something which constituted an unwarrantable interference with the comfortable occupation of their hotel, and the mere fact that they did not start to complain

until Mar. 14 does not mean that before that date there was nothing about which to complain. The defendant company's undertaking was somewhat reluctantly acquiesced in, because the plaintiff, with what I cannot help thinking was some reason, took the view that 10 p.m. was too late for those cranes to go on working. However that may be, they
A were not successful in getting the hours limited, and I am not disposed to take the view, on the facts of this case, that, if that working as late as 10 p.m. stood by itself, it would be a matter which ought to be treated as a nuisance to the plaintiff, in view of the history of the case. I do not wish anything that I should say in that regard to be read as being
B in any way an indication that the working of cranes of that kind up to 10 p.m. is a thing which, in many circumstances, cannot be an actionable nuisance. It seems to me that if persons, for their own convenience, choose to work machines of that kind overtime, and create a disturbance which is going on for 15 hours out of the 24, namely, from 7 a.m. to
C 10 p.m., that is a matter which may, in some cases, be very seriously regarded. However, in this case I do not think that it is more than a make-weight, and I do not think it necessary to say more about it, because I am satisfied that, so far as the previous night-operations of the cranes were concerned, there was sufficient interference with the
D reasonable comfort of the plaintiff in carrying on her establishment to constitute an actionable nuisance. The defendant company apparently adhered to that undertaking with regard to the cranes, except, I think, on one occasion. But there were other occasions on which it conducted noisy operations at night. I do not propose to go through them. There
E are a number of letters of complaint, and those complaints were either attempted to be explained away or they were remedied. But that the complaints were substantial complaints I, for one, am satisfied, and I certainly protest against the idea that, if persons, for their own profit and convenience, choose to destroy even one night's rest of their neigh-
F bours, they are doing something which is excusable. To say that the loss of one or two nights' rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception, and, if it be a misconception existing in the minds of those who conduct these operations, the sooner it is removed the better. In
G substance, those are the specific matters which were complained of in connection with the first operation, what I may describe as the night-operations.

Complaint was also made by the plaintiff's witnesses with regard to other matters in connection with those operations, which were, so far
H as the evidence goes, and as I understand it, not matters in any way out of the ordinary in the conduct of building operations in London. I say that for this reason. The judge, in his judgment, in dealing with this first operation, has approached the matter from this point of view. He has found that the entire operation of excavating to the depth of 60 ft., and building in that site and on that site a steel framed building, was of

an unusual nature, and, therefore, being of an unusual nature, and not a thing which can be justified as a normal user of land, the defendant company is responsible for any noise ensuing from that operation, which constitutes a substantial interference with the plaintiff's occupation. For reasons which I will develop later, I am unable to take that view of the matter, and I think the judge has misdirected himself on that point, but I will reserve what I have to say about that until I have completed the history of the other operations.

The second operation consisted, so far as relevant to the present matters, of demolition work. The substantial complaint with regard to it, as matters now stand, is that it was so conducted as to cause a very large quantity of dust and grit to be thrown into the air and carried into the plaintiff's premises. I am satisfied, from that evidence, that the dust produced by this operation was something which is not to be endured unless some proper explanation is given of why it came. The burden of establishing that is upon the defendant company. Again, I will reserve till a later stage what I have to say with regard to the legal principles involved there, and their application to the facts. At this stage, I merely wish to say this, that I would accept, as the judge who saw the witnesses appears to have accepted, the evidence that the quantity of dust and grit produced by this operation was something very serious indeed.

There was, in connection with that second operation, another matter of complaint, to which the judge attached great importance, namely, the use of pneumatic hammers for the purpose of breaking up reinforced concrete at the back of the Somerset Hotel. It appears that, at the back of the Somerset Hotel, there was a flat roof, with a dome in it, over the old dining room, and that flat roof had to be broken up, consisting, as it did, of reinforced concrete. For that purpose, the defendant company's contractors used two pneumatic hammers. As the result of objection by a professional man, who had business premises close by, the defendant company limited the use of those pneumatic hammers to certain hours in the day, which fitted in with his professional convenience. That was, from his point of view, and from the defendant company's point of view, a reasonable and proper step to take. The actual use of those hammers extended over six days only ; there is no suggestion that they were used by night, and Mr. Vaisey did not feel himself able to say that the use of the hammers, in those circumstances, constituted an actionable nuisance. The complaint, therefore, with regard to the second operation consists of a complaint in respect of dust and grit. With regard to the third operation, Mr. Fergus Morton did not attempt to maintain that the noise caused was anything but a nuisance. His points with regard to that were, first, as to damages, and, secondly, the point I have already dealt with, as to its being a new cause of action, damage from which could not be taken into account in the present proceedings.

There is one matter, before I come to examine the foundation of the judge's judgment, which I ought to mention, in order to get it out of the way. It relates to the first operation, and the plaintiff's cause of complaint, if any, in respect of it. I have said that she had an agreement with Selfridge & Co., Ltd., under which she was to sell her lease, completion to take place at Michaelmas, 1936. She was anxious to have part payment in advance in respect of that, and she obtained from Selfridge & Co., Ltd., a prepayment of, I think, £3,000. In connection with that, two letters passed, to which reference must shortly be made. In July, 1932, that is to say, at a time when the complaints in the matter of the first operation were, so to speak, current, and, indeed, while that operation was continuing, the solicitors of Selfridge & Co., Ltd., in agreeing to that proposal for a prepayment, said this :

> You will understand, however, that this arrangement of repayment [that, I think, should be "prepayment"] will be agreed to by Mr. Selfridge without any admission of liability on his part, but is made simply as an endeavour to make up to you to some extent for the inconvenience which you say in your letter has taken place and is likely to occur in the future.

On that footing it is accepted. I cannot read that correspondence as amounting to any binding agreement by the plaintiff, as was suggested, prohibiting her from complaining, in a court of law, of any infraction of her rights which she had suffered by the first operation. It is, I think, legitimate to bear it in mind when one is considering the question of what damage is to be attributed to it, and what quantum of inconvenience the plaintiff has suffered by it. I think it is relevant to consider that, having received that, she did not issue a writ in respect of the first transaction. All those matters are, I think, relevant ; but I am unable to accept those letters as in any way getting rid of what I have already said existed, in my view, a cause of action in respect of the first operation.

Having got that out of the way, I will now see what was the ground of the judge's judgment. That is to be found in one or two sentences. The judge says this (p. 1424) :

> I cannot regard what the defendants did on the site of the first operation as having been commonly done in the ordinary use and occupation of land or houses. It is neither usual nor common, in this country, for people to excavate a site to a depth of 60 ft. and then to erect upon that site a steel framework and fasten the steel frames together with rivets.

That is a finding in regard to the first operation. Now comes what he finds with regard to the second operation :

> Nor is it, I think, a common or ordinary use of land, in this country, to act as the defendants did when they were dealing with the site of their second operation, namely, to demolish all the houses that they had to demolish, five or six of them I think, if not more, and to use for the purpose of demolishing them pneumatic hammers.

The judge's views on those matters come into the reasoning of his judgment in this way. He found that, by reason of all three operations, there was a substantial interference with the comfort of the plaintiff in the reasonable occupation and use of her houses, such that, assuming damage to be established, an actionable nuisance would be constituted.

But it was said that, when one is dealing with temporary operations, such as demolition and building, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification, and there can be no dispute about it, that, in respect of operations of this character, such as demolition and building, if they are reasonably carried on, and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it. The judge has in effect said that that qualification does not apply in the present case, because that qualification can apply only where the operations are operations that may be described as the usual and normal use of land by people in this country. He has found that these operations which he has described in the passages I have read are not usual operations, and, therefore, the whole of the operations in question, not merely matters in respect of which some precautions were carelessly or negligently omitted, but the entirety of the operations, were operations which, if they produced discomfort and interference, would be actionable, and the entirety of the damage suffered would be recoverable. With great respect to the judge, I take the view that he has not approached this matter from the correct angle. It seems to me that it is not possible to say, nor do I think that there is any evidence in this case which would warrant its being said, that the type of demolition, excavation and construction in which the defendant company was engaged in the course of these operations was of such an abnormal and unusual nature as to prevent the qualification to which I have referred coming into operation. It seems to me that, when the rule, as indeed it is a rule, speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilised for ever. As time goes on, new inventions and new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies. Whether, from other points of view, that is a matter which is desirable for humanity, is neither here nor there; but it is part of the normal use of land to make use, upon your land, in the matter of construction, of what particular type and what particular depth of foundations and particular height of building, may be reasonable, in the circumstances, and in the development of the day. I am unable to take the view that any of these operations was of such an abnormal character as to justify treating the disturbance created by it, and the whole of the disturbance created by it, as constituting a nuisance. That applies both to the first and to the second operations. The judge moreover says, with regard to the second operation, as I read it, that it is the demolition of all the houses which he finds to be unusual, and the demolition of them by means of pneumatic hammers. In point of fact, as I have said, it was only for a short period and over a very limited space that the pneumatic hammers were used. It seems to me, therefore, that the judge's view is open to objection, on the grounds which I have stated. The judge, when coming to deal with the matter of damage, has apparently attributed to the defendant company's operations, if not the whole of the loss of custom which the plaintiff has suffered, at any rate a very substantial part of it. That was a much easier thing for him to do once he had come to the conclusion that the entirety of the defendant company's operations was unjustified, because it is a matter, I should have thought, of common knowledge, and, indeed, common sense, that the ordinary building operations on this scale going on at the back of a hotel cannot be a good thing for its custom. That, however, does not in the least mean that the plaintiff, as owner of the hotel, has for that reason some right of complaint which another person would not have. Guests at hotels are very easily upset. People coming to this hotel, who were accustomed to a quiet outlook at the back, coming back and finding demolition and building going on, may very well have taken the view that the particular merit of this hotel no longer existed. That would be a misfortune for the plaintiff; but, assuming that there was nothing wrong in the defendant company's works, assuming the defendant company was carrying on the demolition and its building, productive of noise though it might be, with all reasonable skill, and taking all reasonable precautions not to cause annoyance to its neighbours, then the plaintiff might lose all her clients in the hotel because they had lost the amenities of an open and quiet place behind, but she would have no cause of complaint. The judge, having found that the entirety of the operations was objectionable, had less difficulty in dealing with the question of damages, because he did not have to discount any loss of clientele by striking out of the computation any loss which might have been due to matters which were not in themselves objectionable, namely, the clearing of the site, the general bustle and activity, and the noise inseparable from building operations throughout the day. He had not to make that dissection, nor did he attempt to do it. The result is that he has attributed the entirety or, at any rate, the greater part, of the loss to the defendant company's operations.

That brings me to the question of damage, and the way the judge has approached it. For that, I must return for a moment to the figures to which I referred earlier. It is true, and I think it need not even be established by evidence, that, in the years 1930 and 1931, especially in 1931, there was a financial crisis and stringency in this country which did operate to curtail the expenditure of a vast number of its inhabitants, and it may very well be that the large drop in profits which took place in the year ending May 31, 1931, and the year ending May 31, 1932, is to be attributed to that matter; but the judge has found this, and I ought to read a passage from his judgment, which is really the key to his judgment on this matter. He says (p. 1424):

> It is quite plain that the financial stringency which was prevailing in the years

> 1931 and 1932 did affect the plaintiff's trade, and may to some extent have been affecting it in the year 1933 and in the year 1934, in which last year I think probably the result of what the defendants did in 1933 would be most felt by the plaintiff. One has more or less to make a guess at the loss that the plaintiff has sustained, but I take the view that she was struck such a blow in the year 1933 by what the defendants did, and her goodwill was so injured by what the defendants did, that it had not, in 1935, recovered from the blow.

The blow consisted of the loss of her clientele caused by the entirety of A the first operation. The real problem, to my mind, is this. I will take the first operation first. There was unquestionably an interference with the plaintiff's rights by noise, noise which took place at unreasonable hours, noise which, according to the evidence, affected the guests in the hotel, caused them to complain, and generally interfered with their B comfort. That is the first matter. The second matter is this, that the profits of the hotel did not recover in the way in which, having regard to the history of the hotel, one might reasonably have expected them to recover; but it is not legitimate, to my mind, and it is indeed impossible, to draw the inference that the failure of the profits to recover C was due, to the extent to which the judge thought it was due, to the defendant company's operations, and it is still more illegitimate to say that it was due to that part of the defendant company's operations which constituted a nuisance. Therefore, the court is necessarily compelled to take some broad common sense view of the situation, having regard D to the evidence. One has to remember various things. People who go to hotels do not like having their nights disturbed. One has to remember that hotel custom is obtained, and, indeed, very largely kept, by recommendation. Those are matters of common knowledge. One also must not assume that, when a guest goes away from a hotel, he is satisfied E only because he has not made a complaint at the office. Various matters of that kind must be remembered. On the other hand, there are in this case other circumstances, such as the lack of action taken. If there was a real outflow of guests, one would have expected action to be taken at the time. I take this view, that there was an injury done to the business F at that time, an injury which did have a deleterious effect on its recovery; but, having regard to the fact that I approach the matter on a different principle from that on which the judge approached it, the actual injury in that respect is, in my view, very much smaller than he found.

The next matter is the question of the second operation. The first G thing to be dealt with there is whether or not anything which the defendant company did in connection with the second operation was a breach of its obligations towards its neighbours. The crucial matter is the matter of dust. I have already indicated that, to my mind, the plaintiff's evidence establishes that the quantity of dust and grit let loose H by this operation was something quite insufferable. The substantial point that is made with regard to it by Mr. Fergus Morton is: Assuming that it was—this, of course, he does not admit, but I hold against him there—the plaintiff must put up with it, provided that all reasonable and proper precautions were taken to save annoyance to the neighbours.

With regard to that, that is a matter of evidence. I have listened attentively to the evidence that was read on the side of the defendant company with regard to that, and I am not satisfied that it has discharged the burden of proof upon it. In the first place, it was pulling down at one and the same time eight houses, with what was, I think, admittedly a large number of men, and doing that quite obviously for reasons of its own, because it was in a hurry to get on with the work. Certainly water was used. It is said that water should be used, and it was used, although it was not used, in my judgment, on the evidence, to a proper extent, nor were any steps taken to board up the windows of the houses. It is said that, if they had been boarded up, having regard to the fact that the windows on the street had to be boarded up to safeguard passers-by, the only result of boarding them up on both sides would have been to let the dust go out at the top like smoke out of a chimney. I am not satisfied that a certain amount of boarding would not have been possible; and, indeed, the evidence of the witnesses does not seem to me at all satisfactory with regard to that matter. Accepting, as I do, the evidence of the plaintiff with regard to the quantum of the nuisance, and the extent of it, I find it impossible to believe that, if due care and attention had been given, and due regard had been had to the neighbours, that operation could not have been carried out in such a way as not to cause the nuisance that it did. That might have involved slower work, it might have involved more careful work, but that it could have been done, albeit possibly at some little expense and some little delay, I have no doubt.

I desire here to make one or two general observations on this class of case. Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual, and conducted with proper and reasonable care and skill, are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say: "We will go on and do what we like until somebody complains." That is not their duty to their neighbours under the rule of law. Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: "But this would mean that we should have to do the work more slowly than we would like to do it, or it would involve putting us to some extra expense." All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that it would make it a prohibitive operation. It is all a question of fact and degree, and must necessarily be so. In this case, the defendant company's attitude seems to have been to go on until somebody complained, and, further, that its desire to hurry its work and conduct it according to its own ideas and its own convenience was to prevail if there was a real conflict between it and the comfort of its neighbours. That, to my mind, is not carrying out the obligation of using reasonable care and skill. Linking that up with what I have said about dust in the second operation, it seems to me that the defendant company has not carried out that obligation. The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which work is to be A done; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes it has to be done, and those who do not do it must not be surprised if they have to pay the penalty B for disregarding their neighbours' rights. The nuisance from dust is, to my mind, established, and it is further established quite clearly by the evidence that, in the case of the second operation, the plaintiff's clients were seriously inconvenienced, that clients left, and that other clients declined to come. That seems to me to be the general effect of C what took place. When the clients came to see the hotel, and were shown the rooms, in July, and found all the windows shut because of the dust, it does not require very much imagination to suppose that a thing of that kind would deter anyone from going to the hotel. I think that, on the evidence, there is proof of a substantial loss of actual customers, D with, in the background, the inevitable repercussion that has on the reputation of a hotel. On the other hand, in this case, as in the other case, one must be careful not to penalise the defendant company by throwing into the scales against it the effect of the loss of clients caused by operations which it was legitimately entitled to carry out. It can E be made liable only in respect of matters on which it has crossed the permissible line.

The third operation is a minor matter, and I need say no more about it. I have intentionally not gone into the details of the evidence; I have merely endeavoured, on the relevant points, to summarise what F appears to me to be the effect of it. The effect comes to this, putting it all together, that, in respect of the first operation, the plaintiff suffered an actionable nuisance; she suffered damage both by personal inconvenience (which is not such an important matter) and by the unfortunate result upon her guests and the reputation of her hotel. That damage, G or similar damage, she also suffered in respect of the second operation. I think that she is entitled, not to a nominal sum, but to a substantial sum, based upon those principles. What that sum is to be is a matter as to which the individual mind can only satisfy itself as to what is fair; but, in arriving at the sum which I consider to be the proper one, and H which the other members of the court consider to be the proper one, I have discounted any loss of custom, or endeavoured to discount, so far as I can, any loss of custom, which might be due to the general loss of amenities owing to what was going on at the back, and I have tried to give what, in my opinion, would be a fair measure of the loss which, on the evidence, I infer that the plaintiff has suffered from that part of the defendant company's operations of which she has legitimate cause for complaint over the period in question.

I would say that, in a case of this kind, where the defendant company has, at any rate at certain stages, and in certain respects, shown, in my judgment, a reprehensible lack of regard for the duty which it owes to its neighbours, I should not be disposed, in drawing inferences, to draw inferences with regard to loss of custom in the defendant company's favour. It is a very difficult thing to attribute loss of custom to a particular cause in a case of this kind. Guests are scattered; it is quite impossible to collect all the guests who left and find out why they left. This is eminently a case where a jury, or a judge sitting alone, should use common sense and their knowledge of affairs in relation to the evidence which is given. I think the evidence in this case does establish a substantial injury, and the sum at which I think, on that basis, the damages should be fixed is £1,000.

The judgment of the judge must, therefore, be varied to that extent, and the damages reduced to £1,000.

ROMER, L.J.: I agree, and have nothing to add.

SCOTT, L.J.: I also agree, and have nothing to add.

Solicitors: *Jaques & Co.* (for the appellant company); *Boyce, Evans & Sheppard* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Dictum of SIMONDS, J., at p. 277, *applied.* STROMDALE & BALL, LTD. *v.* BURDEN. [1952] 1 All E.R. 59.

WHITE *v.* BIJOU MANSIONS, LTD.

[CHANCERY DIVISION (Simonds, J.), **May 26, 27, 28, 1937.**]

Land Registration—Registered land—Restrictive covenant entered upon register against freehold title—Lease—Assignment of lease—No actual notice of covenant to assignee—Constructive notice—Land Registration Act, 1925 (c. 21), *ss.* 20, 50, 52.

Sale of Land—Restrictive covenant—Benefit of covenant—Person not party to nor referred to in deed granting covenant—Real Property Act, 1845 (c. 106), *s.* 5*—Law of Property Act,* 1925 (c. 20), *s.* 56 (1).

The plaintiff, the registered proprietor of certain property, derived title under two deeds of 1886 and 1887 which contained a covenant by the purchaser of the property, which formed part of an estate, that he would build a dwelling-house thereon and that he would use the same for a private residence, and for no other purpose. The deeds also contained a covenant by the vendors that every subsequent building lease or conveyance of any part of the estate would contain similar covenants by the purchasers. There was no question of a building scheme. By a conveyance in 1890 part of the estate was sold and the purchaser duly entered into the restrictive covenant. A successor in title of this purchaser was registered under the Land Registration Act, 1925, as proprietor with an absolute title and the covenant was entered upon the charges register. A lease of the premises was then granted subject to a covenant that they should be used only as a private dwelling-house or for private suites or flats. This lease was assigned to the defendant company, which converted the premises into single room flatlets. In an action for an injunction the defendant company contended *inter alia* (i) that it was a purchaser for value without notice of the restrictive covenant, and (ii) that the plaintiff was not a person entitled to the benefit of the covenant so as to enable him to maintain the action :— A

Held : (i) entry of the covenant upon the charges register was notice to the whole world, and the defendant company was, therefore, bound by the covenant, although it did not have actual notice of it.

(ii) as the plaintiff was not a person with whom the covenant in the conveyance of 1890 was purported to be made, he could not, in the absence of a building scheme, sue upon the covenant. It was not B sufficient for an action under the Real Property Act, 1845, s. 5, or the Law of Property Act, 1925, s. 56, for the plaintiff to show that the covenant, if enforced, would be for his benefit.

[**EDITORIAL NOTE.** This case decides that the entry upon the Land Register of a notice of an incumbrance is notice to all the world and this extends to make an entry against the freehold title binding upon the proprietor under a leasehold title C of the same land. The leasehold proprietor has no right apart from special contract to inspect the freehold title and, therefore, in future any grantee or assigneee of a lease should make it a special condition of his contract that the entries against the freehold title must be disclosed. The construction of the Law of Property Act, 1925, s. 56 is also important ; and it seems that this section cannot be relied upon to secure the benefit of restrictive covenants which would not be otherwise D available to the person seeking to enforce them.

As to Notice of Restrictive Covenants affecting Registered Land, see HALSBURY, Hailsham Edn., Vol. 19, p. 543, para. 1275 ; and for Cases, see DIGEST, Vol. 38, pp. 752, 753, Nos. 903-905.]

Cases referred to :

(1) *Patman* v. *Harland* (1881), 17 Ch.D. 353 ; 30 Digest 397, *600* ; 50 L.J.Ch. 642 ; 44 L.T. 728. E

(2) *Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430 ; Digest Supp. ; 105 L.J.Ch. 168 ; 155 L.T. 281.

(3) *Shears* v. *Wells*, [1936] 1 All E.R. 832 ; Digest Supp.

(4) *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386 ; 40 Digest 313, *2671 ;* 75 L.J.Ch. 238 ; 94 L.T. 297. F

(5) *London & South Western Ry. Co.* v. *Gomm* (1882), 20 Ch.D. 562 ; 40 Digest 305, *2617 ;* 51 L.J.Ch. 530 ; 46 L.T. 449.

(6) *Elliston* v. *Reacher*, [1908] 2 Ch. 665 ; 40 Digest 309, *2646 ;* 78 L.J.Ch. 87 ; 99 L.T. 701.

(7) *Kelsey* v. *Dodd* (1881), 52 L.J.Ch. 34 ; 40 Digest 326, *2751.*

(8) *Grant* v. *Edmondson*, [1931] 1 Ch. 1 ; Digest Supp. ; 100 L.J.Ch. 1 ; 143 L.T. 749. G

(9) *Drake* v. *Gray*, [1936] Ch. 451 ; [1936] 1 All E.R. 363 ; Digest Supp. ; 105 L.J.Ch. 233 ; 155 L.T. 145.

(10) *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter*, [1933] Ch. 611 ; Digest Supp. ; 102 L.J.Ch. 241 ; 149 L.T. 82.

(11) *Sayers* v. *Collyer* (1884), 28 Ch.D. 103 ; 40 Digest 329, *2776 ;* 54 L.J.Ch. 1 ; 51 L.T. 723. H

(12) *Bedford* (*Duke*) v. *British Museum Trustees* (1822), 2 My. & K. 552 ; 40 Digest 328, *2770 ;* 2 L.J.Ch. 129.

Action for an injunction to restrain Bijou Mansions, Ltd., from carrying on, or causing or permitting to be carried on upon the premises

18, Palace Court, Bayswater, the business of a guest-house or apartment house or flatlets, or from using the said premises, or causing or permitting the same to be used, for any purpose other than that of a private dwelling-house in breach of restrictive covenants to that effect. The defendant company contended that it was a purchaser for value without notice of the covenants, that the plaintiff was not a person entitled to the benefit of the covenants so as to enable him to maintain the action, and, assuming that the plaintiff was entitled to enforce the covenants that it would be inequitable, in view of the changes in the character of the neighbourhood, to enforce the covenants against the defendant company. The facts are set out in the judgment.

Alexander Grant, K.C., and *Roger Turnbull* for the plaintiff, referred to *Shears* v. *Wells* (3), *Re Ecclesiastical Comrs. for England's Conveyance* (2), *Re Nisbet & Potts' Contract* (4), *London & South Western Ry. Co.* v. *Gomm* (5) and *Elliston* v. *Reacher* (6).

R. F. Roxburgh, K.C., and *W. F. Waite* for the defendant company, referred to *Kelsey* v. *Dodd* (7), *Grant* v. *Edmondson* (8), *Drake* v. *Gray* (9), *Re Union of London & Smith's Bank, Ltd.'s Conveyance, Miles* v. *Easter* (10), *Sayers* v. *Collyer* (11), and *Bedford* (*Duke*) v. *British Museum Trustees* (12).

SIMONDS, J.: In this case, Mr. Noel Blanco White claims an injunction to restrain Bijou Mansions, Ltd., from carrying on, or causing or permitting to be carried on, upon the premises 18, Palace Court, Bayswater, the business of a guest-house or apartment house or flatlets, or from using the said premises, or causing or permitting the same to be used, for any purpose other than that of a private dwelling-house only, and he claims, by way of further alternative relief, damages. The relevant facts, which I think are not in dispute so far as the major part of the case is concerned, are these. The plaintiff is the owner of the freehold of a house, No. 16, Palace Court, deriving his title as to the greater part of those premises from a deed of Dec. 17, 1886, and as to some small part from a later deed of May 3, 1887. From those deeds, it appears that the freeholders of a substantial parcel of ground known as the Shaftesbury House Estate, namely, a Mr. Alexander Chorley Davidson and a Miss Maria Louisa Davidson, had entered into an agreement with two persons of the name of Daw for the sale to them of that piece of land for a sum of £55,000. It appears by another agreement, recited in the same deed, that the Daws had agreed to sell to one James Israel Fellows a part of that larger plot for the sum of £6,700, and the conveyance of Dec. 17, 1886, was entered into for the purpose of giving effect to that second agreement. The parties to that deed were the Davidsons, the Daws, and Mr. Fellows. By the deed, the property in question was conveyed in fee simple to Mr. Fellows, and the parties entered into certain covenants to which I will now refer. First of all, the purchaser, Mr. Fellows, entered into a covenant with the Daws that he would build a dwelling-house for the sum of £4,000, and that he would use the same for a private residence, and for no other purpose, except for the residence and place of practice of a medical man, subject to certain stipulations. The Daws entered into a covenant in these terms. They covenanted with Fellows : A

> for themselves their heirs executors administrators and assigns and each of them for himself his heirs executors administrators and assigns with the intent to bind themselves and all other persons in whom the residue of the land called the Shaftesbury House Estate comprised in and delineated on the plan annexed to the said agreement of June 12, 1886, shall for the time being be vested but not so as to make themselves personally liable under this covenant in respect of any part or parts of the same land after they the said covenanting parties respectively have ceased to be owners or owner thereof do and doth hereby covenant with the said James Israel B Fellows his heirs and assigns that every building lease or other assurance of any part or lot of the said Shaftesbury House Estate (other than the part hereby granted) shall contain covenants or conditions on the part of the purchaser lessee or owner of the property—

with the Daws, among other things, to use the land for the purpose of a private dwelling-house only. Further, as a complement to that covenant, C the Daws entered into a similar obligation in respect of the land, so long as it should remain in their own ownership. That was the deed under which the plaintiff derived title. He is now the owner of 16, Palace Court, and has caused himself to be registered with an absolute title. The defendant company is the lessee of the adjoining property, No. 18, D Palace Court. The title to that property is as follows. It appears that, by a covenant of May 2, 1890, that is to say, some four years after the earlier conveyance which was made between the Davidsons of the first part, the Daws of the second part, and one Nicholson, the purchaser, of the third part, that property was conveyed to Mr. Nicholson, the E purchaser, subject to a certain covenant into which he entered. The covenant was a covenant by the purchaser for himself, his heirs, executors, administrators and assigns with the intent to benefit himself and his successors in title and the owner for the time being of the property thereby conveyed, that is to say, the Davidsons, their heirs and assigns F that the piece of land thereby conveyed should, among other things, be used for the purpose of a private dwelling-house only. The purchaser further covenanted for himself, his heirs, executors, administrators and assigns to the intent that the covenant should be binding on him and his successors in title and the owner for the time being of the piece of ground G and premises thereby conveyed with the vendor, that is to say, the Daws, and their heirs, executors, administrators and assigns that the purchaser would build a certain building on the land conveyed and similarly entered into a covenant with them that the premises so erected should be used as a private dwelling-house only. That land and the H building upon it, No. 18, Palace Court, in due course came into the ownership of one Irene Plumbly, who was duly registered under the Land Registration Act, 1925, with an absolute title, and the only incumbrance upon the charges register to which I need refer is that covenant which I have just stated. Being so registered as the absolute proprietor, Miss

Plumbly, on Apr. 16, 1935, granted a lease of No. 18, Palace Court, to two ladies, Miss Powell and Miss Flores, for a term of 28 years from Mar. 25, 1925, at a certain rent, and that lease contained a covenant on the part of the lessees that they would not use or permit to be used the demised premises or any part thereof for any purpose other than a private dwelling-house or for private suites of flats, and there was a provision that no part of the premises should be used as a surgery or place for dispensing medicine of any medical man residing on the premises, and so on. That lease was in due course assigned to the defendant company. It will be observed that the terms of the covenant do not agree with the terms of the restriction imposed on the freehold. The leaseholders or their assigns have availed themselves of the permission, if it can be so described, contained in their lease, and they have done that which their lease permitted them to do, but which the restrictions upon the freehold did not permit them to do. The first question for my consideration is this. It is said to be a question of considerable importance, as a matter of conveyancing, whether the lessees, having, as I hold they have, no actual notice of the restriction upon the freehold, are bound by notice of the restriction which has been so imposed upon it. The second question is one also, I think, of some difficulty and importance. Assuming that the lessees are under a liability in respect of that restrictive covenant, can the plaintiff here sue, that is to say, is he a person who is entitled to the benefit of that covenant so as to enable him to maintain this action ? Thirdly, and this is a point upon which some evidence has been given, assuming the defendant company is under a liability, assuming further that the plaintiff is in a position to enforce it, is there available to the defendant company any equitable defence based upon a change in the character of the neighbourhood, or the conduct of the plaintiff himself in regard to the adjoining property ?

The first question, then, which I have to determine is whether the lessees or their assigns, having, as I hold, no actual notice of the incumbrance, the restrictive covenant, are, nevertheless, thereby bound. The position in regard to that appears to me to be this. Before the Law of Property Act, 1925, at any rate, in regard to unregistered land, the law was that a lessee, though he had no right to call for his lessor's title, yet had constructive notice of it, so that his leasehold interest was subject to the restrictions which affected the freehold. That rule, sometimes known as the rule in *Patman* v. *Harland* (1), has, in the form of unregistered land, been abrogated by the Law of Property Act, 1925, s. 44 (5). That statement must be taken subject to this qualification, that sect. 198 of the same Act must be considered, which appears, notwithstanding the unqualified language of sect. 44 (5), to affect a lessee with notice of all those charges which are registered under the Land Charges Act, 1925. The measure of protection which is thereby afforded to the lessee it is not necessary for me to consider. But, whatever may be the position in regard to unregistered land, a wholly different question arises in regard to registered land, and, for the purpose of considering whether the lessee of registered land is affected with notice of a registered incumbrance, it is necessary to consider, and, as I think, to consider only, the language of the Land Registration Act, 1925. That Act supplies a code for registering land, and for disposing of it by grant, charge or lease when it is registered. When the proprietor has been registered as the owner of a freehold estate with absolute title, and under sect. 18 (1) (*e*), has granted a lease of the registered land, and the lease has been, in its turn, duly registered, then the lessee acquires a leasehold interest under sect. 20, and the nature of that leasehold interest is stated in unequivocal language in the section. It is an interest which is subject "to the incumbrances and other entries, if any, appearing on the register." It is subject, "unless the contrary is expressed on the register, to the overriding interest, if any, affecting the estate transferred or created." But it is free from all other estates and interests whatsoever. No language can be more clear to define both the liability to which the registered leaseholder is subject and the measure of the freedom which he enjoys, and it is to be observed that there is no sort of qualification such as is to be found in sect. 52 (1), to which I will presently refer. Just as sect. 20 states the position of the registered grantee, including a lessee in respect of incumbrances and other interests, including, of course, interests of a restrictive covenant, so sect. 50 states the position of the person who is entitled to the benefit of the incumbrance or restrictive covenant, whatever it may be. Sect. 50 provides for an application being made by the person entitled to the benefit of a restrictive covenant to enter notice thereof on the register. Sect. 50 (2) provides:

> When such a notice is entered the proprietor of the land and the persons deriving title under him shall be deemed to be affected with notice of the covenant or agreement as being an incumbrance on the land.

There is no exception to that, except that which is expressly stated in the subsection, namely: "incumbrancers or other persons who at the time when the notice is entered may not be bound by the covenant or agreement." That section appears to me to be the proper complement to sect. 20, to which I have already referred, and so far it appears to me to be clear beyond all doubt that, when notice of an incumbrance has been entered on the register, it is notice to all the world, though it may be, and I recognise it as perhaps a blot, that the lessee, unless he makes some bargain to that effect, is not permitted to inspect the register. The answer is: He is at liberty, if he thinks fit, to make such a bargain, and refuse to enter into any contract or lease, unless first he obtains the permission of the lessor, who can grant it to him, to inspect the register. That being the position so far under the Act, I come now to sect. 52, upon which counsel for the defendant company has relied for his proposition that he takes not subject to this incumbrance. Sect. 52, which is in the same fasciculus of clauses as sect. 50, provides:

> (1) A disposition by the proprietor shall take effect subject to all estates, rights, and

claims which are protected by way of notice on the register at the date of the registration or entry of notice of the disposition, but only if and so far as such estates, rights, and claims may be valid and are not (independently of this Act) overridden by the disposition.

The argument, if I understand it rightly, is this. It is said that the disposition, namely, the lease, does override the incumbrance, the restrictive
A covenant, of which notice has been entered on the register, and the argument proceeds thus: It is said that the intending lessee was not entitled to call for his lessor's title, therefore, under the Law of Property Act, 1925, s. 44 (5), he is not affected by the incumbrances, and, therefore, the disposition to him overrides that. It is a highly ingenious way of
B looking at the section. I decline to give that effect to it. It appears to me that adequate effect can be given to these words by regarding them as applicable to a case where the disposer, the proprietor, in exercise of some statutory power, for instance, as tenant for life under the Settled Land Act, is competent to make a disposition of the property which will
C override estates and interests which are nevertheless properly entered on the register. I decline to give to sect. 52 a meaning which would impose so grave a qualification upon the words of sect. 20. I hold, accordingly, upon the first issue in this case, that the defendant company, which is the lessee, takes subject to the obligations imposed by the
D covenant of which notice is entered on the register. But, if it takes subject to that incumbrance, it takes subject to that alone. I cannot accede to the argument, which has been put forward on behalf of the plaintiff, that, in addition to that incumbrance, there is some other equitable obligation, arising from the application of the doctrine of derogation
E from grant, which affects the property in the hands of the lessees. There is no notice of such an equitable obligation upon the register, and it appears to me that I have no right to charge the lessee with notice of any such equitable obligation any more than I would have the right to charge him with some express covenant which had not been entered on the
F register. Therefore, I proceed to examine the case upon the footing that the lessee is affected by notice of this covenant and by no other.

Then the question arises: Can the plaintiff here enforce that covenant? I turn to look at it once more. There are covenants entered into in the year 1890, the first with the Davidsons, the second with the Daws, and
G they are covenants which are not annexed to any particular parcel of land, they are covenants entered into four years after the plaintiff acquired the title to his land. They are covenants which have not been expressly, or by implication, or in any manner whatsoever, assigned to the plaintiff, and it appears to me to be quite inapplicable that, apart
H from any building scheme, or apart from the special statutory provision to which I shall presently refer, the plaintiff cannot possibly avail himself of this covenant and seek to enforce it. There is here no question of a building scheme. That question was not raised in the pleadings, and, although, at a later stage, indeed, in the course of the case, certainly, Mr. Grant invited me to allow an amendment, so that the issue of a

building scheme might be raised, I did not think fit, at that stage of the case, to allow such an amendment. Therefore there is no question of a building scheme. It remains, then, to consider the only other ground on which, as it appears to me, Mr. Grant can possibly rest his case. He claims that he is entitled to enforce this covenant, entered into on May 2, 1890, upon the ground that, either under the Real Property Act, 1845, s. 5, or under the Law of Property Act, 1925, s. 56, that right is conferred upon him. In the view which I take of both those sections, it is unnecessary for me to consider whether he is in any way entitled to call in aid sect. 56 of the Act of 1925 in regard to covenants or agreements contained in a deed executed in 1890. It is necessary for me to say something about the earlier section before I come to consider the later section. The Real Property Act, 1845, s. 5, which was, as its title suggests, an Act to amend the law of real property, was aimed at remedying certain mischiefs in the state of the common law as it then was. There was a highly technical and artificial rule that, by an indenture, as distinguished from a deed poll, an immediate interest in land could not be granted in favour of a grantee unless that grantee was a party to the deed. That mischief this section was designed to remedy. Further, there was this defect, as it was supposed, in the common law, that a person could not take advantage of a covenant in a deed unless he was a party to the deed. Be it observed that the Act of 1845 dealt with real property. This section was confined to the case of an indenture, and it was confined to the case of an immediate interest created by that indenture, for it was never the law that an estate in remainder could not be validly granted in favour of a grantee if he were not a party. Indeed, the common form of settlement then for centuries in vogue had, of course, limited estates, not only to persons not parties to the deed, but also to persons not yet interested. Accordingly, sect. 5 of the Act of 1845 provided that under an indenture executed after Oct. 1, 1845, an immediate estate or interest in any tenements or hereditament, and the benefit of a condition or covenant in respect of any tenements or hereditaments, may be taken, although the taker thereof be not made a party to the same indenture. I think the important aspect of that section, for my present purpose, is this. It appears to me to be quite plain that that section has a limited operation. It is intended to confer a benefit only upon those persons to whom the deed purports to grant an estate or interest, or those persons with whom there purports to be a covenant or agreement. It is impossible, in my view, to regard this section as creating a benefit in favour of any persons who may like to avail themselves of it and say: If we can take advantage of this it will be for our benefit. It seems to me clear that this section was intended merely to provide that A.B., the grantee under a deed, might take an immediate interest, although he was not a party, so, similarly, that A.B., with whom the covenant was purported to be made by the deed, should be able to avail himself of it, although he was not a party to the deed, and, in the few cases that have arisen under this section since 1845, and there appear to be very few, it will be found that, in every case where it has been applied, it has been in favour of a person who, although not a party to the deed, was a person with whom a covenant purported to be made, or a grant purported to be made. That, then, was the position under the Act of 1845. Now, I turn to consider sect. 56 of the Act of 1925, which, it is said, however inaptly, takes the place of the earlier section. The Law of Property Act, 1925, s. 56, provides as follows :

> (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

I think many difficulties may well arise on that section which do not fall to me to-day to solve. It appears to one at once that, so far as any other interest in land is concerned, the section is superfluous, because a person always could take another interest in land, though not a party. It is at least a question how far such a provision is necessary at all in the case of personalty. Without deciding it, I should be disposed to think that equitable estates, even in land, were not subject to the old artificial rule, and it is very doubtful if an interest in personalty was ever so subject. However that may be, for the purposes of the present case I think I am concerned with only one aspect of this question. Just as, under sect. 5 of the Act of 1845, only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so, under sect. 56 of this Act, only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or by which some agreement or covenant is purported to be in his favour. To give it any other meaning appears to me to open the door to claims or assertions of rights which cannot have been contemplated by the legislature, for, if that be not the limitation which must be imposed on this section, it appears to me that there is no limit, and it will be open to anybody to come into this court and say : Here is a conveyance which, if enforced, will redound to my advantage ; therefore, I claim the benefit of the section, I claim that the general covenant condition is one that should be enforced in my favour, because it is for my benefit ; whether intended for my benefit or whether not intended for my benefit would not appear to matter. I cannot give to the section any such meaning as that. I interpret it as a section which can be called in aid only by a person in whose favour the grant purports to be made, or with whom the covenant or agreement purports to be made. If that is so, whether the plaintiff's claim arises under the earlier or under the later Act, he cannot sue upon it in this court, because he is not a person who, under the deed of 1890, can point to any grant of any covenant purported to be made with him. That is the construction which I place upon sect. 56, with the result that the plaintiff's claim must fail.

I will add only this upon that branch of the case, that my judgment
coincides with the expression of opinion by Luxmoore, J., in *Re Ecclesiastical
Commissioners for England's Conveyance* (2), for, although the
judge has not considered the section so fully as I have had to do to-day,
it is, I think, implicit in his decision, particularly in a passage on p. 438,
beginning: "What it is necessary to consider," and so on, that the A
view of the section which I am taking is one that he also took.

Now, holding, as I do, on the second point, that, although the defendant
company took this lease subject to the registered incumbrance, the
plaintiff is himself not in a position to enforce it, the further question
raised by the defence becomes really unnecessary for me to pursue. B
It is, however, right that I should say just this, that it is clear to me,
upon the facts, first, that, although there may have been some changes
in the neighbourhood, as there undoubtedly were, yet they were not
changes for which the plaintiff himself was substantially responsible.
Secondly, I think the evidence sufficiently shows that it remains a matter C
of real importance to the plaintiff that the covenants contained in the
deed of 1890 should be observed, and the evidence of Mr. Cocks satisfied
me that it is a matter of importance that the neighbouring house, No. 18,
Palace Court, should not be used for the purpose for which it intended
to use it. It may be that, at any particular time the user is detrimental, D
it does not cause an annoyance to anybody, but he satisfied me as a general
proposition that it is depreciatory of property that the adjoining property
should be used for the purpose for which it is intended to use No. 18,
and, when he told me, as he did, that he would never advise the Cadogan
Estate, for which he acts, to admit such user of property adjoining other E
superior flat property, or, I suppose, private houses, that appeared
to me to be cogent evidence that it is of importance to the plaintiff
that this user should not be allowed. Several details were gone into,
and several questions of some importance were no doubt ventilated,
but, taking the view I do on the first and second questions, I think it is F
necessary to say no more than that, in my view, if it is necessary to
decide it, the defendant company fails. Taking the view I do upon the
second point, I must dismiss the action with costs.

Action dismissed with costs.

Solicitors: *T. & N. Blanco White* (for the plaintiff); *Laytons* (for the G
defendant company).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

Re ASHTON'S ESTATE, WESTMINSTER BANK, LTD. *v.* FARLEY.

[Chancery Division (Luxmoore, J.), **June 3, 4, 1937.**]

Charities—Charitable purposes—Gift to vicar and churchwardens for parish work.

By her will a testatrix gave part of her residuary estate to the vicar and churchwardens of a certain church "for parish work":—

Held: this was not a charitable gift, and accordingly it failed.

[EDITORIAL NOTE. The previous authorities had suggested that a gift for the purposes of the parish as distinct from those of the church might not be charitable as including objects not charitable in law, and that view is here adopted.

As to Religious Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and for Cases, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621.

(2) *A.-G.* v. *Lonsdale* (*Earl*) (1827), 1 Sim. 105; 8 Digest 312, *932*; 5 L.J.O.S.Ch. 99.

(3) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 8 Digest 294, *716*; 76 L.J.Ch. 240; 96 L.T. 357.

(4) *Re Bain, Public Trustee* v. *Ross*, [1930] 1 Ch. 224; Digest Supp.; 99 L.J.Ch. 171; 142 L.T. 344.

(5) *Re Stratton, Knapman* v. *A.-G.*, [1930] 2 Ch. 151; [1931] 1 Ch. 197; Digest Supp.; 100 L.J.Ch. 62; 144 L.T. 169.

Adjourned Summons asking for the determination of the questions: (i) whether the gift of a one-fourth share of the net residue of the estate of the testatrix, Miss Emma Mary Ashton, to the defendants the Rev. George William Farley and George Hammersley as vicar and churchwarden of St. Columba's Church, Haggerston, for parish work was a good charitable gift or whether the gift failed and the one-fourth share passed as on the intestacy of the testatrix; (ii) whether the gift of another one-fourth share of the net residue to the Rev. Frederick G. Green (since deceased) and the defendants John MacArthur Nicolls and John Carré Carter as vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, London, S.W., for parish work contained in the will was a good charitable gift or whether the gift failed and the one-fourth share in question passed as on an intestacy of the testatrix.

J. B. Richardson for the Westminster Bank, Ltd., sole executor of the will.

J. M. Gover, K.C., and *C. A. J. Bonner* for the vicar and churchwarden of St. Columba's Church.

H. B. Vaisey, K.C., and *W. S. Wigglesworth* for the vicar and churchwardens of St. Cuthbert's Church.

A. Andrewes Uthwatt, and *J. W. Brunyate* for the Attorney-General.

C. E. Harman, K.C., and *R. W. Goff* for one of the persons claiming to be entitled under an intestacy.

Gover, K.C.: The parish of St. Columba's, Haggerston, is an ecclesiastical parish constituted under the New Parishes Acts, 1843 and 1856, and that parish has only existed for ecclesiastical purposes. It has never been a civil parish. The gift in the present case must therefore be used for religious purposes and furthering the work of the church.

Vaisey, K.C.: The vicar and churchwardens to whom the gift is made are the standing committee of the parochial church council and as such the proper officers to receive a gift to be devoted to the advancement of religion in the parish.

Brunyate: The parishes are definite geographical areas and the gifts are good as benefiting all the inhabitants of such area.

Harman, K.C.: The purposes of these gifts are such that they may be used otherwise than for the spiritual or religious advancement of the parish and for that reason they must fail.

LUXMOORE, J.: By her will dated Aug. 16, 1933, the testatrix gave her residuary estate in equal shares:

> to St. Clement's Mission, Notting Dale, of which my uncle Edmund Waller was the founder, and which he and I have supported, for their mission work, to the Society for the Propagation of the Gospel in Foreign Parts, to the vicar and churchwardens of St. Columba's Church, Hoxton, for parish work, and the vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington, for parish work.

The summons raises the question as to whether the last two of those gifts are charitable. If they are not, it is, I think, admitted that both of these gifts would fail for uncertainty, and the two shares of the residue would pass as on an intestacy. A number of authorities were cited to me in the argument, and it is not easy to reconcile all of them one with another. I think, however, that the principle which emerges is that, in order to create a good charitable gift, its object must either be a specific charitable purpose or be for general purposes which are confined to those which are in law charitable, to the exclusion of any purpose which is not in law charitable. It was said, in *Pemsel's* case (1), that charity in the legal sense comprises four principal divisions. Those are (*a*) the relief of poverty, (*b*) the advancement of education, (*c*) the advancement of religion, and (*d*) trusts for other purposes beneficial to the community, and not falling within any one of the three preceding heads. It is argued in the present case that the gifts in question are valid on two alternative grounds. First, it is said that the trusts, on the true construction of the will, are confined to religious purposes. Secondly, that they are for the benefit of all the inhabitants of the particular parishes referred to.

To deal with the second ground first, it is well settled that a gift for the benefit of a particular parish is valid because it is for a specific public purpose. One of the earliest of the reported decisions to this effect is *A.-G.* v. *Lonsdale* (*Earl*) (2). In that case, the gift was for some purpose conducing to the good of the county of Westmorland, and the parish of Lowther especially. Can the gifts in the present case be brought within that principle? They can be so brought only if, on the true construction of the will, the gifts are for the benefit of the inhabitants of the particular parishes generally. They cannot be valid if they are for the benefit of some section only of the inhabitants of the parishes, not falling within either of the several divisions to which I have already referred. The gift in each case is to the vicar and churchwardens of the particular church "for parish work." The gifts are obviously made to the persons named in respect of the offices held by them, and must, I think, be confined to parish work in connection with the particular churches named. Notwithstanding the arguments of Mr. Gover and of Mr. Vaisey on behalf of the respective vicars and churchwardens, I do not think the fact that the church is, in each case, that of an ecclesiastical parish, as contrasted with the church of a civil parish, makes any substantial difference in construing the gifts. In my judgment, the gifts cannot be construed as being for the benefit of all the inhabitants of the geographical area included in the bounds of the ecclesiastical parishes defined by the reference to the churches of those parishes.

It is, therefore, necessary to consider whether the gifts to the vicar and churchwardens of the particular churches, for parish work, can, on the true construction of the will, be confined to parish work of a religious nature. There is no other context in the will which can afford any assistance in construing the gifts, nor is there any admissible evidence of surrounding circumstances which is material to be considered. There are only two points to be considered in construing the gift. One is that the gift is to the vicar and churchwardens of the particular church, and the other is that the gift is expressed to be for parish work. If the gift had been merely to the vicar and churchwardens of the particular church, the case would, I think, have fallen within the decision of Joyce, J., in *Re Garrard, Gordon* v. *Craigie* (3). In the absence of words purporting to define or limit the objects to which the gifts were to be applied, Joyce, J., held that the charitable purpose of the offices of the donees prevailed, and confined the gift to religious (that is, ecclesiastical) purposes in the parish.

In the present case, the objects to which the gifts are to be applied are specifically defined as parish work. It is said that this must necessarily be a religious or ecclesiastical purpose, for it is work to be done by the officers of the church in their official capacity, and must in substance be construed as synonymous with church work. It was sought on those grounds to distinguish parish work from parochial activities or parochial purpose, phrases used by Lord Hanworth, M.R., and by Lawrence, L.J., in *Re Bain, Public Trustee* v. *Ross* (4). In that case, the testatrix gave all her residue to the vicar of St. Alban's Church, Brooke Street, Holborn, for such objects connected with the church as he should think fit. The majority of the court overruled the decision of Eve, J., and held that the bequest was a valid charitable bequest. Russell, L.J., dissented. Lord Hanworth, M.R., said, at p. 232:

> It appears to me that the words "such objects connected with the church," that is the church of St. Alban's, are to be interpreted narrowly or rather, perhaps, as relating to the church in contradistinction to relating to the parish; and it is not disputed that if the objects were confined to the support of the church, its

> fabric and its services, that would be a good charitable bequest. I see no reason to import into "objects connected with the church" parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the vicar. I have come to the conclusion that if we were to give a loose interpretation to the words "objects connected with the church" we should be violating the rule which requires us to make an effort to give an effective interpretation to the testatrix's words; and I also think that we should be importing from outside something into those words which they do not necessarily convey. It is because we have got the church as the centre of this bequest and not the parish that I think we are right in rejecting outside considerations and in saying that this is a good bequest to the vicar as a trustee for the purposes of his church, that is, for the fabric and for the services which are conducted therein.

It is plain that, if the words used by the testatrix in *Re Bain, Public Trustee* v. *Ross* (4), had been "objects connected with the parish," instead of "objects connected with the church," LORD HANWORTH, M.R., would have held the gift to be invalid. I think the same view is expressed in the judgment of LAWRENCE, L.J., at p. 234, where he says:

> The question then arises, there being here a gift which is *prima facie* a bequest solely for charitable purposes, whether the addition of the words "for such objects connected with the church as he shall think fit" operates to convert the gift into a bequest for purposes which include non-charitable purposes. The answer to that question depends upon the true meaning of the words "objects connected with the church." I read the additional words as meaning "for such church purposes in connection with St. Alban's Church as the vicar shall think fit." The discretion vested in the vicar is in my judgment limited to directing the mode of application of the bequest within the scope of the indicated church purposes, which are described as "objects connected with the church." The cases where the gifts were for purposes conducive to the good of a religion or to the good of a particular church are in my opinion distinguishable from the present case. Here the words, to my mind, are apt and proper to describe objects which are directly connected with the church in contradistinction to objects which are only conducive to the welfare of the parishioners, or to the congregation who attend the church; and I think that the words in question do not have the operation of extending and thus defeating the primary gift to the ecclesiastical body.

"Parish work" is, in my judgment, of wider import than the phrase "objects connected with the church," which was present in the will in *Re Bain, Public Trustee* v. *Ross* (4). It is, in my judgment, impossible to find any substantial distinction between the phrase "parish work" and "parochial activities" or "parochial purposes," referred to in the judgments in *Re Bain, Public Trustee* v. *Ross* (4).

In *Re Stratton, Knapman* v. *A.-G.* (5), a testatrix bequeathed part of the proceeds of sale of a house and a sum of money to the vicar for the time being of the parish of Mortlake "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select." BENNETT, J., held that the words "parochial institutions or purposes" might include objects which were not charities, and that the gifts were, therefore, invalid. That decision was affirmed by the Court of Appeal. LORD HANWORTH, M.R., said, at p. 200:

> It is not without significance that the words of the gifts are "among such parochial institutions or purposes as he shall select," and the attention of the court has been directed to the various parochial activities which are shown in the parish magazine, and which are doubtless very excellent in themselves. But the words of the codicils impose no restriction upon the activities to which the trust moneys might be applied, nor is the vicar's discretion in any way limited. The only condition is that what is done shall have something to do with the parish; that might be something to do with the church or it might not. In law it is not every parochial purpose which is a charity. Many objects are commonly called charitable, but if they are merely

benevolent, or humanitarian, then, however excellent they may be, they are not necessarily charitable in the legal sense. Where in these codicils are there any words to be found restricting the powers of the vicar to purposes deemed by law to be charitable? We can find none.

In the present case, the object of the gifts is, as I have already stated, parish work. I cannot, as a matter of construction, read this as equivalent to church work, and, although I have come to this conclusion with regret, I am satisfied that I must hold that the gifts in this case are not charitable, and that to hold otherwise would be to disregard the decisions of the Court of Appeal in *Re Bain, Public Trustee* v. *Ross* (4) and *Re Stratton, Knapman* v. *A.-G.* (5). I therefore answer the questions raised by paras. (i) and (ii) of the summons by declaring that neither gift is a good charitable gift, and that the gifts, therefore, fail, and the one-fourth share of residue in each case passes as on an intestacy. All costs as between solicitor and client must come out of residue.

Solicitors: *Field, Roscoe & Co.* (for the Westminster Bank, Ltd.); *Alexander Pollock* (for the vicar and churchwarden of St. Columba's Church); *Thomas Eggar & Son* (for the vicar and churchwardens of St. Cuthbert's Church); *Treasury Solicitor* (for the Attorney-General); *Ravenscroft, Woodward & Co.* (for one of the persons claiming to be entitled under an intestacy).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MIDDLESEX COUNTY COUNCIL *v.* NATHAN.

[KING'S BENCH DIVISION (du Parcq, J.), **May 5, 1937.**]

Public Health—Hospital treatment—Recovery of expenses—Person legally liable to maintain—"If possessed of sufficient means"—Local Government Act, 1929 (*c.* 17), *s.* 16—*Poor Law Act,* 1930 (*c.* 17), *s.* 14.

The plaintiff council sought to recover from the defendant part of the expenses incurred by the council in maintaining the defendant's father for a condition which was not an infectious disease in a hospital belonging to the council. The statement of claim stated that the father was an old and poor person unable to work, and that he was the lawful father of the defendant, and gave particulars of the expenses incurred and of the amounts received in respect of those expenses. Upon a motion for judgment in default of defence:—

HELD: as the statement of claim contained no allegation that the defendant was possessed of sufficient means, the plaintiff council had not shown that the defendant was a person legally liable to maintain the assisted person, his father, within the Local Government Act, 1929, s. 16, and could not recover the expenses from him under that section.

[**EDITORIAL NOTE.** In order to recover the expenses of hospital treatment, otherwise than in cases of infectious disease, it is necessary for the local authority to allege and prove that the relative they are suing has sufficient means to pay such expenses.

AS TO RECOVERY OF EXPENSES, see HALSBURY, 1st Edn., Vol. 23, Public Health, pp. 433–435, paras. 837-839 and Supp.; and FOR CASES, see DIGEST, Vol. 38, p. 199, Nos. 350-353.]

Case referred to:

(1) *Allen* v. *Waters & Co.*, [1935] 1 K.B. 200; Digest Supp.; 104 L.J.Ch. 249; 152 L.T. 179.

Motion for judgment in default of defence. The statement of claim was as follows:

1. The plaintiffs are the county council of the administrative county of Middlesex, and under the powers conferred on them by the Public Health Acts, 1875 to 1926, and the Local Government Acts, 1888 and 1929, provide accommodation in a hospital known as the North Middlesex County Hospital.
2. Solomon Nathan, an old and poor person unable to work, is the lawful father of the defendant. Solomon Nathan was admitted to the hospital for treatment for a condition which is not an infectious disease on June 6, 1936, and was maintained by the plaintiffs therein until Aug. 13, 1936.
3. The said hospital is an institution within the meaning of the Local Government Act, 1929, s. 16.
4. The average daily cost per patient of the maintenance of the hospital ascertained in accordance with the provisions of the Local Government Act, 1934, s. 144, was for the material period 10*s.* 7·9*d.*, and a weekly rate of £3 14*s.* 7·4*d.* is charged by the plaintiffs.
5. [This paragraph recited the Local Government Act, 1929, s. 16, which is set out in the judgment.]
6. The plaintiffs have recovered from the said Solomon Nathan and one Alfred Nathan, a person legally liable to maintain the said Solomon Nathan [£1 9*s.* 8*d.* and £2 18*s.* 4*d.* respectively out of total expenses amounting to £36 4*s.* 11*d.*] and are satisfied that the said Solomon Nathan and Alfred Nathan cannot reasonably, having regard to their financial circumstances, be required to pay the whole or any greater part of the expenses of maintaining the said Solomon Nathan in the hospital.
7. The defendant is and at the material time was a person legally liable to maintain the said Solomon Nathan. The plaintiffs' claim is for £31 16*s.* 11*d.*

F. J. Wrottesley, K.C., and *H. B. Williams* for the plaintiff council.

The defendant did not appear.

R. M. Montgomery, K.C. (*G. D. Squibb* with him), as *amicus curiæ* argued for the defendant.

du Parcq, J.: In this case, a question of importance comes before me upon a motion for judgment. The material facts are contained, I think, in paras. 1-6 of the statement of claim, and, in dealing with a motion for judgment, I must assume that those facts are accurately stated. I consider I ought to give judgment as I would if all those facts had been proved to my satisfaction by evidence. I think it is unnecessary to recapitulate those facts. Para. 7, as I read it, contains no allegation of fact. It is well known, though sometimes forgotten, that R.S.C., Ord. 19, r. 4, enacts that:

> Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies.

I do not say for a moment that it is wrong to state inferences of law sometimes in the pleadings, and nobody would say that the pleader, whose statement of claim, if I may say so, raises the point which it was desired to raise, perfectly clearly and neatly, has done wrong in summarising his contention in para. 7; but there is no allegation of fact in para. 7. The words are:

> The defendant is and at the material time was a person legally liable to maintain the said Solomon Nathan.

A great difference of opinion, and a legitimate difference of opinion, is revealed by the arguments I have heard as to what persons are legally liable to maintain Solomon Nathan, as to the persons that description would include. An allegation in that form is a submission of law rather than a statement of fact, so that I ignore it, and I must decide this case upon facts which are stated in paras. 1-6 of the statement of claim.

Now I must deal briefly with the statutes which have been referred to by the counsel in this case: I cannot say the counsel on both sides in this case, because in one sense there is only one side represented. I have had the great advantage, not only of hearing Mr. Wrottesley for the plaintiff council, but also of hearing an argument from Mr. Montgomery. The reason for that is that this case came on originally before PORTER, J. He saw the importance of the question that was raised, and, with the concurrence of the plaintiff council, which was naturally and properly anxious that the matter should be decided, if possible, after argument, he expressed a desire that some arrangement should be made whereby the court should be assisted by having the points argued. In the result, it has been found possible to secure the assistance of Mr. Montgomery, whom I have heard as *amicus curiæ*. That being so, I am, as Mr. Wrottesley would be the first to acknowledge, in a better position to decide the case than that in which I should have been if I had heard only one side. It is always very difficult for one counsel to argue both sides of a case, and his duty is, after all, to the clients, who, in the ordinary way, could not be expected to be pleased if they listened to an admirable exposition on the opposite side from the counsel whom they had retained. But, although I have had the assistance of the arguments on both sides, I do not think it is desirable that I should decide more than it is necessary that I should decide for the decision of this case.

Taking the statutes in chronological order, I have been referred to the Poor Relief Act, 1601, s. 6. That section provided:

> That the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or every poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in the manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed.

That remained in substance the law as far as poor law relief is concerned, for a very long time, and indeed is still in substance the law, but in course of time there were some developments as to the person charged with the relief of the poor and the justices before whom the question should be brought, and, in 1927, an Act was passed which I think was undoubtedly a consolidating Act. That contained much the same provision as was contained in the Poor Relief Act, 1601, s. 6, but the provision, instead of being in one section, is to be found in two sections. Sect. 41 (1) enacts the duty. Sect. 43 (2) enacted that a board of guardians might:

> obtain orders of maintenance upon the relatives liable under this Act to maintain any person whose relief would be chargeable to them in such manner and according to such rate as the court may order.

It is of importance to see upon whom falls the duty to relieve and maintain poor persons. Looking at this Act, as at the Act of 1601, it would be wrong to say that every child of a poor, old, blind, lame and impotent person, or other poor person not able to work, was under a duty to relieve and maintain such person. The Act says no such thing. The necessary part of the description of the persons who come under this Act is to be found in the words "if possessed of sufficient means," and there is no duty at all unless that provision is fulfilled. Historically, the next A statute that comes into question here is the Local Government Act, 1929, but before I deal with that, it is convenient to say that the Act of 1927 is in substance re-enacted, so far, at any rate, as concerns me, in the Poor Law Act, 1930. There is one slight change: the duty of the family is dealt with, in sect. 14 (1), in words which are just the same as B those in the corresponding section of the 1927 Act, except that the words "poor, old, blind, lame and impotent person" become changed to "poor, old, blind, lame or impotent person." I do not think it makes any difference to the meaning. The draughtsman probably took the view that it was a happier way of expressing the meaning of what C was intended. Then the provision as to obtaining maintenance orders is to be found in sect. 19 (2). Both the Acts provide that orders upon the relation liable under the Act are to be obtained, so that it is necessary to show the petty sessional court that the person against whom an order is sought is possessed of such sufficient means, not necessarily meaning D sufficient means to pay everything that is due, but possessed of sufficient means to pay something, at any rate, of what is due. So far, we have been in the region of poor law relief only. Before I come to the Local Government Act, 1929, it is, I think, desirable just to look at the Public Health Act, 1875, s. 131. That provided that: E

> Any local authority may provide for the use of the inhabitants of their district, hospitals or temporary places for the reception of the sick.

It is unnecessary, I think, for me to say anything about sect. 132. As will presently appear, county councils have now secured powers similar to those of local authorities, but they have not, by the Act of F 1929, obtained the power given to local authorities by the Public Health Act, 1875, s. 132. That has been determined by the decision of the Court of Appeal in *Allen* v. *Waters & Co.* (1). The Local Government Act, 1929, sought, to a great extent, at any rate, to take out of the realm of poor law a large number of people who obtained what may be G called assistance. The Local Government Act, 1929, s. 5, made provision for alternative powers of giving assistance. It provided:

> (1) A council in preparing an administrative scheme shall have regard to the desirability of securing that, as soon as circumstances permit, all assistance which can lawfully be provided otherwise than by way of poor relief shall be so provided. H

Further, it contained a provision that any such administrative scheme should provide assistance which previously could be provided either by way of poor relief or otherwise, and, among other Acts, could be provided by the Public Health Act, 1875, and that this should be provided exclusively by virtue of the appropriate Act, and not by way of poor relief.

Sect. 14 gives the county council the same powers, with regard to the provision of places for reception of the sick, as were conferred on local authorities by the Public Health Act, 1875, s. 131, which I have just read. County councils, therefore, found themselves in a position to provide assistance for the sick, and not as poor persons or paupers at all, and not under the Poor Law Act. Parliament thought it proper, in those circumstances, that there should be some provision under which the county council should, in certain cases, be able to recover, from certain persons who had the means to pay, and were under liability to relieve and maintain the person assisted, some part, or the whole, of the expense of such assistance. That brings me to the Local Government Act, 1929, s. 16, the crucial section, which provides:

> (1) As from the appointed day it shall be the duty of the council of every county and county borough and of every other local authority to recover from any person who has been maintained by them in any institution [with exceptions which I need not trouble about] or from any person legally liable to maintain that person, the whole of the expenses incurred by the council or authority in the maintenance of that person, or, if the council or authority are satisfied that the persons from whom the expenses are recoverable cannot reasonably, having regard to their financial circumstances, be required to pay the whole of those expenses, such part, if any, of the expenses as they are in the opinion of the council or authority able to pay.

It is a matter of great importance to county councils, because the terms of that section are mandatory. If they failed to fulfil their duty, the High Court would by *mandamus* compel them to perform it. I think Mr. Wrottesley is right in saying that the council might be surcharged by the auditor. That, at any rate, is a possibility. There is an imperative duty laid upon the councils. Now, what is that duty ? They must recover the expenses from any person legally liable to maintain the person assisted. Mr. Montgomery suggests that that may mean legally liable at common law. I must say that I see no reason to accept that contention. I think those words must include persons legally liable by the force of some statute.

Now, the question is whether the allegations of fact in this statement of claim show the defendant to be a person legally liable to maintain Solomon Nathan. I look now at the material section of the Act of 1930, and I find, on the facts, which I must deal with as if they had been proved, that the defendant is a child of a person who was not able to work, and who was poor and old, and, I suppose, in the sense in which the word is used in the Act, impotent. A question arises as to the effect on the construction of that section of the definition clause, sect. 163 of the Act. "'A poor person' includes any poor or indigent person applying for or receiving relief"; and Mr. Montgomery says that I ought to read the word "includes" there as if the word were not "includes" but "means." About that he may be right. There is plenty of authority for it, I think, and Mr. Montgomery referred me to a judgment of the Privy Council; and I think there is ample authority for it that a court sometimes is bound to read "includes" as if it were "means." I do not desire, in this case, to express a final opinion of that argument of

Mr. Montgomery's. I think it is unnecessary, and I do not propose to do so. I will assume that, although there is no allegation that Solomon Nathan was entitled to receive relief, he still comes within the class of persons mentioned in sect. 14, on the ground that he was poor and old and unable to work. So that I have the fact that the defendant is the child of one of those persons. Then the question remains, is he A
possessed of sufficient means? Because those words, as I have said, are vital to the definition or description of the person set out in sect. 14. I think that, if the council is in a position to satisfy the court that a person, who is a child of one of the assisted persons unable to work, is possessed of sufficient means, then the county council can recover, B
either in the county court or in the High Court—the county court, in the ordinary way, would probably be the appropriate tribunal—expenses which he has sufficient means to pay. But I am satisfied that, unless the county council proves that the defendant has sufficient means, it does not bring him within the ambit of the Local Government Act, 1929, C
s. 16, because it does not show him to be a person legally liable to maintain the assisted person.

When I look at this statement of claim, excluding as I have said I must exclude altogether sect. 7, I find no allegation that the defendant is possessed of sufficient means to pay anything. Now, it is said that the D
difficulty of the construction which I am putting upon sect. 16 is that that section contemplates some sort of inquiry by the council, and leaves it to the council to decide whether the person who is within the class mentioned in the Poor Law Act, 1930, s. 14, has sufficient means to pay some, or all, of the expenses. I see no difficulty about it. Even if E
there were any difficulty about it, I could not be induced, for that reason, to give to the words "any person legally liable to maintain" a meaning different from that which I have given to them, and to leave out of the definition those vital words, "if possessed of sufficient means." But, indeed, what sect. 16 is saying, in my view, is this. There is this imperative duty upon the council, but the council is not obliged to waste money F
by taking proceedings against people who have not any means, and the council is not obliged to do what most people would think harsh and unnecessary—to take proceedings for the whole of the expenses against somebody who, it thinks, though he may have in the savings bank G
enough money to pay the whole of the expenses, could not reasonably, having regard to his financial circumstances, be required to pay the whole of the expenses. The legislature, remembering, I dare say, that it is sometimes alleged that corporations, as public bodies, are lacking in charity, and the virtue which we like to associate with private persons, H
have made it possible for a public body to exercise some virtue. Public bodies are very often supposed to be harsh, not because they want to be, but because they cannot be generous at the expense of the ratepayer. If there had been an obligation without some exception, the council might have found itself compelled to take proceedings, which it would

very much have regretted to have to take. As it is, it is entitled to consider a man's financial position. It has a certain discretion, and it may say, "We do not think, in these circumstances, that we can suggest that this man can reasonably be required to pay the whole of the expenses."

The result is that this motion for judgment fails, on the ground, as I have stated, that there is no allegation that the defendant was possessed of sufficient means.

Motion dismissed.

Solicitor: *C. W. Radcliffe* (for the plaintiff council and instructing the *amicus curiæ*).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

STEPNEY CORPORATION *v.* OSOFSKY.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **June 7, 8, 1937.**]

Contract—Appropriation of payments—Statute-barred debt—Implied appropriations by debtor.

On Sept. 17, 1935, a certain sum was owing by the respondent, a licensed street trader, to the appellant corporation, in respect of removal of refuse and other services. During the period from Sept. 18, 1935, to Mar. 17, 1936, further sums became due for similar services, and, during the same period, certain payments were made by the respondent to the appellant corporation. The respondent did not specifically appropriate any of these payments to any particular charges. The appellant corporation purported to appropriate the payments in satisfaction of the arrears of earliest date, and, on Mar. 17, 1936, sought to recover the balance alleged to be due. The justices thought that the respondent believed that he was making payments towards current dues, and decided that the appropriation by the appellant corporation was not, and could not be properly made, and they held that the appellant corporation could not recover a sum larger than the difference between the money due in respect of the period from Sept. 18, 1935, to Mar. 17, 1936, and the amount paid by the respondent during that period. The appellant corporation appealed, contending that, in the absence of specific appropriation by the respondent, the appellant corporation was entitled to appropriate the payments, to satisfy any arrears, even though the arrears might be irrecoverable at law:—

HELD: the justices had not found that there had been any appropriation by the respondent.

Decision of the Divisional Court ([1936] 3 All E.R. 494) *reversed.*

[EDITORIAL NOTE. Upon this appeal the Court of Appeal allowed the appeal upon a different view of the facts appearing from the case stated and no question of law arises on the appeal.

AS TO APPROPRIATION OF PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 244-247, paras. 335-339; and FOR CASES, see DIGEST, Vol. 12, pp. 479-483, Nos. 3911-3960.]

APPEAL from a judgment of the Divisional Court, dated Oct. 29, 1936, and reported in [1936] 3 All E.R. 494.

N. L. C. Macaskie, K.C., and *Phineas Quass* for the appellant corporation.

Neville Laski, K.C., and *Leslie Brooks* for the respondent.

Greer, L.J.: I cannot help thinking that this is a somewhat unfortunate case. If the magistrates had so chosen, they might have come to the conclusion that at any rate so far as the earlier payments were concerned they were payments of amounts which could only be appropriated to the current period, namely, 2*s.* 6*d.* per week. But, unfortunately, they had, in addition to that, two payments that cannot be treated as payments of 2*s.* 6*d.* per week, and they were faced with the difficulty of deciding whether or not, taking all these facts together, they could say there was appropriation by the debtor, with the knowledge and assent of the creditor. Faced with that question, they have stated a case in which they say, in para. 4:

> Upon the hearing of the said complaint the following facts were admitted or proved in evidence before us . . . (4) At no time in making any of the said payments did the respondent appropriate them to any particular charges.

I regard that, notwithstanding the words of para. 4 (5), as a finding of fact that the payer, the debtor, did not in fact, according to their finding:

> appropriate or purport to appropriate the payments in satisfaction of the arrears of earliest date.

We are asked by Mr. Laski to say that, if you look at para. 9, it has an effect on the interpretation of para. 4. Para. 9 says:

> The justices thought that the respondent believed that he was making payments towards current dues. With reference to para. 4 (4) hereof the respondent did not in terms appropriate the payments he made to any particular dates.

We are asked to say that that shows that para. 4 (4) means that there was no express appropriation, but still there were circumstances which might have enabled the magistrates, if they had so chosen, to say that the facts and circumstances of the case indicated that the appellant in this case, the Stepney Corporation, and its agents, must have known perfectly well that the items of 2*s.* 6*d.* week by week were paid in respect of the year when 2*s.* 6*d.* was appropriate to payment, and were not paid on account generally. But I fail to come to the conclusion that they gave any such finding. I am helped in that by paras. 9 and 10. Para. 9 says, in addition to the words that I have read:

> The respondent did not in terms appropriate the payments he made to any particular dates. He does not know the meaning of the expression "appropriate" or its significance.

All they find is that he believed that he was making payments towards current dues. There is nowhere any finding in the case that the circumstances were such that the payee, the corporation, was bound to regard the payments as payments which were intended by the payer to be appropriated to the year in which they were made. That can have no reference, in any case, to the last payments, which were not in accordance with the moneys due in respect of that last year.

Then para. 10 says:

> So far as the justices could judge from the evidence submitted to them, these appropriations were made at the offices of the appellants subsequently to payment to the council's officers. Be this as it may the justices were of opinion on the evidence submitted that when these payments were made the respondent was not informed that such an appropriation was to be made and that when asked he made such small payments as he was able from time to time without considering or appreciating the position.

How it can be said, in this case, that the circumstances of the payments necessarily involved an appropriation towards dues in the later year, I do not understand.

The result is that, in my judgment, the judges of the divisional court have mistaken the finding of the magistrates, and have not read the case in the way in which, in my judgment, it ought to be read.

I think it is a little unfortunate, but I hope that, if this case is reported anywhere, it will become known to these street traders that, if they have the advantage of the period of limitation which will prevent recourse to the magistrates in relation to a year that is past, and after six months have expired, they will be astute enough to say, when they make the payments, "I am making these payments in respect of the current year, and not in respect of the past year." I do not know whether there is any association of these street traders, but, if there is, they will take note of the decision, and their secretary will probably inform their members about it.

That is how we determine this case. I would like to say just a word more about the request that has been made, that we should advise the Poor Persons authorities as to what they should do in the event of a successful appeal. We cannot do that, because this is not an appeal by a poor person; on the other hand it is an appeal against a poor person, in which the appellant is the corporation, and in which the corporation is successful. No expression of opinion that we might make, on the question on which we are asked to give an expression of opinion, would be binding upon anyone, because it would be *obiter*, and would have no relation whatever to the facts of the case we have decided.

I cannot help thinking that Mr. Macaskie is right in saying there are, or at any rate there may be, many cases in which the facts are identical with those of the present case, and, therefore, this case would bind both parties in those cases, but I should like to appeal to the generosity, if it is possible to appeal to the generosity of a corporation, that has no soul to be saved or body to be kicked, to take a generous view of these cases, and to assume, at any rate in the majority of the claims, even on the lower scale relating to the current year, that it should not itself appropriate the moneys which have been paid to the earlier date, but should appropriate them to current dues, as the magistrates in this case found was the uncommunicated belief and intention of the payer.

That is a matter entirely for the corporation. It may or may not pay any attention to the observations that I have thought it right to make in the discussion.

Slesser and MacKinnon, L.JJ., concurred.

Appeal allowed.

Solicitors: *T. Myrddin Baker* (for the appellant corporation); *Stewart-Wallace & Co.* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

Applied. *Re* Carey (*decd.*). [1950] 1 All E.R. 726.

Re COLLER'S DEED TRUSTS, COLLER *v.* COLLER.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **June 4, 14, 1937.**]

Annuities—Rights as to property charged—Whether charge on capital or continuing charge on income—Gift over of surplus income during life of annuitant.

By a deed of family arrangement, certain assets representing the residuary estate of a testator were directed to be held by the trustees of his will (*a*) upon trust to pay out of the income thereof the sum of £10 a week to the testator's widow during her widowhood, (*b*) upon trust to pay out of the income thereof the sum of £3 a week to the testator's widowed daughter during her widowhood, (*c*) upon trust to pay out of the income thereof the sum of £1 a week to the testator's mother during her life, (*d*) during the widowhood of the testator's widow to pay or apply the whole or any part of the balance of the income for the maintenance support or otherwise for the benefit of the testator's widow and his four sons as the trustees in their absolute discretion should think fit and subject as aforesaid to apply the said balance in payment off of the existing mortgages on the testator's estate, (*e*) upon trust as to capital and income for the testator's four sons in equal shares. The weekly sums fell into arrear and the widow asked for a declaration that the three weekly sums were a charge on the capital of the trust fund, or, alternatively, were a continuing charge on the income of such fund:—

Held: the weekly sums were neither a charge on the capital nor a continuing charge on the income of the trust fund. The direction in the deed as to surplus income arising during the widowhood of the testator's widow showed that the parties to the deed intended that the weekly sums in any year should be paid out of the income of that year, and of that year alone.

[**EDITORIAL NOTE.** In the judgment herein, Romer, L.J., without considering individual decisions, reviews the principles upon which an annuity may be held to be a charge on the corpus of an estate or a continuing charge on income. While such cases must to a great extent turn upon the particular words used in the document, this statement of principle, which is fully concurred in by the other members of the court, will be found of great assistance in construing such clauses.

As to Annuities Charged on Corpus or a Continuing Charge on Income, see HALSBURY, 1st Edn., Vol. 24, Rentcharges and Annuities, p. 493, para. 958; and for Cases, see DIGEST, Vol. 39, pp. 145-153, Nos. 398-457.]

Cases referred to:

(1) *Stelfox* v. *Sugden* (1859), John. 234; 39 Digest 153, *456*.

(2) *Re Platt, Sykes* v. *Dawson*, [1916] 2 Ch. 563; 39 Digest 153, *457*; 86 L.J.Ch. 114; 115 L.T. 524.

(3) *Harbin* v. *Masterman*, [1896] 1 Ch. 351; 39 Digest 144, *392*; 65 L.J.Ch. 195; 73 L.T. 591.

APPEAL from a decision of FARWELL, J., delivered on July 10, 1936. The facts are fully set out in the judgment.

W. C. Cleveland-Stevens, K.C., and *G. A. Rink* for the appellant.

J. M. Gover, K.C., and *H. O. Danckwerts* for the respondents.

ROMER, L.J. [delivering the judgment of the court]: Under a deed of family arrangement dated Sept. 26, 1932, certain assets, representing the residuary estate of one Harris Coller, deceased, were directed to be held by the trustees of his will upon trusts that, so far as are material for the present purposes, were as follows:

(*a*) Upon trust to pay out of the income thereof the sum of £10 a week to the testator's widow Baila Coller during her widowhood.

(*b*) Upon trust to pay out of the income thereof the sum of £3 a week to the testator's widowed daughter Fanny Bloom during her widowhood.

(*c*) Upon trust to pay out of the income thereof the sum of £1 a week to the said testator's mother Rachel Coller during her life.

(*d*) Upon trust during the widowhood of the said Baila Coller to pay or apply the whole or any part of the balance of the income thereof for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the said Baila Coller and the testator's sons Benjamin Coller Jack Coller Maurice Coller and David Coller as the trustees in their absolute discretion should think fit and subject as aforesaid to apply the said balance of the said income in payment off of the existing mortgages on the testator's estate or some part thereof.

(*e*) Upon trust as to capital and income for the testator's four sons in equal shares.

For some time after the execution of the deed, the weekly sum payable to Baila Coller was paid in full, but, since Aug., 1935, her weekly sum and the weekly sums of Fanny Bloom and Rachel Coller have fallen into arrear. In these circumstances, Baila Coller, as plaintiff, took out an originating summons asking to have it declared that, on the true construction of the deed of family arrangement, the three weekly sums are a charge on the capital of the trust fund, or, alternatively, are a continuing charge on the income of such fund, and for the appropriate consequential relief. The matter came before FARWELL, J., on July 10, 1936, and he, by an order of that date, declared that, according to the true construction of the deed, the three weekly sums are neither a charge on the capital of the trust funds nor a continuing charge on the income of those funds. From that order an appeal has been brought to this court by Mrs. Baila Coller.

The question in what circumstances an annuitant is entitled to have arrears of the annuity satisfied out of the capital or future income of property is one that has frequently engaged the attention of the court. The reported cases upon the subject are numerous, and not altogether reconcilable. The question is always one of the proper construction of the instrument creating the annuity, and must, accordingly, depend in every case upon the precise language employed. No one case, therefore, can be said to govern another. There are, however, certain principles of construction applicable to such cases that seem to be well established. Where, for instance, there is, in a will, a bequest of an annuity, the residuary legatees, or the other persons becoming entitled to the testator's residuary estate, can take that estate only on the terms of paying, or providing for the payment of, the annuity in full. The annuity is a charge upon the whole income and corpus of the residuary estate just as much as if it were an ordinary pecuniary legacy. But sometimes, and this must usually be the case where the annuity is created by a settlement of personalty, the annuity arises under a trust to pay it. If the trust be one to pay the annuity out of the capital of a trust fund, no difficulty can arise, but, where the trust is one to pay the annuity out of the income of a trust fund, it is very often a question of considerable doubt whether the arrears of the annuity in one year can be paid out of the income of a subsequent year. The language of the instrument may, indeed, make it quite clear that the instalment of the annuity for one year is to be paid out of the income for that year only. But, even when the actual trust for the payment of the annuity, if standing by itself, would be so construed, the subsequent language may show that the arrears in any year are to be raised out of the corpus of the trust fund. Such will be the case if the corpus be given, not merely "subject to the trust for payment of the annuity," but "subject to the payment of the annuity." For these, or words to the same effect, indicate that the corpus is to be taken only on the terms that the annuity is paid in full, and the trust to pay the annuity out of the income for each year is regarded as being directory only, and not as limiting the rights of the annuitant. But now take the case of a trust to pay an annuity out of the income of a trust fund, without any subsequent indication being given that the annuity is in any case to be paid in full, and without any express words confining the annuity for any one year to the income of that year. Under such a trust, the annuity is *prima facie* a continuing charge upon the income of the fund, and the annuitant, or his legal personal representatives after his death, will be entitled to have the income impounded until all arrears of the annuity are paid. Sometimes, indeed, this right extends only to the income arising during a limited period, such as, for instance, the annuitant's life. This is the case when a trust is expressed to take effect at the expiration of that period, in terms that show that the whole trust fund, both capital and future income, is, at that moment, to go over to another person intact. But, in the absence of any such indication, the right to have the income applied in satisfaction of the arrears will continue until the arrears are satisfied. But what is to happen to the surplus remaining in any year after the annuity and all arrears up to that time have been satisfied? I cannot think that the answer to this question admits of any doubt. Where any property is charged with, or is subject to, a trust for payment

of an annuity, the annuitant is entitled to demand, and can, by taking
the appropriate steps, ensure, that every part of that property is made
available for payment of the annuity, and the right of the annuitant
must prevail, whatever may be the nature of the property that is charged,
or is the subject matter of the trust. Where, therefore, the property in
A question is the income of a fund, the annuitant is in strictness entitled to
require that the surplus income in any year, after keeping down the
current instalments of the annuity, and any existing arrears, shall,
within the limits permissible by law, be accumulated for the purpose
of meeting subsequent instalments. If this be the right, as I think
B it is, of an annuitant whose annuity is a continuing charge upon the
income of a fund until paid in full, any directions in the instrument
creating the annuity that are inconsistent with that right indicate that
the annuity is not meant to be so charged. This will be the case whenever
the instrument provides that any surplus income in any year after the
C current instalment of the annuity is to be paid to, or applied for the
benefit of, other persons. Such a provision was contained in the will
that fell to be considered by SIR W. PAGE WOOD, V.-C., in *Stelfox* v.
Sugden (1). In that case, a testator directed the trustees of his will
out of the income of his residuary estate to pay to his widow during her
D life an annuity of £100, and declared that his trustees should during
her life divide and pay the residue of the income for the benefit of various
beneficiaries who did not include the widow, and that, from and after
the decease of his widow, his trustees should stand possessed of the
residue of the trust moneys on trusts in favour of a class that was not
E the same as the class entitled to the surplus income. The widow's
annuity having fallen into arrear, it was contended on her behalf that
the annuity was charged upon corpus. This contention was, however,
rejected by SIR W. PAGE WOOD, V.-C., because, and solely because, of
the trust contained in the will of the surplus income during the widow's
F lifetime. If the annuity were charged on corpus, or were a continuing
charge upon income, the result would have been that, after her death,
the persons then entitled to the trust fund would have been obliged to
make good thereout all arrears of her annuity, without any recourse
against those persons who, during her lifetime, might have received
G surplus income. This result was regarded by SIR W. PAGE WOOD, V.-C.,
as an absurdity which the testator could not have contemplated.

Turning now to the deed with which we are concerned on this appeal,
it is plain that the weekly sums are not charged upon corpus. FARWELL,
J., so held, and the appellant does not challenge that decision. But
H the judge also held that the weekly sums were not a continuing charge
upon income. In so holding, he based his decision upon the direction
in the deed as to the surplus income arising during the widowhood of
the appellant, following the reasoning of SIR W. PAGE WOOD, V.-C., in
Stelfox v. *Sugden* (1). In my opinion, he was right in so doing. I think
that the direction in question shows unmistakably that the parties

to the deed intended that the weekly sums in any year should be paid out of the income of that year, and out of that alone. Suppose, for instance, that, during the first few years of the appellant's widowhood, there was a surplus of income, after paying the three weekly sums, and that the trustees, in the exercise of their discretion, had applied the whole of such surplus for the widow's benefit. Suppose, further, that, during the remainder of her widowhood, the income is insufficient to pay the weekly sums. It can hardly have been within the contemplation of the parties that the widow, or her legal personal representatives, should, in such circumstances, be paid the arrears of her weekly sum out of the income accruing after her remarriage or death. In my opinion, the express trust contained in the deed for distribution of the surplus income is a reasonably plain indication that the weekly sums were not intended to be continuing charge upon the income of the trust fund.

It remains only to say a few words about *Re Platt, Sykes* v. *Dawson* (2), on which Mr. Cleveland-Stevens placed some reliance. For this purpose, it is necessary to refer once more to the strict rights, as I conceive them to be, of an annuitant whose annuity is charged upon the corpus or the income of a fund. An annuity so charged affects the whole subject matter of the charge, and the persons entitled subject to the charge can claim that subject matter only on the terms of providing for the annuity in full. But, in practice, and as a matter of administration, the distribution of the corpus or the income subjected to the annuity is never held up altogether in cases where the annuitant cannot be prejudiced by a partial distribution: see, for example, *Harbin* v. *Masterman* (3). Where, therefore, an annuity is charged upon income that in all human probability will always be sufficient to pay it, the trustees will be justified in paying the surplus income in each year to the persons entitled to the income upon which the annuity is charged. Now, the facts in *Re Platt, Sykes* v. *Dawson* (2) were as follows: a testator, who died in 1906, had, by his will, bequeathed a share of his residuary estate upon trust out of the income thereof to pay his widow an annuity, and, subject thereto, to permit the share and the income thereof to devolve as therein mentioned. The testator's residuary estate consisted partly of ordinary shares in a limited company. The dividend on these shares had been reduced from 7½ to 5 per cent. since the War, but, so long as the company continued to pay a dividend at that rate, the income of the share of the residuary estate was sufficient to pay the annuity and leave a surplus over. If, however, the dividend were passed, or were further materially reduced, there would be a deficiency. In these circumstances, the trustees of the will applied to the court, to have it determined whether surplus income in their hands ought to be resorted to for the purpose of making good the annuity in any year in which the income was not sufficient to pay it. At the date when the summons was taken out, it was thought that the dividend on the shares would be less than 5 per cent., but, before the summons came on for hearing, the dividend had in fact been declared at that rate. SARGANT, J., while feeling great doubt on the point, held that the income of the share in the residuary estate, after satisfying the claims of the annuitant down to date, ought to be distributed among the persons who, subject to the annuity, were entitled to such income. But he then added this, at p. 569:

> A Of course, if the trustees should foresee a certain deficiency and should have surplus income in their hands, I do not intend to preclude them from applying this money to making good the annuity. As a matter of administration and of immediate adjustment they might make good the annuity out of any income in their hands. All that I decide is that they were not to retain or accumulate any surplus income for the purpose of making good a possible or contingent deficiency in a future year.

B This view of the rights of an annuitant whose annuity is charged upon the income of a fund does not seem to differ substantially from the view of those rights which I have endeavoured to express.

In our opinion the decision of FARWELL, J., was right, and the appeal should be dismissed.

C *Appeal dismissed.*

Solicitors: *Shapiro & Co.* (for the appellant); *N. Mackover* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

D

Re WILSON, WILSON *v.* BLAND.

[CHANCERY DIVISION (Clauson and Luxmoore, JJ.), **April 27, May 3, 10, June 21, 1937.**]

E *Limitation of Actions—Debt—Acknowledgment—Arrangement in lieu of payment of interest—Creditor living rent free on debtors' farm and receiving free farm produce—Continuous acknowledgment.*

Between 1923 and 1925, the appellant lent sums amounting to £4,200 to the debtors who were in partnership as farmers. In Oct., 1924, £10 was paid in cash by way of interest, this being the only cash payment made by the debtors to the appellant. In 1926 the appellant asked the F debtors to pay interest on the loan, but he was told by them that they were unable at that time to do so, but that they hoped to pay it before long. In 1927 an arrangement was made whereby the debtors' obligation to pay interest was to be discharged or partly discharged by the appellant living on one of the partnership farms rent and rates free and being provided with farm produce without charge. This continued until 1935. In Dec., 1935, the debtors entered into a deed of arrange- G ment for the benefit of their creditors. The appellant sought to have his claim for £4,200 admitted to proof. The trustee of the deed of arrangement contended that the debt was statute-barred:—

HELD: the services rendered to the appellant in pursuance of the arrangement in 1927 constituted a continuous acknowledgment of the debt, which was, therefore, not statute-barred and ought to be admitted H to proof.

Decision of His Honour JUDGE HILDESLEY, K.C. (1936), 3 L.J.N.C.C.R. 325, *reversed.*

[EDITORIAL NOTE. It is not necessary that payment of interest should be actually made in money. A payment in kind is sufficient, and here the payment in kind is a right to live in a farmhouse rent-free and the receipt of certain farm produce free of charge. The main contention in the present case here is that even admitting this was a payment of interest, no reference was made, in the arrangement between the parties, to any payment of principal; but it is held that such payment is sufficient to support the presumption of an implied promise to pay the principal, and therefore an acknowledgment within the statute.

As to MODE OF PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 20, p. 640, para. 812; and FOR CASES, see DIGEST, Vol. 32, pp. 382, 383, Nos. 650-656.

As to SUFFICIENCY OF ACKNOWLEDGMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 631-636, paras. 800-805; and FOR CASES, see DIGEST, Vol. 32, pp. 357-377, Nos. 409-607.]

Cases referred to:

(1) *Tanner* v. *Smart* (1827), 6 B. & C. 603; 32 Digest 364, *490*; 5 L.J.O.S.K.B. 218.
(2) *Morgan* v. *Rowlands* (1872), L.R. 7 Q.B. 493; 32 Digest 380, *627*; 41 L.J.Q.B. 187; 26 L.T. 855.
(3) *Bodger* v. *Arch* (1854), 10 Exch. 333; 32 Digest 382, *651*; 24 L.J.Ex. 19; 24 L.T.O.S. 96.
(4) *Waters* v. *Tompkins* (1835), 2 Cr. M. & R. 723; 32 Digest 379, *621*; 5 L.J.Ex. 61.
(5) *Wainman* v. *Kynman* (1847), 1 Exch. 118; 32 Digest 380, *625*; 16 L.J.Ex. 232.
(6) *Spencer* v. *Hemmerde*, [1922] 2 A.C. 507; 32 Digest 364, *484*; 91 L.J.K.B. 941; 128 L.T. 33.
(7) *Fettes* v. *Robertson* (1921), 37 T.L.R. 581; 32 Digest 365, *504*.
(8) *Foster* v. *Dawber* (1851), 6 Exch. 839; 32 Digest 378, *619*; 20 L.J.Ex. 385; 17 L.T.O.S. 310.
(9) *Re Somerset, Somerset* v. *Poulett (Earl)*, [1894] 1 Ch. 231; 32 Digest 496, *1571*; 63 L.J.Ch. 41; 69 L.T. 744.
(10) *Cleave* v. *Jones* (1851), 6 Exch. 573; 32 Digest 391, *723*; 20 L.J.Ex. 238; 17 L.T.O.S. 108.
(11) *Bamfield* v. *Tupper* (1851), 7 Exch. 27; 32 Digest 384, *674*; 21 L.J.Ex. 6; 18 L.T.O.S. 78.
(12) *Fordham* v. *Wallis* (1853), 10 Hare, 217; 32 Digest 384, *675*; 22 L.J.Ch. 548; 21 L.T.O.S. 190.
(13) *Irving* v. *Veitch* (1837), 3 M. & W. 90; 32 Digest 383, *662*; 7 L.J.Ex. 25.
(14) *Pittam* v. *Foster* (1823), 1 B. & C. 248; 32 Digest 353, *365*; 1 L.J.O.S.K.B. 81.
(15) *Tippets* v. *Heane* (1834), 1 Cr. M. & R. 252; 32 Digest 379, *622*; 3 L.J.Ex. 281.
(16) *Catling* v. *Skoulding* (1795), 6 Term Rep. 189; 32 Digest 368, *524*.
(17) *Cottam* v. *Partridge* (1842), 4 Man. & G. 271; 32 Digest 383, *654*; 11 L.J.C.P. 161.
(18) *Ashby* v. *James* (1843), 11 M. & W. 542; 32 Digest 384, *667*; 12 L.J.Ex. 295; 1 L.T.O.S. 170.
(19) *Scholey* v. *Walton* (1844), 12 M. & W. 510; 32 Digest 388, *699*; 13 L.J.Ex. 122; 2 L.T.O.S. 331.
(20) *Re Lee, Ex p. Grunwaldt*, [1920] 2 K.B. 200; 32 Digest 380, *628*; 89 L.J.K.B. 364; 123 L.T. 31.

APPEAL from a decision of His Honour JUDGE HILDESLEY, K.C., given in the Colchester County Court on Oct. 28, 1936, dismissing a motion for a declaration that the sum of £4,200 advanced by the creditor to the debtors by way of loan constituted a valid and enforceable claim against the debtors and an order that the trustee appointed under the deed of arrangement should admit the same to proof. The facts are set out in the judgment of His Honour Judge Hildesley, K.C. (1936), 3 L.J.N.C.C.R. 325, and in the judgment of Luxmoore, J.

J. T. Molony for the appellant.

W. N. Stable, K.C., and *George Pollock* for the respondent.

Molony: Part payment within 6 years of the time when the action is brought will take a case out of the Statute of Limitations. Almost daily payments in kind were being made to the creditor by the debtors in respect of this loan. The Statute of Frauds Amendment Act, 1828, which required that acknowledgments of debts should be in writing to prevent the Statute of Limitations from applying, did not interfere with the effectiveness of any part payment (Halsbury's Laws of England, Hailsham Edn., Vol. 20, p. 628). Part payment may not be conclusive, but in the present case there are circumstances which show that the part payments made in kind were intended as an acknowledgment. There is no evidence of denial of the liability in respect of which they were made. A man can promise to pay and yet be unable to pay, but it is sufficient if he shows his willingness. The evidence shows an acknowledgment, and the contention that part payment cannot be relied upon because there was not an acknowledgment cannot be sustained. The county court judge was wrong in making a distinction between principal and interest; interest cannot be paid upon nothing, and if interest is to be paid as interest it involves that capital is outstanding. For 8 years interest as interest was paid by the debtors to the creditor. If one could properly refer to what was in the minds of the parties or to the conversations which took place, it would be seen that the debtors were recognising their capital liability. There has not been an independent promise to pay the capital, but it is not necessary that there should be a promise to pay the capital independently of the payment of interest. [Counsel referred to *Morgan* v. *Rowlands* (2); *Wainman* v. *Kynman* (5); *Foster* v. *Dawber* (8); *Spencer* v. *Hemmerde* (6); *Re Somerset, Somerset* v. *Poulett (Earl)* (9); *Cleave* v. *Jones* (10); *Bamfield* v. *Tupper* (11); *Fordham* v. *Wallis* (12).]

Stable, K.C.: The mere fact of part payment is not sufficient unless it also imports an acknowledgment. So far as the acknowledgment goes, it is insufficient unless it carries with it in terms an implication of a promise to pay. It is not the payment that matters, but it is the promise. The promise must be one which the court can infer as a matter of fact, and not a promise which the law implies. There is no evidence from which it can be inferred as a matter of fact that a promise was made. The debtors executed the deed of arrangement in Dec., 1935, and at no time within the preceding 6 years had any account been presented. The payments do not point to any promise to pay the principal. What they point to is the antecedent agreement by which Col. Wilson was to remain as a tenant, and the benefit of the tenancy was to be set off against the obligation of his brothers to pay him interest. The agreement of May, 1927, is not a sufficient acknowledgment of the debt, because it is not in writing and it is long outside the period of 6 years. The debtors said they could not pay but in the meanwhile they would allow their brother to live rent and produce free at the farm. The mere fact that this agreement was performed could not justify the finding during the whole of the 8 years of an unqualified promise. It was only a conditional promise that the debtors made, and a promise to pay the principal cannot be inferred from the fact that they allowed their brother to remain on the farm and receive the produce free. This debt is barred by the statute. [Counsel referred to *Irving* v. *Veitch* (13); *Pittam* v. *Foster* (14); *Cleave* v. *Jones* (10); *Tippets* v. *Heane* (15); *Catling* v. *Skoulding* (16); *Cottam* v. *Partridge* (17); *Ashby* v. *James* (18); *Scholey* v. *Walton* (19); *Re Lee, Ex p. Grunwaldt* (20); *Bodger* v. *Arch* (3); *Wainman* v. *Kynman* (5).]

Molony, in reply: In the present case the goods which represented the payments were delivered to the creditor himself, and the only inference which can be drawn is that these payments, or the equivalent thereof, were deliveries made from day to day by agents of the debtors. [Counsel referred to: *Bodger* v. *Arch* (3); *Cleave* v. *Jones* (10.)]

LUXMOORE, J. [reading the judgment of the court]: On Sept. 30, 1936, Colonel Francis Tyrwhitt Drake Wilson (hereinafter referred to as the claimant) gave a notice of motion in the Essex County Court holden at Chelmsford claiming a declaration that a sum of £4,200 had been advanced by him by way of loan to his two brothers, Messrs. Charles Spencer Wilson and George Micklethwait Wilson (hereinafter referred to as the debtors), and that that sum constituted a valid and enforceable claim against them. The notice of motion also asked for an order that the trustee, appointed under a deed of arrangement, dated Dec. 23, 1935, executed by the debtors for the benefit of their creditors, should admit the claim to proof. The trustee had rejected the proof on the grounds, first, that there was no loan, and, secondly, that, if there was a loan, the debt thereby created was statute-barred. On Oct. 28, 1936, the county court judge dismissed the motion with costs, holding that, although the money had been lent to the debtors by the claimant, the debt was statute-barred. The claimant has appealed from this order.

The facts as found by the county court judge are as follows: The debtors were for many years engaged in partnership as farmers. At various dates between Nov. 28, 1923, and Aug. 11, 1925, the claimant advanced to the partnership sums amounting in all to £4,200. On Oct. 23, 1924, the debtors paid to the claimant the sum of £10 in cash by way of interest. This was the only cash payment made by the debtors to the claimant. In Sept., 1924, the claimant retired from service in His Majesty's Forces and went to live at Colchester. Towards the end of 1926, the claimant asked the debtors to pay interest on the loan, but was told by them that they were unable at that time to do so, but that they hoped to pay it before long. In Jan., 1927, Mr. C. S.

Wilson was living at the house on Stanway Hall Farm. This farm was leased to the debtors, and was included in their partnership undertaking. Mr. C. S. Wilson was offered a post near Bury St. Edmunds. This proposal was discussed by the claimant and the debtors—to quote the words used in para. 6 of the claimant's affidavit in support of the motion :

> in relation to their liability to me particularly for interest [and] it was eventually arranged after several discussions that as repayment was not then possible their obligation to pay me interest on the several loans should be discharged or partly discharged by my living at Stanway Hall rent free and my being provided with farm produce without charge.

In pursuance of this arrangement, Mr. C. S. Wilson went to Bury St. Edmunds and, shortly afterwards, the claimant went to live at Stanway Hall, the rent, rates, and taxes in respect of the house being paid by the debtors until Sept., 1935, when the lease of the farm to the debtors expired. After its expiration, the claimant took a new lease of the house, and from that time himself paid the rent, rates, and taxes in respect of it. The value of the right to live at the house free of rent, rates, and taxes was agreed at £100. The claimant kept a careful record of the farm produce supplied to him under the arrangement, and its value is stated by the county court judge to have been about £46 per annum.

The county court judge rejected the suggestion, made by the trustee of the deed of arrangement, that the dominant motive underlying the arrangement was that the claimant should render substantial help in carrying on the farming business on Stanway Hall Farm, so as to enable Mr. C. S. Wilson to take up the appointment at Bury St. Edmunds, and held that the arrangement was entered into in order to provide for the discharge, or partial discharge, of the debtors' liability for interest on the moneys advanced by the claimant. The arrangement under which the claimant went into occupation of the house, and was supplied with farm produce, was made at the latest in 1927, and, consequently, more than 6 years before he made his claim to prove in respect of the £4,200 under the deed of arrangement ; but its terms were complied with from the date when it was made until the expiration of the debtors' lease in Sept., 1935.

The question to be determined is whether the carrying out of this arrangement is sufficient to take the case out of the Limitation Act, 1623. That Act provides that all actions of debt grounded upon any lending or contract without specialty shall be commenced and sued within 6 years next after the cause of action or suit and not after. The Act is silent with regard to acknowledgment or part payment, but it was established, by a series of cases decided after the Limitation Act, and before the Statute of Frauds Amendment Act, 1828, commonly called Lord Tenterden's Act, was passed, that a promise to pay an existing debt, if given within 6 years before action brought, was sufficient to make a new contract, and thereby to avoid the operation of the statute, the existing debt being the consideration to support the promise. Such a promise might either be express, or be inferred from a plain acknowledgment of the debt, or from a part payment of principal, or a payment of, or on account of, interest. If the acknowledgment was accompanied by any declaration, it was necessary to consider its terms. LORD TENTERDEN said, in *Tanner* v. *Smart* (1), at p. 609 :

> Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought, to be implied ; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply ? A

With regard to payment of, or on account of, interest, or part payment of principal, the payment must take place in such circumstances that a promise to pay may be inferred in fact : see *per* BLACKBURN, J., in B *Morgan* v. *Rowlands* (2), at p. 497. In that case, the part payment relied on was the payment under a judgment of the court in respect of interest upon a promissory note. The debtor resisted payment and paid only in obedience to the judgment. The court held that it was impossible from such a payment to infer any promise to pay the principal. C

Lord Tenterden's Act provided by sect. 1 that, in actions of debt grounded upon any simple contract :

> no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation [of (among other enactments) the Limitation Act, 1623, or to deprive any person of the benefit of that enactment] unless such acknowledgment or promise shall be made D or contained by or in some writing to be signed by the party chargeable thereby.

There is an express proviso to the section :

> that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person.

In the present case, there is admittedly no written acknowledgment of, E or promise to pay, the debt sufficient to comply with the requirements of Lord Tenterden's Act. The substantial question is, therefore, whether there has been any payment in respect of interest or of principal by the debtors within 6 years before the claimant made his claim to prove the debt from which a new promise to pay the debt can be implied. In F considering whether there has been any sufficient payment, it must be borne in mind that the payment need not be in cash. It is sufficient if the payment be made in kind, in fulfilment of an agreement to that effect. *Bodger* v. *Arch* (3) affords a good example of such payment. In that case, the defendant borrowed a sum of money from the plaintiff's G wife, while she was sole, and gave a promissory note for the debt. The plaintiff's wife died shortly after her marriage to the plaintiff, who took upon himself the management of his wife's affairs before letters of administration were granted to him. He arranged with the defendant that he should keep one of his children, and, in return, should, as part H of the consideration for so doing, retain the interest on the money secured by the promissory note. Accounts between the plaintiff and defendant were settled in 1839, when they signed on the back of the promissory note an acknowledgment that all interest on it had been paid up to that date. There was no subsequent settlement of account between the plaintiff and defendant, but the defendant continued to maintain the child until its death, which happened in 1848. This was within 6 years of the date when action was brought. PARKE, B., who delivered the judgment of the court, after pointing out that it was essential to prove a new contract for the payment of the debt with the plaintiff, as his wife's administrator, said, at p. 340:

> In order to constitute a new contract, the acknowledgment or promise must be in writing, signed, by 9 Geo. 4, c. 14, or there must be a payment of part or the whole of the interest as such, or part payment of the principal of the debt sued for, due from the person paying to him to whom it was made. It must, in order to fall within the exception of that statute, be a payment which implies an acknowledgment, and consequently a promise to pay the whole debt to the plaintiff; and the reason why the effect of such payment is not lessened by the Act, is, that it is not a mere acknowledgment by words, but it is coupled with a fact: *Waters* v. *Tompkins* (4), *Wainman* v. *Kynman* (5). This part payment need not be in money, but in any mode which the parties agree shall be treated as equivalent to a payment in money. Therefore, the settlement of accounts in 1839, whereby it was agreed between the plaintiff and defendant that the interest up to that time should be considered as paid and discharged, is such a payment as took the case out of the statute, that is, constituted a fresh contract to pay in consideration of the original debt. Since that time, there has been no settlement of accounts, and the question is, whether, as the agreement was then made, or rather continued, that for the future the maintenance of the child should be paid for in part by the interest of the note, or correlatively, that the interest of the note should be paid by maintenance of the child, and that agreement has since been acted upon, there can be considered to have been a part payment to take the case out of the statute; in other words, a fresh contract by the defendant to pay in consideration of the old debt. My brethren are all of opinion, that the maintenance of the child, part of which took place within 6 years before the commencement of the suit, being the agreed mode of payment of interest, was a payment within the meaning of the exception in the 9 Geo. 4, and consequently there must be verdict for the plaintiff on the amended declaration.

In the present case, there has admittedly been no payment in cash in respect of interest within 6 years of the claim, but the claimant has, under the arrangement stated, been allowed to live rent free at the house until Sept., 1935, the rates and taxes in respect of it have been paid by the debtors, and they have from time to time, down to Sept., 1935, supplied the claimant with such farm produce as he required. It is to be observed that the facts of this case differ from the facts in *Bodger* v. *Arch* (3), in that the services referred to were rendered to the claimant himself, while in *Bodger* v. *Arch* (3) they were rendered to the infant, and not to the creditor. This difference disposes of the personal doubts expressed by PARKE, B., with regard to the opinion arrived at by the rest of the court. The material passage in his judgment is on p. 341:

> I greatly doubt whether such a payment as this does amount to a new promise, founded on the old consideration, so as to make the defendant liable. If so, there would be a perpetual series of new contracts in consideration of the old debt, *de die in diem*, by every supply of food or raiment to the child, none of them made to the plaintiff or his agent, none implying an acknowledgment to him of the principal money being still due, and a consequent promise to pay it to him. I should have thought a payment to revive the old debt, must be a payment to the plaintiff or his agent, accompanied by an express promise to pay him the principal, or an acknowledgment to the plaintiff from which such a promise could be implied.

If the arrangement in 1927 was, on its proper construction, an agreement to satisfy the interest in kind, the continued carrying out of its terms would, on the authority of *Bodger* v. *Arch* (3), entitle the court to infer a new promise to pay the debt from each act done in accordance with it. The county court judge has not taken this view. He has first considered the arrangement itself, and has held that, if it had been in writing, it would not have constituted an acknowledgment from which any promise to pay the principal could be inferred ; and he has treated the arrangement to satisfy the interest on the debt in the manner agreed A as having no reference to the principal of the debt. The material passage in the judgment of the county court judge is (p. 327) :

> As regards the principal, the matter stands as follows. In para. 5 of his affidavit the applicant says : " towards the end of 1926 I asked the debtors about payment of the interest then due to me, but I was told that they could not pay the interest then but hoped to do so before long." In that paragraph no reference is made to B any question of repayment of principal except that : " I anticipated that eventually they would be able to redeem their liability to me in respect of both capital and interest." I have already referred to para. 6 in which occurs the phrase : " as repayment of the capital sum was not then possible." In para. 7 he refers to the position after Mr. C. S. Wilson had moved to Bury St. Edmunds, and says : " I was aware that the debtors were not in a position to repay me my loans and I did not press them to do so, but it was never in question that when things improved they would discharge C the whole of their obligations to me for capital and interest less what I had received in kind." It may be observed that all these discussions took place before the Statute of Limitations could come into operation. In cross-examination Mr. Pollock, fortified by his knowledge of the facts of *Tanner* v. *Smart* (1) elicited in answer to a question the answer that " when I went to the farm in 1927, as regards repayment of capital the partnership could not pay the debt, but would pay it at some time if they could."

D In my judgment, the arrangement made in 1927 clearly acknowledges the existence of the debt, for it provides for the future discharge of interest in respect of it. There is no condition as to payment at a future time, nor is there any refusal to pay the debt, though there is a statement of present inability to do so. It seems to me that the arrangement falls E within the decision of the House of Lords in *Spencer* v. *Hemmerde* (6). In that case, the debtor had written letters which acknowledged the existence of the debt and in doing so had said in substance : " It is not that I won't pay you, although I see no prospect of being able to pay the capital at the present time." VISCOUNT CAVE said, at p. 518 : F

> Are the words, " I can't do so," and the statement that the writer sees no prospect of being able to pay the capital at present, so inconsistent with a promise to pay that they negative the implication of such a promise ? I do not think they are. There is no promise to pay on a future date, or on the fulfilment of a condition, and still less is there a refusal to pay at all. There is only a profession of present inability to carry out the promise which is implied. It is urged that, when a man couples his acknowledgment of a debt with a statement that he cannot pay, it is G difficult to read into his acknowledgment a promise that he will pay ; and no doubt there is force in this observation, which appears to have commended itself to the Court of Appeal, both in this case and in the case of *Fettes* v. *Robertson* (7). But it does not appear to me that the two things are really inconsistent. A debtor may well say at one and the same time : " I admit my obligation and promise to discharge it," and " I do not discharge it now, because I have not the money to do so." The important thing is that the present obligation to pay is admitted, and the original promise to pay is renewed and affirmed without condition or qualification ; H and if that be done, there is a new promise to pay upon which an action may be founded.

The facts in the present case are, I think, more favourable to the creditor than are those in *Spencer* v. *Hemmerde* (6), because the arrangement provides for payment on account of interest, which re-enforces the acknowledgment and affords an additional ground for the implication of a new promise to pay. In my judgment, the county court judge was in error in coming to the conclusion that, if the arrangement had been in writing, given within 6 years of the claim, it would not have constituted an acknowledgment sufficient to take the case out of the operation of Lord Tenterden's Act. It is true that, if it had been in writing, the acknowledgment thereby given would have been inoperative, because it would have been given more than 6 years before the making of the claim, but the services rendered to the claimant in pursuance of the arrangement constitute a continuous acknowledgment of the debt, from which, as each payment was made, a new promise to pay the debt ought, on the authority of *Bodger* v. *Arch* (3), to be inferred. With all respect to the county court judge, I think he was wrong in refusing to make the necessary inference.

For these reason, I think the appeal should succeed, and the trustee of the deed of arrangement ought to admit the claimant's proof in respect of the £4,200 and interest, credit being given by the claimant for the benefits received by him under the arrangement.

Appeal allowed.

Solicitors: *Wilberforce Allen & Bryant*, agents for *F. S. Collinge & Co.*, Colchester (for the appellant); *Corbin, Greener & Cook*, agents for *Thompson, Smith & Puxon*, Colchester (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re GREENWICH (PRINCE OF ORANGE LANE) HOUSING ORDER, 1936. APPLICATION OF WILLEY.

[KING'S BENCH DIVISION (Swift, J.), **June 11, 1937.**]

Public Health—Housing—Clearance area—Clearance order or compulsory purchase order—Onus on local authority to show that it has chosen appropriate method for securing clearance—Housing Act, 1930 (*c.* 39), *s.* 1 (3).

The owner of certain property included in a compulsory purchase order contended that the onus was upon the local authority to satisfy the Minister of Health that, by making a compulsory purchase order rather than a clearance order, it had chosen the most appropriate method for securing the clearance of the area:—

HELD: the Housing Act, 1930, s. 1 (3), gave the local authority an absolute right to secure the clearance of the area in either of the two ways as it should decide, or partly in one and partly in the other. At the local inquiry the local authority was not required by the Act to call evidence to show why it thought one way more appropriate than another to the particular case, but it was open to the Minister not to confirm the order if he thought the local authority had adopted a wrong method.

[**EDITORIAL NOTE.** Where a local authority has declared an area to be a clearance area it has the option of making clearance orders in respect of the properties within the area or it may compulsorily purchase the same. It was contended in the present case that the local authority was bound to show good reason for proceeding to purchase the properties rather than ordering the owners to demolish them. It is held, however, that, subject to the Minister confirming their order, they have an absolute discretion to proceed in either way.

As to Clearance Areas, see HALSBURY, Supp., Public Health, paras. 1034-1042; and for Cases, see DIGEST, Supp., Public Health, Nos. 502*g*-502*v*.]

Application under the Housing Act, 1930, s. 11 (3), by a person aggrieved by a compulsory purchase order confirmed by the Minister of Health. The facts are set out in the judgment. The Housing Act, A
1930, s. 1 (3), provides:

> So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say— B
> (i) by ordering the demolition of the buildings in the area; or
> (ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

H. A. Hill for the applicant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Valentine Holmes* for the Minister of Health. C

Swift, J.: On Dec. 5, 1935, the housing committee of the Greenwich Corporation considered the condition of properties included in what subsequently became known as the Prince of Orange Lane area, and it reported that it would be necessary to proceed with the acquisition of the D
property by means of a compulsory purchase order, and stated that it would report as to its proposals for the utilisation of the cleared site. The matter went forward in the usual way; the committee of the corporation, or the corporation, made the appropriate compulsory purchase order, and it went forward to the Minister of Health for con- E
firmation. Before the Minister of Health confirmed it, he, as in duty bound under the statute, ordered a public inquiry to be held, and a report to be made to him with reference to the matter, and that inquiry was held on Apr. 7, 1936, before Mr. G. B. Scotland, an inspector of the Ministry of Health. When the matter came before him, Mr. Reason, F
the town clerk, appeared for the Greenwich corporation, and Mr. Hill appeared for Mrs. Willey, the owner of the property. Mr. Hill objected to the property being acquired by compulsory purchase order by the corporation, and he pointed out that the corporation had not advanced, and indeed that the town clerk declined to advance, any reasons why the G
corporation should have made the compulsory purchase order rather than a clearance order, which it was in its power to do, and, having expressed with his usual clarity, and with his usual force, his objections to the conduct of the town clerk and the corporation, he then retired from the contest. I do not mean by that to say that he threw up his H
brief, or anything of that sort, but he did not call any evidence; he put forward nothing which the inspector could report to the Minister as being evidence as to what the advantage would be, or the disadvantage would be, of the order made being confirmed or not being confirmed. He left the matter very much where the town clerk had left it, and, when

the matter got on the report to the Minister, though we are not allowed to see it, I should imagine that the report must have been of a meagre character, merely saying : " I went down to Greenwich to hold an inquiry as to whether or no these houses were or were not fit for human habitation. The owner of the houses had objected that they were not unfit. When I got there, the objection was withdrawn, and it was admitted they were unfit, and then counsel for the owner of the property said : ' Well, there ought to be a clearance order instead of a compulsory purchase order, because some day either we or somebody who comes after us may want to develop this property,' " and I can imagine the inspector going on to say : " As far as I can see, having seen the site, and having heard that the corporation had decided to acquire this property, and having heard the objections to its doing so by counsel, I think it is very much better that the corporation should, and the order should be confirmed." The order was confirmed, and it is on those proceedings leading up to that confirmation that an appeal is brought, before this court, from that confirmation, under sect. 11 of the Act of 1930, which provides that any person who is aggrieved by an order and :

> desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within 6 weeks after the publication of the notice of confirmation, make an application . . . to the High Court.

He has got to show that the order is bad because it is not within the powers of the Act, or that some requirement of the Act has not been complied with. Now, the contention which is made here by Mr. Hill is that, where a local authority has declared an area to be a clearance area, and it is going to proceed under sect. 1 (3) to secure the clearance of that area, and it has two alternative ways of doing it, the onus is upon it to satisfy the Minister of Health that it has chosen the better way, or the proper way, or the way which is the more appropriate to the particular case. I cannot accede to that doctrine for one moment. It seems to me that sect. 1 (3) gives the local authority an absolute right to secure the clearance of the area in either of the two ways as it likes, or partly in one and partly in the other. It is for it to decide it. If, on inquiry and a report made to him, the Minister of Health comes to the conclusion that the local authority has made a mistake, then he will not confirm its order. He will say : " Well, I do not think in this case it was wise for you to make a clearance order ; having regard to the way you must develop the rest of the area, you ought to have acquired this particular piece of land," or he may say : " I think it is foolish of you to buy that piece of land. You do not want it. It is going to be no use to you, and it would be very much better left in private hands for development for commercial purposes." But the Act of Parliament has left it entirely to the local authority to say how it will proceed, subject always to the approval of the Minister. Now, what the Minister has got to do, no doubt, is to act fairly between everybody, as, indeed, the council has got to do, and as the inspector has got to do, and as, indeed, we hope that everybody will do—certainly we are all agreed that everybody ought to. Everybody should act fairly, but there is no question, as far as I can see, about onus in this matter. It is not for the local authority, in my view, to call evidence to show why it thinks it is better that the land should be bought by it than that it should make a clearance order, or why it should A make a clearance order rather than that it should purchase the land, nor is it for the owner, but, when the matter is submitted to the Minister, it is his duty to say: "I will cause an inquiry to be held, and when I hear all that my inspectors can find out, by what they see, by what they hear, from one side and the other, by their solicitors and counsel, and their B witnesses, and when I know what the whole position is, I will make up my mind for myself as to whether or no I shall confirm that order." Here he has confirmed the order, and I am bound to say that no reasons have been shown to me why he should not have done so, and, in my view, this appeal ought to be dismissed. C

Appeal dismissed, with costs.

Solicitors: *R. C. Bartlett & Co.* (for the applicant); *Solicitor to the Ministry of Health.*

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

D

Re FALMOUTH (WELL LANE, SEDGMOND'S COURT AND SMITHICK HILL) CLEARANCE ORDER, 1936. APPLICATION OF HALSE.

E

[KING'S BENCH DIVISION (Swift, J.), **June 14, 15, 1937.**]

Public Health—Housing—Clearance order—Confirmation by Minister of Health—Objection that no evidence upon which Minister could confirm—Appeal to High Court—Grounds for appeal—Housing Act, 1930 (c. 39), *s.* 11 (3).

F

A clearance order was made which related to an area including a house owned by the appellant, and the appellant was in due course served with notice of the making of the order. He lodged an objection to the order, in accordance with the provisions of the Housing Acts, and was duly served with notice of the principal grounds on which the local authority was satisfied that the premises were unfit for human habitation. The Minister of Health caused a public local inquiry to be held, at G which the appellant was represented and his objections to the making of the order were stated. The inspector looked at the houses in question and made a report to the Minister, who decided to confirm the clearance order. The appellant appealed on the ground that there was no evidence upon which the Minister could confirm the order:—

HELD: as the appellant had shown neither that the order was not H within the powers of the Act, nor that any requirement of the Act had not been complied with, the court could not interfere with the Minister's decision.

[EDITORIAL NOTE. So long as the question of property being unfit for human habitation has been properly brought before the local authority by a representation or otherwise, and the order has been confirmed by the Minister of Health, the court has no power to question the finding of the unfitness of the property for such habitation.

As to Clearance Orders, see HALSBURY, Supp., Public Health, paras. 1034-1042; and for Cases, see DIGEST, Supp. Public Health, Nos. 502*g*-502*v*.]

Cases referred to:

(1) *Re Bowman, South Shields* (*Thames Street*) *Clearance Order*. 1931, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150.

(2) *Estate and Trust Agencies* (*1927*), *Ltd.* v. *Singapore Improvement Trust*, p. 324 *post.*

Application under the Housing Act, 1930, s. 11 (3), by a person aggrieved by a clearance order confirmed by the Minister of Health. The facts are set out in the judgment.

H. A. Hill for the applicant.

Valentine Holmes for the Minister of Health.

Swift, J.: On May 12, 1936, the mayor, aldermen and burgesses of the borough of Falmouth, acting by their council of that borough, made a clearance order which related, amongst other lands, to No. 34, Smithick Hill, Falmouth, a house, or part of a house, of which Henry Sherman Halse is the owner, and, on May 22, Mr. Halse was served with notice of the making of the order. He objected to the order, in accordance with the provisions of the Housing Acts, and he was duly served with notice of the principal grounds on which the council was satisfied that the premises were unfit for human habitation. On Aug. 31, 1936, the Minister of Health caused a public local inquiry to be held at the council chamber at Falmouth. Mr. Halse was represented at that inquiry, and he stated his objections to the making of the order. The matter went forward to the Minister, and in due course the Minister confirmed the order. From that confirmation, Mr. Halse appeals, under sect. 11 of the Act of 1930, to this court, contending that the order is bad, on the ground that there was no evidence before the Minister which justified him in confirming the order which the council had made, and he contends that it ought to be quashed, as being injurious to him.

Now, the Housing Act, 1930, s. 11, gives a right of appeal to any person aggrieved by an order who desires to question its validity on one of two, or on both of two, grounds, and on two grounds only, (i) that it is not within the powers of the Act, or (ii) that any requirement of the Act has not been complied with. It is said here that what was done by the local authority was no doubt properly done; it had an official representation or other information in its possession which satisfied it that the area ought to be declared a clearance area, and it proceeded to cause that area to be defined on a map. It is complained, incidentally, though I do not think it is made really part of the grievance in the appeal, or a ground of the appeal, that it did not exclude from the area a building which was not unfit for human habitation, or dangerous, or injurious to health. If that is the complaint in this case—I am not sure whether it is or not, and I am inclined to think it is not—I express the opinion that the duty of the local authority with regard to excluding a building which is not unfit for human habitation, or dangerous, or injurious to health, must be dependent upon its own satisfaction with regard to the matter. The whole of this section is a provision for the local authority to deal with an insanitary or unhealthy area within its jurisdiction in such a way, if it thinks proper, as to clear out all the buildings in the area, but there is power given to it, when it makes its order, to exclude, from those buildings which must be destroyed, such as it is satisfied do not merit the condemnation which has fallen upon the rest of the houses in that area. I cannot think that it was ever intended by sect. 1 of the Act of 1930 that there should be an application to this or some other court to say that a local authority had done something wrong, because, in the opinion of the experts for the owner, the house which belonged to him, the owner, had not been excluded, whereas, in their opinion, it ought to have been. In *Bowman's* case (1), which was before this court in 1932, I said what I still think to be correct, and what, so far as I know, has never been questioned, and what I adhere to until it is put right by some other more authoritative tribunal. I am reported to have said, at p. 634 :

> If, therefore, the order having been confirmed by the Minister of Health, any person feels himself aggrieved by it, he may apply to this court under the Act on one or other or on both of two grounds, but on those grounds alone, one of the grounds being that the order as confirmed is not within the powers of the Act, and the other ground being that some requirement of the Act has not been complied with. He is not, in my view, entitled to come here and complain that the local authority have made a mistake in fact in making the order. He is not entitled to say that his house is not insanitary or unfit for human habitation, and that, therefore, the order should not have been made. These seem to me to be matters which are left by the legislature entirely to the local authority subject to the confirmation of the Minister of Health. Sect. 1 of the Act begins by saying : "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied" that the houses in the area are unfit for human habitation, and when once the local authority say that they are satisfied as to that matter, it does not seem to me that there is any power in any tribunal, unless it be the Minister of Health, to interfere with that finding of fact. There may some day arise a case, which is certainly not this case, in which it may be said that there was no material, no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made. When such a case as that arises, it will be dealt with, but where, as in this case, there was obviously ample material before the local authority to justify them in making the clearance order if they thought fit to do so, it does not seem to me that this court has any right to interfere.

I will not recede from one word, and I would leave still the word "material" standing in the judgment, only I would ask those who read the judgment, and those who cite it, to read it as ordinary English, and not to try and convert it into something quite different from what it was obviously intended to mean, and what I certainly intend it to mean, and always have. The material which the local authority has got to have to satisfy itself is laid down by the Act of Parliament, and the material which it has to have is either an official representation or some information in its possession. When I say there may be no material before the local authority, and then go on to say no representation or no information in its possession, to my mind it is idle to come and say that that means it is to have evidence before it in the sense that witnesses are to be called who are supposed to be sworn, and that somebody is to be brought to testify about these matters. The Act of Parliament never said anything of the sort, and I certainly never conceived anything of the sort, and I do not now. The passage in *Bowman's* case (1) which I have read refers only, and obviously refers only, to the duties of the local authority, and those few lines have nothing to do with the Minister of Health. But it is argued before me to-day that the Minister of Health has got some duty to hear some sort of evidence beyond the report of his inspector, and to satisfy himself, on the hearing of evidence, whether the houses are fit or unfit for human habitation. I have had my attention called to a case from Singapore (2), in which apparently the Privy Council laid down some sort of principles which should guide one in determining whether or not a house was or was not fit for human habitation. It may well be that, under the ordinance of Singapore, the question as to whether or no a particular house, or a particular series of houses, was fit for human habitation is a question of fact which was appealable, and which was properly appealed upon, to the Privy Council. I have been unable to find out the procedure in Singapore with regard to this matter. I do not know by what means the questions of fact to which my attention was called came before the appellate tribunal at all, and I do not think that there is anything in that case which compels me to deviate from what I have already said as to my intention to adhere to the decision which this court gave in *Bowman's* case (1).

Now, the whole contention in this case is this. The borough council having, on proper material, that is to say, with a proper official representation, or with some other information in its possession, made the order, the Minister, as bound by the statute, directed a public inquiry, and the public inquiry was held. The inspector not only listened to anything which anybody wanted to say, but he went and looked at the houses in question, and he made a report to the Minister. Upon that, the Minister decided that he would confirm the order. The matter comes before me now, and it is said that there was no evidence upon which the Minister could confirm the order. All I can say is that, if it were a question for me, if it were a question that I could go into, if it were a question in which I could investigate the facts, I have not the slightest doubt that I should confirm the order. These houses were built as far back as 1690 or 1700. There are 12 of them in the area, one is a lock-up shop and three of the houses are divided into separate tenements. Some of the houses are back to back, some of them are back to the earth, some of them are underneath other houses, and some of them are above other houses. They are, no doubt, delightfully picturesque and splendid to artists visiting Falmouth, looking for grist to the artistic mill, but they are contrary to one's notion as to how people ought to have homes which are fit to live in in these days. You have only to look at the two photographs, and particularly the one of the back of the premises, to wonder how they have been allowed to remain so long, and to feel no surprise that any inspector who saw them reported in favour of the confirmation of the order. I have been invited to go into this, and I have been invited to say that there was no evidence before the Minister, but it is not for me to consider whether there was or was not. He has to comply with the Act of Parliament. A proper order has been sent up to him, A and he has ordered a proper inquiry to be made, which has been made, and he has got the report, and it was for him to decide himself whether or not to confirm it. In my view, it is not for this court to interfere with his decision. Having been invited to say there is no evidence, I cannot resist *en passant* saying that, to my mind, it was an overwhelming B case of horrid slums, which ought to be quickly cleared away. This appeal is dismissed.

Appeal dismissed, with costs.

Solicitors: *Peake & Co.*, agents for *Ratcliff, Son & Henderson*, Falmouth (for the applicant); *Solicitor to the Minister of Health.* C

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

LLOYDS BANK, LTD. *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION. D

[KING'S BENCH DIVISION (Porter, J.), **May 25, 26, June 8, 1937.**]

Agency—Mercantile agent—Pledge of documents—Surrender of documents to pledgor upon trust for sale—Pledge to third party—" Owner "—Estoppel—Factors Act, 1889 (*c.* 45), *ss.* 1 (1), 2 (1).

E A company pledged certain bills of lading with the plaintiff bank as security for bills of exchange or advances. The plaintiff bank then handed the bills of lading back to the company at its request, so that they or the goods represented by them might be sold and the proceeds held in trust for the plaintiff bank, as stipulated in trust receipts which were given to the plaintiff bank. Instead of selling the bills of lading and goods, and paying the proceeds to the plaintiff bank, the company F pledged the bills of lading to the defendant bank by way of security for advances made. The company became insolvent, and the plaintiff bank sought to recover the bills of lading from the defendant bank. It was admitted that the defendant bank had acted in good faith. The defendant bank, in its defence, pleaded, *inter alia*, (i) that the company was a mercantile agent and therefore entitled to give a valid title by way of pledge, and (ii) that the plaintiff bank was estopped from alleging G that the bills of lading were handed over without its authority:—

HELD: (i) the plea of estoppel failed, because, although the plaintiff bank gave the company express authority to sell, it gave no authority, express or implied, to pledge, for no such authority could be implied from mere possession of the goods.

(ii) the plaintiff bank was the " owner " of the bills of lading within H the Factors Act, 1889, and the company was employed as a mercantile agent within the same Act to sell on behalf of the plaintiff bank and to receive and keep the proceeds on its behalf. The company could therefore give a valid title to the defendant company.

[**EDITORIAL NOTE.** This case involves the solution of two problems arising out of the hypothecation of documents of title to goods to the plaintiff bank by Strauss

& Co.: (*a*) who was the owner of the goods after such hypothecation, (*b*) if the bank was the owner, were Strauss & Co. then mercantile agents within the Factors Act, 1889? The second of these two views is adopted. It will be noted that the documents of title after they were handed back to Strauss & Co. contained no indication of any charge or pledge to the bank. The only document showing the charge or pledge was at all times in the possession of the plaintiff bank.

As to Pledge of Documents of Title with Bank, see HALSBURY, Hailsham Edn., Vol. 1, p. 863 para. 1400; and for Cases, see DIGEST, Vol. 3, pp. 277-282, Nos. 864-867.]

Cases referred to:

(1) *Pickering* v. *Busk* (1812), 15 East, 38; 1 Digest 308, *315*.

(2) *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354; 1 Digest 333, *477*; 44 L.J. C.P. 233; 32 L.T. 733.

(3) *Lowther* v. *Harris*, [1927] 1 K.B. 393; Digest Supp.; 96 L.J.K.B. 170; 136 L.T. 377.

(4) *Monk* v. *Whittenbury* (1831), 2 B. & Ad. 484; 1 Digest 330, *467*.

(5) *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds*, [1895] A.C. 56; 3 Digest 277, *865*; 64 L.J.P.C. 27; 72 L.T. 93.

(6) *Re Allester (D.), Ltd.*, [1922] 2 Ch. 211; Digest Supp.; 91 L.J. Ch. 797; 127 L.T. 434.

(7) *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.*, [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170.

Action for the return of certain bills of lading and invoices and/or the relative merchandise, which the plaintiff bank claimed were its property, or their value, or damages for their conversion or detention. The facts are set out in the judgment. The Factors Act, 1889, provides:

> 1. (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.
>
> 2. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall . . . be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Sir William Jowitt, K.C., *Sir Walter Monckton, K.C.*, and *James Wylie* for the plaintiff bank.

Sir Stafford Cripps, K.C., and *H. G. Robertson* for the defendant bank.

Porter, J.: This action is brought by one bank against another, and involves, not only a considerable sum of money, but also new and difficult questions as to the rights of the parties as to certain property, taken as security by both banks for advances made. The dispute arises out of the failure of a company, Strauss & Co., Ltd., which carried on business in London and India, primarily as a grain merchant, and for that purpose required to have its transactions financed. The practice, so far as the plaintiff bank was concerned, was to advance money or buy bills drawn by Strauss & Co., Ltd., on itself against bills of lading or other shipping documents—I speak of them as buying bills; it is convenient

whether they be bills or promissory notes—and to surrender those documents against trust receipts whereby Strauss & Co., Ltd., agreed to sell the goods and pay the money received to the plaintiff bank. As I understand it, the bank advanced the sum of £50,000 without the security of any bills of lading; but, if further accommodation was required, it was prepared to advance up to an additional £125,000 against bills of A
lading. What occurred in respect of all the property in dispute was that the plaintiff bank, after receiving the bills of lading which had been pledged with it as security for bills of exchange or advances, handed them back to Strauss & Co., Ltd., at that company's request so that they, or the goods represented by them, might be sold, and the proceeds applied B
as stipulated in the trust receipts. The trust receipts stipulate for the handing over of the documents of title to Strauss & Co., Ltd., to hold on trust for the plaintiff bank, and either to sell the relative goods and hold the proceeds in trust for the plaintiff bank or to sell part, and hold the proceeds of that part and the unsold goods in trust, or to hold the whole C
of the goods in trust, and return them. The receipts provide for the keeping of the goods and proceeds separate from other goods and proceeds until handed over to the plaintiff bank, but in fact neither of these provisions was carried out. I was informed that the practice of handing documents or goods to Strauss & Co., Ltd., under trust receipts had been D
in use since June, 1928, and the same practice had been followed during that period. Strauss & Co., Ltd., presumably wanted to realise the property, and pay off its indebtedness to the plaintiff bank, and the plaintiff bank's intention was that the goods should be sold and that Strauss & Co., Ltd., should give a good title to the purchasers, and its E
bills should be met. Indeed, where the plaintiff bank held documents against acceptances, and not against payment, a similar procedure was adopted, except that no trust receipts were required or given, and in either case there was nothing on the documents to indicate to a purchaser or pledgee from Strauss & Co., Ltd., that the plaintiff bank had any interest F
in the bills of lading.

So far as the documents and goods in dispute in this case are concerned, Strauss & Co., Ltd., at the end of 1934 and beginning of 1935, instead of selling them and paying the proceeds to the plaintiff bank, pledged the documents to the defendant bank by way of security for G
advances made. By this time Strauss & Co., Ltd., was in financial difficulties, and by Jan. 25, 1935, the plaintiff bank became suspicious of its solvency, and demanded back the documents handed over under trust receipts of Jan. 2 and Jan. 14, 1935. Ultimately, on Jan. 29, 1935, the Official Receiver was appointed provisional liquidator of the company, H
and the various creditors of Strauss & Co., Ltd., were left to realise such security as they had or thought they had.

A demand was made for the return of the bills of lading surrendered by the plaintiff bank to Strauss & Co., Ltd., under trust receipts, and pledged with the defendant bank. It is common ground that, in so acting, the defendant bank neither knew nor had any ground for suspecting that the transactions were not in order in every respect.

The total value of the goods so dealt with amounts to £34,485 12*s.* 8*d.*, but, of those, goods or documents to the value of £3,267 4*s.* 11*d.* were handed back by the defendant bank to Strauss & Co., Ltd., and, as regards these, the defendant bank says that, whatever may be the true view as to the remainder of the goods, it has handed them back, and either has not detained or converted them, or, if it has converted, is liable only for a nominal sum as damages.

In these circumstances, the plaintiff bank claims the documents and goods, or damages for their detention or conversion by the defendant bank. *Prima facie*, its claim is valid. It never gave up possession of its pledges except for a temporary or specific purpose, and Strauss & Co., Ltd., never held the goods except as trustee to sell and hand the proceeds to the plaintiff bank. The defendant bank, however, pleads that Strauss & Co., Ltd., was, at the time of the pledge of the documents with it, (*a*) the owner of the goods, (*b*) if not the owner, then a mercantile agent within the meaning of the Factors Act, and, therefore, entitled to give a valid title by way of pledge, and (*c*) that, in any case, the plaintiff bank is estopped from alleging that the bills of lading were handed over without its authority. It is common ground that Strauss & Co., Ltd., was the owner in the sense that the general property in the goods or documents representing the goods was in it, but the plaintiff bank says that this ownership was subject to a special interest in it by way of pledge, and that Strauss & Co., Ltd., was entrusted with the goods subject to that pledge, and could deal with them only subject thereto, unless it followed the express mandate given by the trust receipts, that is to say, by selling them. There would then be, it agreed, a right to pledge if Strauss & Co., Ltd., was a mercantile agent entrusted with the goods for an owner under the provisions of the Factors Act, 1889, but it denied that that Act applied. I agree that the substantial question which I have to determine is whether the Factors Act applies or not. At common law, a person in the possession of goods can give no better title than that which he himself possesses, subject to the qualification that, if the true owners hold him out or permit him to hold himself out as having authority to do a particular act, they are estopped from denying that that authority exists. In the present case, though the plaintiff bank gave Strauss & Co., Ltd., express authority to sell, it gave no authority, express or implied, to pledge, because no such authority can be implied from the mere possession of the goods: see *Pickering* v. *Busk* (1) and *Cole* v. *North Western Bank* (2). For this reason, in my view, the defendant bank's plea in estoppel must fail.

The rule that authority to sell gives no authority to pledge, though firmly established, has been the subject of considerable criticism, and one of the objects of the Factors Act was to enable a mercantile agent entrusted with goods to give a good title by way of sale or pledge, notwithstanding that he had in fact no authority to do the act which he purported to perform. Those acts made the entrusting of the goods to the mercantile agent a kind of statutory holding out, by the owner of the goods, of authority in the agent to deal with them as if he were the owner. The present Act requires an owner, a mercantile agent, possession of the goods or documents of title by the agent with the owner's consent, and complete good faith in the purchaser or pledgee. Possession by Strauss & Co., Ltd., with the plaintiff bank's consent and complete good faith are admitted. The plaintiff bank, however, denies that it is the "owner," and that Strauss & Co., Ltd., is a mercantile agent.

The word "owner" is not defined, and one has to gather its meaning from the tenor of the Act, and extraneously. In a sense, it is true to say that Strauss & Co., Ltd., is the owner, because it has, at any rate, the general property in the goods or documents; but, nevertheless, the plaintiff bank may be the owner within the meaning of the Act; it has, at any rate, the possession, and can permit or prevent the immediate delivery to a third person, or delivery at all, unless its pledge is satisfied. The Act is, I think, meant to facilitate the giving of a good title by a mercantile agent, and it would be unfortunate if the validity of that title depended upon whether the pledgee handed back the goods to the pledgor to sell or with his consent employed some third person. This view is not without its difficulties. Suppose that, at a time when the pledgee is in possession of his pledge, but has as yet no power of sale (as, for example, he can sell only after default), is he then the owner so as to enable a mercantile agent to sell on his instructions and give a valid title? I cannot think he is; but I think he is an owner within the meaning of that word as used in the Factors Act, provided that, in giving his instructions for sale, he has the assent of the person in whom the general property is vested. I should be inclined to define "owner" as the person to whom, or in trust for whom, the proceeds of sale are payable, provided he is in a position to give instructions for, or assent to, a sale. It was argued on behalf of the plaintiff bank that Strauss & Co., Ltd., and not the plaintiff bank, was the owner. The difficulty of this view appears to lie in the fact that, under the trust receipts, whatever right Strauss & Co., Ltd., might have to an account and ultimate payment in case of a surplus of receipts over its indebtedness, yet the immediate sale and payment was to be for the plaintiff bank's sole benefit.

If, then, the plaintiff bank were the owner within the meaning of the Factors Act, was Strauss & Co., Ltd., a mercantile agent? I agree with Sir Stafford Cripps that, if it was an agent, it was a mercantile agent; it was, if an agent, an agent employed to sell. The real question under this heading is: was it an agent at all? Looking at its mandate, namely, the trust receipts, I think it was employed as an agent, its duty being to sell on behalf of the plaintiff bank and to receive and keep the proceeds

on its behalf. If, as I think, Strauss & Co., Ltd., was acting as the plaintiff bank's agent in the individual matters in dispute, it does not, in my view, matter that it was not an agent for sale generally, either of grain or any other commodity. In fact, as I have stated, Strauss & Co., Ltd., had been selling for the plaintiff bank under trust receipts for some
A 6 or 7 years. An attempt which was made to prove that it had acted as a mercantile agent for others in barley and one other commodity broke down, but this failure is, in my view, immaterial: see *Lowther* v. *Harris* (3). It must, it is true, be acting as an agent, and not be entrusted with the goods in some other capacity: see *Monk* v. *Whittenbury* (4) and
B *Cole* v. *North Western Bank* (2); but no capacity other than that of owner has been suggested, and that capacity I have already rejected.

My view that the plaintiff bank was the owner and Strauss & Co., Ltd., a mercantile agent in these transactions is, I think, generally supported by *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds*
C (5), *Re Allester (D.), Ltd.* (6), and *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (7), though differences in detail between the present case and those cases undoubtedly exist. In the course of his evidence on behalf of the plaintiff bank, Mr. Robinson stated that, acting on its behalf, he intended to entrust the documents to Strauss & Co., Ltd.,
D as the owner. The instructions are contained in writing, and must be construed by their terms, but in any case I doubt whether Mr. Robinson had sufficiently analysed the position. I accept his view that he entrusted the documents to Strauss & Co., Ltd., because it was the owner. So did the pledgee in *North Western Bank, Ltd.* v. *Poynter, Son & Macdonalds*
E (5), *Re Allester (D.), Ltd.* (6), and *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (7). Nevertheless, the Factors Act prevailed. The confusion, in my view, lies between handing the documents back to Strauss & Co., Ltd., to deal with them in its capacity of owner, and handing them back to deal with them in its capacity of agent, because
F it is the owner. I think that the latter was the course adopted by the plaintiff bank; but, if I thought that it had adopted the former, I should be inclined to think that it had given up the security of its pledge.

For the reasons given above, I think the claim fails. Having regard to this decision, the question as to whether any distinction should be
G drawn between the goods returned to Strauss & Co., Ltd., and those retained by the defendant bank does not arise. I find for the defendant bank with costs.

Judgment for the defendant bank with costs.

Solicitors: *Allen & Overy* (for the plaintiff bank); *Slaughter & May*
H (for the defendant bank).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

PHILIPPSON *v.* IMPERIAL AIRWAYS, LTD.

[King's Bench Division (Porter, J.), **April 30, May 6, 7, June 8, 1937.**]

Street and Aerial Traffic—Carriage by air—International carriage—Conditions of the International Air Traffic Association—Construction—" High contracting party " to Convention of Warsaw—Carriage by Air Act, 1932 (*c.* 36), *s.* 1 (2), *Sched. I.*

A consignment note for the carriage of gold from England to Belgium by air was subject to general conditions of carriage of goods based on the Convention of Warsaw. The conditions applied to both internal and international carriage. The contract in the present case was made in Mar., 1935, and by the conditions international carriage included all carriage by air between places within the territories of the high contracting parties to the Convention of Warsaw :—

Held : the contract must be construed according to English law and high contracting parties meant the parties as defined in the English Act of 1932 giving effect to the Convention of Warsaw. The term high contracting parties was therefore confined to those who, under sect. 1 (2) of that Act, had been declared to be such by order in council before the date of the contract. As Belgium had not been so declared, the carriage was not international.

[EDITORIAL NOTE. The consignment note in this case was in the form which was before the court in *Westminster Bank Ltd.* v. *Imperial Airways, Ltd.* (1), and the incorporation of the convention was insufficient. It is understood that since that decision a new form of consignment note has been adopted which includes the exact words of art. 8 (*q*) and therefore avoids the difficulty met with in that case. The present case turns wholly upon the meaning of the words " high contracting parties " as used in the conditions of carriage governing the contract here in question. These words are held to have the meaning given to them by the Carriage by Air Act, 1932, where they are specifically defined. It is understood that the British and foreign experts who have made a special study of the convention do not share the view here expressed as to the meaning of those words in the convention itself, but that view is in no way essential to the present decision.

As to Carriage by Air, see HALSBURY, Supp., Street and Aerial Traffic, para. 712 ; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 260*a*-260*f*. For the Carriage by Air Act, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 865.]

Case referred to :

(1) *Westminster Bank, Ltd.* v. *Imperial Airways, Ltd.*, [1936] 2 All E.R. 890 : Digest Supp. ; 155 L.T. 86.

Action for breach of contract of carriage to recover £10,600 and interest in respect of the loss of gold bullion consigned by the plaintiffs from London to Brussels. The gold was stolen from the Croydon Airport on Mar. 5, 1935.

The defendant company relied upon the contentions (*a*) that Belgium was not a high contracting party to the Convention of Warsaw, (*b*) that the carriage was not international carriage within the conditions of carriage to which the consignment note was subject, (*c*) that the contract was not subject to the Carriage by Air Act, 1932, (*d*) that whereas by the conditions of carriage to which the consignment note was subject an action for damages in the case of international carriage had to be brought within two years, in all other cases an action had to be brought within

6 months, and the present action could not be maintained, as it was commenced after the expiration of 6 months from the date of the loss. An order was made for certain issues to be set down for hearing before the trial of the action. These issues are set out as questions at the end of the judgment, together with the answers given to them. The General Conditions of Carriage of Goods included the following articles which were relied upon:

> 19 (4) Goods are accepted for carriage only upon condition that except in so far as liability is expressly provided for by the said conditions no liability whatever is accepted by the carriers.
>
> 20 (1) (1) Carriers are liable for all damage arising during the period of the carriage in the event of the destruction or loss of or damage to the goods.
>
> 20 (1) (3) Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.
>
> 20 (2) (1) The liability of carriers is limited to the sum of 250 francs per kilogram unless the consignor has made at the time when the package was handed over to the carriers a special declaration of the value at delivery and has paid such supplementary charge as is required.
>
> 23 (1) (1) The right to damages arising under the provisions of Art. 20 in connection with Art. 1 (2) (which relates to international carriage) shall be extinguished if an action is not brought within two years.
>
> 23 (1) (2) All other rights arising out of the contract of carriage shall be extinguished if an action is not brought within a period of six months.

H. U. Willink, K.C., and *W. L. McNair* for the plaintiffs.

A. T. Miller, K.C., and *H. G. Robertson* for the defendant company

PORTER, J.: This action, brought by Jules Philippson and others, arises out of the theft of a consignment of gold, which took place from Croydon Aerodrome on Mar. 5-6, 1935. The plaintiffs are the owners and consignees of part of the consignment. The gold was entrusted to the defendant company at Croydon by Machinery & Technical Transport, Ltd., upon behalf of which the consignment note was signed, and that company acted throughout as the agent of the plaintiffs. The contract was made in London for the carriage of the gold to Brussels. Whilst, however, it was still at Croydon, awaiting transportation to Brussels, it was stolen on the night of Mar. 5-6, 1935. The plaintiffs, alleging that the defendant company was liable to recoup them for the loss, issued a writ on Feb. 11, 1936, claiming damages for breach of contract or duty. On Jan. 12, 1937, an order was made at the instance of both parties that the points of law raised by the defendant company be set down for hearing before the trial of the issues of fact in the action. Substantially, the ultimate answers depend upon whether or not the carriage from London to Brussels is to be described as international carriage within the meaning of the contract, but there are certain other matters, some of which have already been decided in other actions, which, for that reason, were not argued before me, but were explained and maintained as points, in order that they might be available for either party if they desired to argue them in the Court of Appeal.

The substantial question arises in this way. The consignment note which contains the contract between the parties contains certain conditions in French and English, of which one need quote only the first in its English form :

> The general conditions of carriage of goods are applicable to both internal and international carriage.

These general conditions are based on the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. The Convention of Warsaw herein referred to was an agreement entered into by the representatives of some 30 states, in the French language, at Warsaw, for the unification of certain rules relating to international carriage by air. Two of these states were Great Britain and Belgium. By art. 37 (1), the convention was to be ratified, and, by art. 37 (2), as soon as it was ratified by five of the high contracting parties, it was to come into force as between them on the ninetieth day after the deposit of the fifth ratification, and as between those high contracting parties and other high contracting parties on the ninetieth day after the deposit by those others. By arts. 38 and 39, it says :

> 38. (1) This convention shall, after it has come into force, remain open for accession by any state. (2) The accession shall be effected by a notification addressed to the government of the Republic of Poland, which will inform the government of each of the high contracting parties thereof. (3) The accession shall take effect as from the ninetieth day after the notification made to the government of the Republic of Poland.
>
> 39. (1) Any one of the high contracting parties may denounce this convention by a notification addressed to the government of the Republic of Poland, which will at once inform the government of each of the high contracting parties. (2) Denunciation shall take effect 6 months after the notification of denunciation, and shall operate only as regards the party who shall have proceeded to denunciation.

Some dispute arose as to the meaning of the words " high contracting parties " in this document, the plaintiffs maintaining that they referred to the original 30 states, parties to the convention, together with any acceding state, as and when it acceded, the defendant company, that they referred only to the various states as and when they had ratified the convention. I do not think it necessary to determine this question, though, from the provisions of art. 37 (2), my impression is that the words included, at any rate, the whole of the original signatories, whether they had ratified or not. In fact, the convention came into force on Feb. 13, 1933, as the result of the ratification of five high contracting parties. Great Britain ratified on Feb. 14, and the convention came into force, so far as she was concerned, on May 15, 1933, but Belgium did not become a party to the convention until Oct. 11, 1936, that is to say, she was not a party at the time of the theft of the gold. In order to implement the ratification of the convention, Great Britain had already, on July 12, 1932, passed an Act of Parliament whereby an English translation of the convention was given the force of law, and it was further provided that His Majesty might by order in council from time to time certify who are the high contracting parties to the convention, and any such order should be conclusive evidence of the matters so certified. It appears that such orders in council were not necessarily made at dates which ensured that states ratifying or acceding to the convention should become high contracting parties under the English Act of Parliament at the time at which they themselves became bound, but only at such later times as were convenient for the making of an order in council. In any case, Belgium was never "certified" under sect. 1 (*e*) of the Act at any material time. The convention applies only to international carriage (art. 1 (1)) as defined in art. 1 (2), that is, for the purposes of this case, where the carriage is between the territories of one high contracting party and another. It was contended that, under the Act, carriage between Great Britain and Belgium in Mar., 1935, was not international carriage.

The liability of the carrier, and its limitations, are to be found in arts. 17-30 of the convention, and may be compendiously described as a sweeping away of any common law liability, and the substitution of a general statutory liability for all loss, subject to certain limitations, which, however, do not apply if the consignment note does not contain a statement that the carriage is subject to the rules relating to liability established by the convention. LEWIS, J., in *Westminster Bank, Ltd.* v. *Imperial Airways, Ltd.* (1), has already decided that a note in the form adopted in the present case does not comply with this regulation, and, therefore, unless his decision be reversed, even if this were international carriage within the meaning of the Act, the carrier would not be protected. But it is admitted by the plaintiffs that the carriage was not international within the meaning of the Act. The argument on their behalf is put otherwise. It is said that the consignment note is subject to certain terms, based upon, but not identical with, or subject to, those contained in the Convention of Warsaw, and it is to those terms, and those only, that we must look in determining what are the rights of the parties, and what is international carriage within the meaning of the contract.

The terms in question are contained in an orange-coloured book, headed in French and English, the English heading being International Air Traffic Association (I.A.T.A.). I was not told who were members of the I.A.T.A., but, at any rate, the defendant company is a member. As I read this book, it contains an agreement as to the terms on which passengers and goods will be carried by members of the I.A.T.A., and contains provisions as to when that agreement shall come into force, namely, at the same time as the Convention of Warsaw comes into force. It was suggested, I think, that this provision means that each member shall be bound as and when his country becomes bound by ratification. I do not think so. It seems to me to be an agreement by individual carriers as to the terms on which they will carry, with a provision that, as soon as the Convention of Warsaw comes into force,, namely, 90 days after the five ratifications, those terms shall be binding on all members of the I.A.T.A., whatever their nationality, and, indeed I doubt whether it matters which provision the orange book contains as to the date when the provisions become effective—if an individual member chooses to make his consignment note incorporate them, that is enough, provided, of course, he does not incorporate a provision determining that date.

The conditions, as a whole, apply to both internal and international carriage, and contain, in arts. 19 and 20, provisions as to liability and its limitations, and, in art. 23 (2), limitations as to time in which the action must be brought. In the case of international carriage, however, those limitations do not apply at all, unless the consignment note contains certain prescribed particulars. The consignment note in the present case did not, according to the decision of Lewis, J., contain the particulars required by art. 4 (5) (*b*). Moreover, art. 23 (2) does not apply to international carriage. It follows that, if this be international carriage, the carriers are not protected under art. 20, because they have omitted the necessary particulars from their notes, nor under art. 23 (2), as it is not applicable. I ought to add there that, in coming to my conclusion, I apply the decision of Lewis, J., to a contract, as he did to an annexe to an Act of Parliament. In my view, his decision covers both those documents. Is this, then, international carriage within the meaning of the orange book ? International carriage of goods is defined in arts. 1, 2 (2). It is said to include all carriage by air between places within the territories of two high contracting parties to the Convention of Warsaw. In this definition, I think " includes " means that such carriage is international to the exclusion of all other carriage. I think it is meant to be definitive, and does not merely add something to some other vague process known as international carriage. But, if this be so, what is the meaning of high contracting parties to the Convention of Warsaw ? I have already said that, in my view, high contracting parties, as used in the convention, meant all the parties originally signatories, together with those who adhere, as and when they adhere. It is no doubt possible to draw a subtle difference between high contracting parties to the convention and high contracting parties as that phrase is used in the orange document, but this is, I think, too fine a distinction. In my view, the words " high contracting party to the Convention of Warsaw " bear the same meaning as the words " high contracting party " when used in that convention. But this does not determine the matter. I have to decide what meaning the words bear in a contract, one of the forms of which is in English, made in England, for the carriage of goods from London to Brussels, and, according to our system, to be determined according to English law. The English Act was passed in July, 1932, and came into force in May, 1933 ; the contract was made on Mar. 5, 1935. Whatever the original meaning " high contracting parties " bore in the convention as originally signed, I have to determine what meaning it bore in England, in an English contract, in Mar., 1935. In my opinion, it then, and in those circumstances, meant high contracting parties as defined in the English Act, and is confined to those parties declared by order in council to be high contracting parties to the convention. I accordingly hold this carriage not to be international, the carrier to be protected by its terms, and the action to fail. This view makes it unnecessary for me to determine when a treaty comes into force, and whether a high contracting party can rightly be so described before ratification, and I pronounce no opinion upon those matters.

I answer the questions put to me as follows:

1. (*a*) Whether the contract of carriage contained in the consignment note was subject to the Carriage by Air Act, 1932 ?—No.

(*b*) If so, whether the consignment note satisfied the requirement of art. 8 (*q*) of the Convention set out in Sched. I of the Act ?—No.

(*c*) If the answer to (*a*) was "Yes" and the answer to (*b*) was "No," whether the defendant company had any defence to the plaintiffs' claim ?—Do not arise.

2. (*a*) Whether the carriage covered by the consignment note was international carriage as defined by art. 1 (2) of the General Conditions of the Carriage of Goods ?—No.

(*b*) If so, whether the consignment note satisfied the requirement of art. 4 (5) (*b*) of the Conditions ?—Does not arise. If it did, No.

(*c*) If the answer to (*a*) was "Yes" and to (*b*) was "No," whether the defendant company had any defence to the plaintiffs' claim ?—Does not arise.

3. Whether the plaintiffs' claim was barred by the conditions because the action was not begun within 6 months of the loss ?—Yes.

4. Whether there was (*a*) within the meaning of art. 22 (2) of the convention set out in Sched. 1 of the Act, or (*b*) within the meaning of art. 20 (2) (i) of the Conditions a special declaration of value and supplementary payment made and, if so, what was the effect in law ?—(*a*) and (*b*), No.

5. The measure of damages, if any ?—Does not arise.

The result will be judgment for the defendant company, with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the plaintiffs); *Beaumont & Son* (for the defendant company).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

NOTE.

THORNE *v.* MOTOR TRADE ASSOCIATION AND ANOTHER.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Roche), **April 9, 12, 13, June 3, 1937.**]

[Reported p. 157, *ante.*]

The following amendments have been made to the printed judgments herein:—

p. 167 l. H.2. For *cannot* read *could not, if asked for, . . .*

p. 171 l. B.2. Read *I think the declarations claimed should be refused.*

ESTATE AND TRUST AGENCIES (1927), LTD. *v.* SINGAPORE IMPROVEMENT TRUST.

[Privy Council (Lord Maugham, Sir Lancelot Sanderson, Sir Sidney Rowlatt), **April 22, 23, 26, 27, May 31, 1937.**]

Privy Council—Straits Settlements—Public health—Housing—Dwelling-house declared to be insanitary—Declaration submitted to Governor in Council—Prohibition of further proceedings in respect of declaration—Quasi-judicial functions—Duties still remaining to be discharged—Singapore Improvement Ordinance, No. 10 *of* 1927, *ss.* 4, 57, 59-61.

The respondent trust, a corporate body constituted by the Singapore Improvement Ordinance, 1927, made a declaration that a house owned by the appellant company was insanitary within the meaning of sect. 57 of the Ordinance. After hearing objections to the declaration by the appellant company, the respondent trust submitted the declaration to the Governor in Council for approval in accordance with the provisions of sect. 59 of the Ordinance. The appellant company applied for a writ of prohibition, prohibiting the respondent trust from further proceeding in respect of the declaration, on the ground that its action was *ultra vires* :—

Held : (i) in deciding whether, after considering the objections raised against the declaration being a true and fair representation of the construction and condition of the dwelling, the declaration should be revoked or submitted to the Governor in Council, the respondent trust must be regarded as exercising *quasi*-judicial functions.

(ii) the respondent trust had applied a wrong and inadmissible test in making the declaration, and in deciding to submit it to the Governor in Council. It was therefore acting beyond its powers, and the declaration was not enforceable.

(iii) after the submission of the declaration for the approval of the Governor in Council, the respondent trust was still charged with the performance of certain duties, to which a writ of prohibition could apply. It was not *functus officio* and a writ of prohibition might issue.

Judgment of the Court of Appeal of the Straits Settlements ([1935] Straits Settlements L.R. 255, 420), *reversed.*

[**EDITORIAL NOTE.** Although this case deals with the demolition of houses in Singapore, the consideration by their Lordships of the question of what dwellings are unfit for human habitation has much in it that will be of general interest and some of the English authorities are considered. The question upon the availability of the writ of prohibition also requires a careful study of the duties of local authorities in demolition cases, particularly as to when such duties are fully completed and the authority becomes *functus officio.*

As to Clearance Areas, see HALSBURY, Supp., Public Health, paras. 1034-1042; and for Cases, see DIGEST, Supp., Public Health, Nos. 502*g*-502*v*.]

Cases referred to :

(1) *Errington* v. *Minister of Health,* [1935] 1 K.B. 249; Digest Supp; 104 L.J.K.B. 49; 152 L.T. 154.

(2) *Hall* v. *Manchester Corpn.* (1915), 84 L.J. Ch. 732; 38 Digest 212, *470*; 113 L.T. 465.

(3) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.,* [1924] 1 K.B. 171; Digest Supp; 93 L.J.K.B. 390; 130 L.T. 164.

(4) *Re London Scottish Permanent Building Society* (1893), 63 L.J.Q.B. 112; 16 Digest 379, *2168*.

(5) *R.* v. *North, Ex p. Oakey,* [1927] 1 K.B. 491; Digest Supp.; 96 L.J.K.B. 77; 136 L.T. 387.

(6) *R.* v. *Minister of Health, Ex p. Davis,* [1929] 1 K.B. 619; Digest Supp.; 98 L.J.K.B. 636; 141 L.T. 6.

(7) *R.* v. *Woodhouse,* [1906] 2 K.B. 501; 16 Digest 398, *2421*; 75 L.J.K.B. 745; 95 L.T. 367.

(8) *London Corpn.* v. *Cox* (1867), L.R. 2 H.L. 239; 16 Digest 373, *2112*; 36 L.J. Ex. 225.

A (9) *Serjeant* v. *Dale* (1877), 2 Q.B.D. 558; 16 Digest 385, *2245*; 46 L.J.Q.B. 781; 37 L.T. 153.

(10) *Darby* v. *Cosens* (1787), 1 Term Rep. 552; 16 Digest 384, *2220*.

(11) *Chabot* v. *Morpeth (Lord)* (1848), 15 Q.B. 446; 16 Digest 389, *2312*; 17 L.J.Q.B. 336; 11 L.T.O.S. 287.

(12) *White* v. *Steele* (1862), 12 C.B.N.S. 383; 16 Digest 374, *2121*; 31 L.J.C.P. 265; 6 L.T. 686. B

(13) *Jones* v. *Owen* (1848), 5 Dow. & L. 669; 16 Digest 118, *161*; 18 L.J.Q.B. 8; 12 L.T.O.S. 153.

(14) *R.* v. *Chester Licensing JJ., Ex p. Bennion,* [1914] 3 K.B. 349; 16 Digest 377, *2149*; 83 L.J.K.B. 1259; 111 L.T. 575.

(15) *Re Clifford & O'Sullivan,* [1921] 2 A.C. 570; 16 Digest 388, *2287*; 90 L.J.P.C. 244; 126 L.T. 97. C

(16) *R.* v. *Howard, etc., Farnham Licensing JJ.* (1902), 71 L.J.K.B. 754; 16 Digest 296, *1091*.

APPEAL from an order of the Court of Appeal of the Straits Settlements (Settlement of Singapore) (SIR SAMUEL JOYCE THOMAS, C.J., Federated D Malay States, and TERRELL, J., BURTON, A.C.J., dissenting), dated Aug. 1, 1935, allowing the respondent trust's appeal from a judgment of the Supreme Court (SIR WALTER CLARENCE HUGGARD, C.J.), dated Apr. 2, 1935, directing a writ of prohibition to issue to the respondent trust. The facts of the case are set out in the judgment of their Lord-E ships delivered by LORD MAUGHAM.

R. M. Montgomery, K.C., R. Storry Deans, and *H. D. Mundell,* for the appellant company, referred to *Hall* v. *Manchester Corporation* (2), *R.* v. *Electricity Commissioners, Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.* (3), *R.* v. *Minister of Health, Ex p. Davis* (6), *R.* v. *Wood-F house* (7), *London Corpn.* v. *Cox* (8), *Serjeant* v. *Dale* (9), *Darby* v. *Cosens* (10), *Chabot* v. *Morpeth (Lord)* (11), *White* v. *Steele* (12), *Jones* v. *Owen* (13).

Sir Gerald Hurst, K.C., and *H. A. Hill,* for the respondent trust, referred to *Hall* v. *Manchester Corporation* (2), *R.* v. *Electricity Commissioners, Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.* (3), G *R.* v. *Chester Licensing JJ., Ex p. Bennion* (14), *Re Clifford & O'Sullivan* (15), *Errington* v. *Minister of Health* (1), *R.* v. *Howard, etc., Farnham Licensing JJ.* (16).

LORD MAUGHAM: Estate and Trust Agencies (1927), Ltd., is the H owner of a house known as Municipal No. 543, North Bridge Road, Singapore. The Singapore Improvement Trust is a corporate body, constituted by the Singapore Improvement Ordinance, 1927, and entrusted (by sect. 4) with the duty of carrying out the provisions of that ordinance. These proceedings were commenced by the appellant company by summons in the Supreme Court of the Straits Settlements

(Settlement of Singapore) asking for the issue of a writ of prohibition directed to the respondent trust to prohibit it from further proceedings in respect of a declaration, made by the respondent trust on Dec. 11, 1933, that a large block of 97 houses, including the appellant company's said house, was insanitary within the meaning of sect. 57 of the said ordinance. The Singapore Improvement Ordinance, 1927, is divided into parts ; Part V (sects. 57-63, inclusive) deals with insanitary buildings and Part VI (sects. 64-102) deals with improvement schemes. The following sections are very material :

> 57. Whenever it appears to the board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling-place is of such a construction or is in such a condition as to be unfit for human habitation, the board may by resolution declare such building to be insanitary.

By sect. 58 (2) (as amended by the Amendment Act, 13 of 1930), it is provided that, when a declaration under sect. 57 has been made, the owner of a building in respect of which a declaration has been made may, within one month, deliver to the chairman an objection in writing to such declaration ; and by sect. 58 (5) the objector shall be furnished with a statement in writing "of the grounds on which the board made the declaration."

> 59.—(1) After consideration of all objections the board may revoke any declaration made under sect. 57 or may submit it to the Governor in Council.
>
> (2) Every declaration submitted under this section to the Governor in Council shall be accompanied by—(A) the reports, statements or matters upon which the board acted ; (B) such objections as have been made to the declaration ; (C) any evidence which the objector may have produced before the board ; (D) a schedule showing the way in which the board has dealt with each such objection.
>
> (3) If no objection has been made to the declaration or [if any objection made has been withdrawn, the Governor in Council shall approve the declaration.
>
> (4) If any objection has been made and not withdrawn the Governor in Council shall inform the objector and the board of a time and place at which they may be heard.
>
> (5) At such hearing the board may appear by one of its officers or by an advocate and solicitor of the Supreme Court and the objector may appear as provided in sect. 58 (4).
>
> (6) Each party may at the discretion of the Governor in Council adduce further evidence.
>
> (7) After hearing the parties, or such of them as may appear, the Governor in Council may make an order approving or revoking the declaration.

Sect. 60 (as amended) is as follows :

> 60.—(1) Every order made by the Governor in Council under sect. 59 (3) or sect. 59 (7) shall be notified. The board shall thereupon cause a memorandum to be presented to the registrar of deeds containing a complete list of all the lands affected by such order, and the registrar shall note in the register against all such lands the fact that such order has been made.
>
> (2) Upon such note being made in the register all leases and all rights of occupancy under any tenancy in respect of the building to which the order relates shall forthwith determine without compensation from the board or from any other person.
>
> 61.—(1) At any time after the registration of an order declaring that a building is insanitary the board may require the owner or reputed owner thereof by notice in writing to demolish the same within a period to be stated in the notice ; provided that the board shall make such arrangements as it considers necessary for the rehousing of any persons thereby dishoused and shall pay such persons such compensation for disturbance and transport as in its absolute discretion it thinks reasonable.

It should be observed that there is no provision for compensation as regards the demolition.

On Dec. 11, 1933, the respondent trust caused to be served upon the appellant company notice of a resolution passed by the respondent trust on Nov. 22, 1933, under the Singapore Improvement Ordinance, 1927, sect. 57, whereby the respondent trust had declared the said house (among other houses) to be insanitary, and by the said notice it was stated that any objection to the said declaration should be delivered to the chairman of the respondent trust within one week from the service of the said notice. The said house is a dwelling-house, and is one of a block of 94 such houses situate in an area bounded by Victoria Street, Bugis Street, Rochore Road, and North Bridge Road, within the jurisdiction of the respondent trust, and, as stated above, is known as Municipal No. 543, North Bridge Road. The said resolution applied to all of the said 94 houses. It may be mentioned that, in 1928, the respondent trust had formulated a scheme under Part VI of the said ordinance for the improvement of that area of Singapore which comprises the said 94 houses. This scheme, however, was deemed to be rejected, after objections by certain owners of property affected had been heard by the Governor in Council. One of the main objects of that scheme was to secure the demolition of the houses in the said block of 94 houses, including the appellant company's house.

On Dec. 27, 1933, the appellant company, by its solicitors, duly objected in writing to the declaration, and requested to be supplied by the respondent trust with a statement in writing of the grounds upon which the respondent trust had made the said declaration. On Jan. 3, 1934, the respondent trust, by its secretary, acknowledged the appellant company's objection, and furnished the appellant company with a copy of the report of Dr. Dawson, the acting municipal health officer, on the house, stating the grounds upon which the house was declared to be insanitary. The report was in these terms:

> Insanitary Condition of No. 543, North Bridge Road. This is a two-storeyed brick and tile building, back to back with Nos. 59 and 60, Malabar Street. It is 13 ft. in width and 135 ft. in depth. It has two airwells adjoining a centre party wall of dimensions 12 ft. by 8 ft. There is also an open area of dimensions 14½ ft. by 10 ft. At the rear of the building a brick latrine kitchen and bathroom are situated, a corrugated iron bathroom is situated near the airwell on the first floor. The ceiling of the first-floor front is 10 ft. in height, above which there is an attic under the roof. The light is good only in that portion of the building which faces North Bridge Road. Ventilation is bad, there being no through current of air and no possibility of obtaining it. Drainage is through the house by means of a loose plank covered drain. Refuse and nightsoil have to be carried through the house for disposal. It is impossible for a water-carriage sewage system to be installed.

On Feb. 21 and Feb. 22, 1934, the respondent trust heard objections to the declaration. The appellant company, which was represented by counsel, called expert evidence to prove that the appellant company's house was not unfit for human habitation. The respondent trust called no evidence. At the conclusion of the arguments, Mr. William Bartley, the chairman of the respondent trust, announced that consideration of the matter would be postponed until another day. Without giving any further notice of its intention in that behalf, by letter dated June 5, 1934, the respondent trust informed the appellant company's solicitors that, on May 22, 1934, the declaration had been submitted by the respondent trust to the Governor in Council, in accordance with the provisions of sect. 59 of the Ordinance. On the following day, notice was given by the appellant company to the respondent trust that application would be made for a writ of prohibition against the respondent trust, and subsequently an originating summons was issued asking for a writ of prohibition prohibiting the respondent trust from proceeding further in respect of the declaration in question. The grounds mentioned in the summons, which was issued pursuant to an order of the court made on the originating summons, included (amongst others) the ground that the respondent trust had acted *ultra vires* in making the declaration. Affidavits were filed, both by the appellant company and by the respondent trust. In particular, Mr. William Bartley, the chairman of the respondent trust, caused to be filed on its behalf an affidavit sworn by him on Jan. 12, 1935, containing some statements which call for serious attention, namely, the following paragraphs :

> 4. With reference to para. 5 of the said affidavit of the said James William Wotherspoon and the letter from the secretary of the board to Messrs. Donaldson and Burkinshaw and Rodyk and Davidson therein set out, I say that the grounds on which the board declared the said house and premises to be insanitary were not confined to consideration of the report of the acting municipal health officer, portions whereof are set out in the said affidavit. In addition thereto the board had visited the said premises and had personal knowledge and experience of the condition thereof. As a result of the reports of Dr. Dawson and of the knowledge and information available to the board, it appeared to the board that such premises were in such condition as to be unfit for human habitation.
>
> 9. I ask leave to refer to the manual on unfit houses and unhealthy areas issued officially by the Ministry of Health for official use and particularly to Vol. I, second part, cap. 5, under the heading " Standards of Fitness," a copy of which is now produced and shown to me. The first para. of cap. 5 of that official publication reads as follows :
>
> " Conditions to fit houses.
>
> " 1. In this chapter a standard of fitness is indicated which should be regarded as the minimum in connection with existing houses. It is not suggested that the full and universal enforcement of the standard is immediately practicable at the present time. On this point reference should be made to what is said in cap. II, p. 7, as to the temporary acceptance in some cases of lower standards. Nor is it suggested that a house which is deficient in respect of one or more of the matters mentioned would necessarily be in a state which would justify the making of a closing order. From this point of view it will be observed that the matters mentioned are of varying importance, those mentioned in the earlier paragraphs being generally the more essential. It will be obvious, of course, that the seriousness of any particular defect may be much greater if that defect is accompanied by others.
>
> " A fit house should be : (1) free from serious dampness ; (2) satisfactorily lighted and ventilated ; (3) properly drained and provided with adequate sanitary conveniences and with a sink and suitable arrangements for disposing of slop water ; and (4) in good general repair ; and should have (5) a satisfactory water supply ; (6) adequate washing accommodation ; (7) adequate facilities for preparing and cooking food ; and (8) a well-ventilated store for food."
>
> 10. Accordingly the board as a whole inspected and examined on Mar. 12, 1934, the said premises and the construction and condition thereof. Upon such inspection the board took with them the detailed evidence and objections given and raised by the objectors' expert witnesses on behalf of the objectors and gave due consideration to all matters pointed out on behalf of the objectors by such expert witnesses. Such inspection was of great importance and largely influenced the board in its subsequent decisions upon the objections. Two members of the board were absent when the board made the inspection, but they subsequently informed the board that they had each made a visit individually.

> 13. In considering the standard of fitness for habitation the board acted on the standard of fitness laid down in the official manual of unfit houses by the Ministry of Health mentioned in para. 9 hereof, except that they eliminated from that standard two conditions, namely, (1) free from serious dampness and (5) satisfactory water supply.

The application for the writ of prohibition was heard at length before HUGGARD, C.J., and he delivered his reserved judgment on Apr. 2, 1935. In a learned and very careful judgment, HUGGARD, C.J., held that the respondent trust, having a duty to exercise functions of a judicial or *quasi*-judicial character, was amenable to a writ of prohibition, and that, as there was still something left to be done by it, it was not *functus officio*; that the respondent trust had taken into account matters other than the condition and construction of the appellant company's individual house, and that the action of the respondent trust was therefore *ultra vires*; that the respondent trust had taken into consideration matters outside sect. 57 and outside the municipal health officer's report, and that sect. 57 applied only to a building unfit in itself by reason of its construction or condition; and he ordered a writ or prohibition to issue. He also expressed his opinion on other points, which, in the view their Lordships take, need not be mentioned here.

The appeal of the respondent trust was heard before the Court of Appeal of the Straits Settlements (Settlement of Singapore) composed of BURTON, A.C.J., THOMAS, C.J., Federated Malay States, and TERRELL, J., of whom THOMAS, C.J., and TERRELL, J., allowed the appeal (BURTON, A.C.J., dissenting). On the appeal, as before the trial judge, a number of points was argued in addition to those above specifically mentioned. The judges seem to have agreed that, at the hearing of the objections taken by the appellant company, the respondent trust was acting *quasi*-judicially. On the other material points, they were not agreed. THOMAS, C.J., and TERRELL, J., however, concurred in holding that, after the declaration was submitted to the Governor in Council, the respondent trust had no more to do, as regards its judicial functions, and was a body *functus officio*, with the result that the application for prohibition was made too late, and they also concurred in thinking that the respondent trust did not take into consideration any extraneous matter, or depart from the powers conferred on it by sect. 57. On the other hand, BURTON, A.C.J., held that there had been no proper statement in writing of the grounds for the declaration, and that no question of waiver of this objection arose. Further, he held that, since the respondent trust would have the duty of carrying out the declaration if it were approved by the Governor in Council, it was not too late to issue a writ of prohibition. He was therefore in favour of dismissing the appeal. In these circumstances, the case comes before their Lordships.

Their Lordships think it right, in the first place, to state that they have no doubt that the respondent trust has throughout acted with complete good faith, and with an earnest desire to improve the housing accommodation of the town and island of Singapore. Its powers, however, are strictly limited by the terms of the ordinance. Within those powers, it can determine questions gravely affecting the property and rights of the inhabitants, but, if it steps in any degree beyond the limits imposed, any person aggrieved is at liberty to invoke the assistance of the law. The ordinance in many respects, and in particular in Part V, encroaches on the rights of the subject. If a building is demolished as the result of a declaration under sect. 57, the owner can receive no compensation. There can be no doubt that the ordinance, in this and also in some other parts of it, must be strictly construed.

The next point to be dealt with is as to the position occupied by the respondent trust under sects. 57, 58, 59 of the ordinance. The procedure under those sections as pointed out by Terrell, J., may be conveniently divided into three stages, i.e., (i) the consideration of the municipal health officer's report resulting in a declaration under sect. 57; (ii) the hearing of objection by the owners and the decision of the board to refer the matter to the Governor in Council; (iii) the consideration of the matter by the Governor in Council, at which the parties may be represented and further evidence adduced. This stage results in the Governor in Council making an order, either approving or revoking the declaration. It does not seem necessary to decide whether the respondent trust was acting in a ministerial or a judicial capacity in the first of these stages; for it is not in dispute that, in the second stage, that is, in deciding whether, after considering the objections raised against the declaration being a true and fair representation of the construction and condition of the dwelling (including, no doubt, the question as to whether alleged defects are not capable of being easily remedied), the declaration should be revoked or submitted to the Governor in Council, the respondent trust must be regarded as exercising *quasi*-judicial functions. A number of English authorities were referred to on this point, but it does not seem necessary to refer to them in detail, for the point has been in effect conceded, and the judges in Singapore seem (rightly, in the opinion of their Lordships) to have treated it as reasonably clear. Some observations made by Greer, L.J., in *Errington* v. *Minister of Health* (1), at p. 259, are pertinent and applicable.

The circumstances of the present case must now be examined. It is at once admitted that the powers of the respondent trust are derived entirely from sect. 57 of the ordinance. The respondent trust had come to the conclusion, of course in good faith, that the building in question was of such a construction, or was in such a condition, as to be unfit for human habitation. The expression, as was pointed out by Lord Dunedin in *Hall* v. *Manchester Corpn.* (2), is a very strong one, and vastly different from "not up to modern or model requirements." If the report of the health officer with its ten statements is regarded, as their Lordships think it must be regarded, as the main grounds upon which the respondent trust made its declaration, there is strong reason for thinking that the statements on the face of them appear to be directed to a complaint other than that of fitness for human habitation. The first five statements relate to construction, and it cannot be contended that, applying the standards of housing of Singapore, or for that matter, of England, they suggest anything more or worse than a small, and perhaps a mean, dwelling. In the first statement, the words "back to back" are admitted to be inaccurate; they are in fact corrected by the statement that there is an open area 14½ ft. by 10 ft. at the rear of the house. Then come two statements as to light and as to ventilation. A house with rooms in it which are badly lighted or ill-ventilated cannot be held to be unfit for human habitation without condemning an enormous number of houses, including, if an illustration from London is permissible, many of the older houses of the rich in Mayfair. The truth is, as was in effect pointed out by LORD DUNEDIN and by LORD PARKER in *Hall* v. *Manchester Corpn.* (2), that, when a house is stated to be unfit for human habitation, it is the whole house that is being so described. In the portion of No. 543 that faces North Bridge Road the light is stated to be good; and the same portion is apparently well ventilated. It cannot be suggested that a room with adequate windows must be ill-ventilated unless it has also a through current of air. The most that is suggested by these two "grounds" is that the back portion of the house may be unhealthy to live in for prolonged periods. The next statement as to drainage must be qualified by stating that it refers to sink-water. If a loose plank covering is insanitary, a small expenditure could probably put this right. The last grounds refer to a mere question of convenience, and suggest that the health officer would prefer a water carriage system, a very intelligible preference, but one which has little bearing on the question as to whether human beings cannot occupy the house without any real injury to health.

Their Lordships are not disposed to look upon these so-called grounds as if they were pleadings in an action which could be challenged by a species of demurrer. It seems to them that the ordinance requires no more than a fair statement of all the matters which the board relies on, and which the proprietors must be prepared to discuss, on the inquiry which must take place before the declaration is submitted to the Governor in Council. Their Lordships would, therefore, have hesitated to act on the strong suspicion which an attentive consideration of the report has aroused in their minds, namely, that the respondent trust was applying a very different test from that which was open to it under the section; but, as it happens, the affidavit which the chairman of the respondent trust made with great fairness and candour has relieved them of any difficulty on this head. It is manifest, from the paragraphs of that affidavit, which are above set out, that the respondent trust in fact was considering, with slight modifications, a standard suggested by the Ministry of Health in England for a very different purpose. The manual, which has, of course, no statutory authority, is concerned merely to indicate

the view of the Ministry as to a desirable standard of fitness for houses
in England and Wales, presumably in towns, and under conditions which
are widely different from those of a great Eastern city. Apart however
from this, the manual itself is not dealing with the standard to be applied
in considering whether houses can be held to be unfit for human habitation.
It will be noted that there is not one of the matters referred to A
in the passages from the manual referred to by Mr. Bartley which is not
capable of remedy, and, on the other hand, that there is not a single
reference to those matters which generally render a house unfit for
human habitation, such as a structure which is unsafe, a verminous
condition of the materials, a pestiferous atmosphere, a state of things B
dangerous to health, or such a rotten or decayed condition of the building
that rebuilding will be cheaper than extensive repair. Their Lordships
are not attempting to define the facts or circumstances which render a
building unfit for human habitation; they are merely giving reasons for
thinking that the defects pointed out in the manual—defects which in C
fact exist in country cottages all over the world, and in a vast number
of old towns—do not purport to afford a guide on the particular question
with which the respondent trust had to deal. Moreover, it should be
noted that the effect of a closing order under the Housing Act, 1925,
s. 11, is very different from that of a declaration under the ordinance D
approved by the Governor in Council; the provisions of sect. 14 of the
Act are not to be found in the ordinance. Instead of the owner having
not less than 4 months to remedy the defects of the house, a further
hearing before the local authority, with a right of appeal to the Minister,
under the ordinance the board may require the owner to demolish his E
house, if the Governor in Council has approved the declaration, without
any further hearing, and without affording the owner any opportunity
of executing the works necessary to render the house fit for human
habitation.

To sum up this part of the case, their Lordships have come to the F
conclusion that the "grounds" on which the respondent trust made
the declaration, as explained by the affidavit of its chairman, were grounds
which did not justify the declaration. In other words, the respondent
trust was applying a wrong and an inadmissible test in making the
declaration, and in deciding to submit it to the Governor in Council. G
It was therefore acting beyond its powers, and the declaration is not
enforceable.

On this view of the merits of the case, there remains a question of
difficulty to be decided, not the less important because it is one of a
purely technical character. The originating summons as framed is H
limited to a claim that a writ of prohibition may issue against the
respondent trust. The Governor in Council is no party to the proceedings,
and there is no claim founded on *certiorari*. The respondent trust
has thus been enabled to argue that, as a board, it is *functus officio*, that
there is nothing left to be done by it as a *quasi*-judicial body, nothing

on which the writ of prohibition could operate, and that the application, not having been made before the declaration was submitted to the Governor in Council, is too late. It is not in dispute that the fact that the declaration has been submitted to the Governor in Council is in itself no reason against the issue of the writ. A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority: see *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.* (3), and cases there referred to. On the other hand, there must remain something to which prohibition can apply, some act which the respondent trust, if not prohibited, may do in excess of its jurisdiction, including any act, not merely ministerial, which may be done by it in carrying into effect any *quasi*-judicial order which it has wrongly made. Their Lordships do not doubt the correctness of the view expressed by R. S. WRIGHT, J., in *Re London Scottish Permanent Building Society* (4), at p. 113, namely, that:

> an application for prohibition is never too late as long as there is something left for it to operate upon.

In *R.* v. *North, Ex p. Oakey* (5), SCRUTTON, L.J., after expressly approving this *dictum* as that of a judge who had great familiarity with this subject, remarked, at p. 503:

> when the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced.

It is not immaterial in this connection to observe, since the writ of prohibition is a matter of discretion, that the respondent trust gave the appellant company no opportunity of applying for prohibition or *certiorari* before it sent the declaration to the Governor in Council. In the present case there are three duties with which the respondent trust may still be charged. In the first place, under sect. 59 (5), it may appear at the hearing before the Governor in Council by one of its officers or by an advocate and solicitor of the Supreme Court. In the second place, if the declaration is approved, the respondent trust, under sect. 60 (1), must cause the order approving the declaration to be presented for registration under ordinance No. 148. In the third place, at any time after the registration of the order:

> the board may require the owner . . . by notice in writing to demolish [the building] within a period to be stated in the notice.

Their Lordships are not disposed to think that the court in its discretion would order prohibition to issue in relation to the first matter. The Governor in Council could proceed with his inquiry without the assistance of the respondent trust, and the prohibition as to that appearance might be of a futile character. There might also be serious difficulties in ordering the writ to issue merely in regard to the registration. Their Lordships do not think it necessary to express a final opinion as to this, for, in their view, the functions which the respondent trust has to perform under sect. 61 are free from those difficulties. Plainly, the power which it has under that section is of a discretionary character, and the Governor in Council has nothing to do with the exercise of that discretion. Nor will the respondent trust under sect. 61 be carrying out the order of the Governor in Council, which can do no more than approve the declaration. There is no reason for thinking that the actions of the respondent trust under that section are to be treated as altogether severed from its actions under sect. 57. The more correct view would seem to be that, in requiring the demolition, it would in truth be carrying into effect its original declaration, which indeed required the approval of an independent authority, but which, that approval having been obtained, was left to the respondent trust to carry out according to its discretion. It must not be forgotten, in considering the technical aspect of the case, that, on the conclusion at which their Lordships arrived, the declaration was *ultra vires*, and that, if the respondent trust was to attempt to exercise its powers under sect. 61, it would be relying on an order which, if challenged in time by suitable proceedings, could not have been made.

On the whole, and on careful consideration of the four judgments and some able arguments, their Lordships must agree with the conclusions of HUGGARD, C.J., and of BURTON, A.C.J. The order of the former must be restored and the appeal must be allowed with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed with costs.

Solicitors: *Whites & Co.* (for the appellant company); *Peacock & Goddard* (for the respondent trust).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

NOTE.

LAMBERT AND ANOTHER *v.* F. W. WOOLWORTH & CO., LTD. (No. 2).

[CHANCERY DIVISION (Simonds, J.), **June 2, 3, 4, 7, 1937.**]

[Reported p. 195, *ante.*]

It has been pointed out to the Editors that the concluding words of the judgment do not very clearly indicate the order actually made herein, and the material part of the order is here set out in full.

This court doth declare that the plaintiffs have not acted unreasonably in withholding their licence and consent to the execution by the defendants of the works in the pleadings mentioned.

And on the said counterclaim this court doth declare (1) that the said works are improvements to the premises in the pleadings mentioned within the meaning of sect. 19 (2) of the Landlord and Tenant Act, 1927, and (2) that the covenant by the defendants in cl. 2 (v) of the lease dated Feb. 27, 1931, in the pleadings mentioned is on the true construction thereof a "covenant condition or agreement against the making of improvements without licence or consent" within the meaning of sect. 19 (2) of the Landlord and Tenant Act, 1927.

bservations of ATKINSON, J.,
pproved. ARMSTRONG v. STRAIN.
952] 1 All E.R. 139.

ANGLO-SCOTTISH BEET SUGAR CORPORATION, LTD. *v.* SPALDING URBAN DISTRICT COUNCIL.

LTD. TURVEY v. DENTONS [1952] 2 All E.R. 1025.

DIVISION (Atkinson, J.), **May 5, 6, 11, 1937.**]

Mistake—Money paid under mistake of fact—Contract—Modification of terms of payment—Payment upon old terms—Account passed by agent ignorant of new terms—Mistake of principal—Effect of knowledge of another agent.

Under a contract for the supply of water by the defendant council to the plaintiff company, the plaintiff company was to pay a minimum quarterly charge of £375. By an agreement entered into in 1927 the first agreement was modified to the extent that the minimum quarterly payment was reduced to £100. For three quarters in every year the amount of water taken never exceeded £100 in value, but demand notes for the £375 minimum continued to be made and paid. The plaintiff company's branch manager, who was ignorant of the second agreement, passed the accounts for payment, while the managing director, who had negotiated the agreement, did not question the accuracy or otherwise of the amounts for which cheques, which he signed, were drawn. The signing of cheques was purely mechanical on account of the large number which the managing director was required to sign. In an action to recover the amount overpaid as money paid under a mistake of fact, the defendant council contended (i) that the mistake was a mistake of law. and (ii) that the knowledge of its servants and agents was the knowledge of the company and that no payment could be recovered which was made with full knowledge of the facts :—

HELD : (i) the mistake was a mistake of fact and not of law.

(ii) the mistake of the agent (the branch manager) was the mistake of the principal (the plaintiff company), and the mere fact that some agent of the company (the managing director) knew of the second agreement was immaterial so long as he had no idea that it was not being acted on.

(iii) no notice was necessary to constitute the cause of action in the present case, and the Statute of Limitations applied. The plaintiff company was, therefore, entitled to recover only such over-payments as were not statute-barred.

[EDITORIAL NOTE. The judgment in this case includes a critical analysis of the judgment in *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10). That case was understood to have decided as a general proposition that it was possible, so to speak, to add up the elements of fraud as between two agents of a limited company. Thus if the actual representation was made by an innocent agent, but another had the requisite knowledge of the falsity of the statement, these two elements could be added together to constitute fraud for which the company was liable. It is here suggested that this is not true as a general proposition, but that it is also necessary that the agent with the knowledge of the falsity must know the statement is going to be made. So in the present case, which is a case of mistake and not of fraud, the agent was not fixed with knowledge of an agreement because he was unaware the transaction he was incidentally concerned in was based on that agreement, and the case is brought within the principle of *Kelly* v. *Solari* (2). In the latter case it must be assumed that there were agents with full knowledge of the circumstances.

AS TO POSSESSION OF KNOWLEDGE OR MEANS OF KNOWLEDGE, see HALSBURY, Hailsham Edn., Vol. 23, p. 163, para. 235 ; and FOR CASES, see DIGEST, Vol. 35, pp. 151-153, Nos. 486-502.]

Cases referred to :

(1) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281 ; 35 Digest 157, *537*.

(2) *Kelly* v. *Solari* (1841), 9 M. & W. 54 ; 35 Digest 151, *487* ; 11 L.J.Ex. 10.

(3) *Milnes* v. *Duncan* (1827), 6 B. & C. 671; 35 Digest 154, *515*; 5 L.J.O.S. K.B. 239.

(4) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A.C. 670; 35 Digest 149, *470*; 95 L.J.K.B. 913; 135 L.T. 548.

(5) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49; 35 Digest 152, *494*; 72 L.J.P.C. 1; 87 L.T. 457.

(6) *Barrow* v. *Isaacs & Son*, [1891] 1 Q.B. 417; 35 Digest 89, *5*; 60 L.J.Q.B. 179; 64 L.T. 686.

(7) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149; 35 Digest 93, *27*; 16 L.T. 678.

(8) *Meadows* v. *Grand Junction Waterworks Co.* (1905), 69 J.P. 255; 35 Digest 151, *484*.

(9) *Barber* v. *Brown* (1856), 1 C.B.N.S. 121; 35 Digest 155, *520*; 26 L.J.C.P. 41; 28 L.T.O.S. 318.

(10) *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.*, [1936] 2 All E.R. 1039; Digest Supp.; 155 L.T. 190.

(11) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 1 Digest 587, *2245*; 36 L.J. Ex. 147; 16 L.T. 461.

(12) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; 1 Digest 589, *2255*; 9 L.J. Ex. 297.

(13) *Udell* v. *Atherton* (1861), 7 H. & N. 172; 1 Digest 589, *2253*; 30 L.J. Ex. 337; 4 L.T. 797.

(14) *Pearson (S.) & Son, Ltd.* v. *Dublin Corpn.*, [1907] A.C. 351; 35 Digest 15, *83*; 77 L.J.P.C. 1; 97 L.T. 645.

(15) *Freeman* v. *Jeffries* (1869), L.R. 4 Exch. 189; 35 Digest 155, *522*; 38 L.J. Ex. 116; 20 L.T. 533.

(16) *Baker* v. *Courage & Co.*, [1910] 1 K.B. 56; 35 Digest 157, *536*; 79 L.J.K.B. 313; 101 L.T. 854.

(17) *Re Mason*, [1928] 1 Ch. 385; Digest Supp.; 97 L.J.Ch. 321; 139 L.T. 477, *on appeal*, [1929] 1 Ch. 1.

ACTION to recover £4,591 3*s.* 10*d.* as money paid under a mistake of fact. The facts are fully set out in the judgment.

Richard O'Sullivan, K.C., and *W. A. Sime* for the plaintiff company.

H. J. Wallington, K.C., and *Maurice FitzGerald* for the defendant council.

O'Sullivan, K.C.: The mistake of the branch manager in passing for payment the demands on the higher scale was clearly a mistake of fact, and the money can therefore be recovered: *Kelly* v. *Solari* (2).

Wallington, K.C.: The mistake was a mistake of law because it was a mistake about the plaintiff's legal rights. The defendant council cannot be asked to pay back money which has been paid with a complete and full knowledge of the facts. The payment was made by the company and the managing director's knowledge of the second agreement was the knowledge of the company: see *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10).

ATKINSON, J.: In this case, the Anglo-Scottish Beet Sugar Corpn., Ltd., is claiming from the Spalding Urban District Council the return of money which it is alleged was paid by mistake. The plaintiff company has a number of factories scattered about the country. Its registered office is in Glasgow. Its commercial headquarters are in Nottingham. The factory with which this case is concerned is at Spalding. A Mr. Talbot-Crosbie is the managing director. His time is spent between Glasgow and London. Mr. Weisse was the general manager at Nottingham, but he became ill in 1928, and died in 1930. A Mr. Evans was the commercial manager at Nottingham. The local manager at Spalding was Mr. Gostick. The company needed large supplies of water for its factories, and in 1925 entered into an agreement with the defendant council for the supply of water. Apparently, in the last quarter of the year large quantities of water are wanted, and in the other three quarters very little. The only relevant provision in that agreement was that the water was to be paid for quarterly, at certain prices, but the amount to be paid by the plaintiff company:

> in respect of water supplied in any quarter shall not be less than £375 whatever may be the quantity of water actually taken [during that quarter].

Apparently the parties thought that that was an excessive payment, and two years afterwards, on Dec. 7, 1927, a further agreement was made, modifying the first agreement to the extent that the minimum payment was reduced to £100. Normally, the corporation's agreements are kept in Glasgow, but copies ought to be sent to Nottingham. Apparently no copy of this second agreement was ever sent to Nottingham, certainly none was sent to Spalding, and Mr. Evans, the commercial manager at Nottingham, never heard of it either. Whether Mr. Weisse knew of it I do not know, but certainly Mr. Talbot-Crosbie, the managing director, knew of it, because he negotiated it.

Notwithstanding this agreement, the defendant council continued to send in demand notes for a minimum charge of £375, with only one or two exceptions. Except in the fourth quarter of the year, the amount of water taken in any quarter never exceeded £100 in value, but these notes came in alleging that a minimum charge of £375 was due. No explanation whatever has been offered by the defendant council for these inaccurate demands. The first was in July, 1928, and from July 1, 1928, up to 1936, these demands were sent in and were paid. There is an agreed statement of the sums paid, and of the extent to which they were over-payments. When the accounts came in, they were checked and passed by Mr. Gostick. They all have a stamp in the corner, showing that they had been checked and passed for payment. They were then sent to Nottingham, because all payments were made from there. Mr. Evans has not been called, and I do not know to what extent accounts were checked afresh. Probably they were not; the passing of the accounts by the Spalding manager would, in all probability, be treated as sufficient. At any rate, the cheques were drawn at Nottingham in accordance with the demands passed by Mr. Gostick, and every fortnight Mr. Talbot-Crosbie, the managing director, went to Nottingham for the purpose of signing cheques. He says that he would have before him anything from 600 to 800 cheques to sign, that he signed them without bringing his mind to bear in any way on the accuracy or otherwise of the amounts for which the cheques were drawn, and that he never had any idea, in signing these cheques, that he was signing cheques for payments which were not due. Last year, there were certain negotiations for amalgamation, and, during these negotiations, this series of mistakes was discovered. The defendant council has in fact received £4,591 3*s.* 10*d.* A to which it is not entitled. The various payments have been made by mistake, mistakes to which the defendant council has certainly contributed by its inaccurate demands, and the plaintiff company claims the return of this money.

It is not suggested that there are any circumstances which would B enable the defendant council to pray in aid the principle of *Skyring* v. *Greenwood* (1), and, at first sight, subject to the Statute of Limitations, it would seem a clear case. Mr. Gostick and Mr. Evans both thought that their rights and obligations were regulated by the agreement of 1925, when in part that agreement had been superseded by the agree- C ment of 1927, an agreement of which they had never heard. The signatures on the cheques were purely mechanical, the managing director naturally assuming that the accounts had been checked accurately, and that they were in order. The plaintiff company relied on *Kelly* v. *Solari* (2), where the executrix of a man named Solari had received pay- D ment from the Argus Life Assurance Co. of money due, or alleged to be due, on three life policies. In fact, one of those policies had lapsed before the death of the assured. The actuary of the office, who knew all about it, had informed two directors of the lapsing of the policy, and the policy had been marked "lapsed." When the claim was made, E although these two directors had been given this information, they had forgotten all about it, and they passed the claim for payment, and, in fact, signed the cheque in payment of the amounts due, or apparently due, on the policies. Then the mistake was discovered, and the representatives of the assurance company claimed repayment of the money F paid on the policy which had lapsed. They were held entitled to recover. Two passages have been frequently cited from that case. Parke, B., said this, at p. 58:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the G other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Bayley, J., in the case of *Milnes* v. *Duncan* (3); and with all respect to that authority, I do not think it H can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.

ROLFE, B., in that case said, at p. 59 :

> With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it, if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.

A That case was considered by the House of Lords fairly recently in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow, Ltd.* (4), where LORD SHAW said, at p. 688 :

> . . . it is important to note exactly the principle of cases of refund on account of mistake in fact, as that principle was authoritatively expounded by PARKE, B., in *Solari's* case (2).

B LORD SHAW then cited, obviously with approval, the passage which I have read. He went on, at p. 689 :

> But means of knowledge and actual knowledge are not the same ; and it was long ago decided in *Kelly* v. *Solari* (2) that money honestly paid by a mistake in facts could be recovered back, although the person paying it did not avail himself of C means of knowledge which he possessed.

LORD SHAW was there quoting with approval the language of LORD LINDLEY in *Imperial Bank of Canada* v. *Bank of Hamilton* (5). Again, in *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow, Ltd.* (4), LORD SUMNER D referred to *Kelly* v. *Solari* (2) as part of the foundation of his judgment, and LORD CARSON quoted with approval both the passages which I have read. In *Barrow* v. *Isaacs & Son* (6), KAY, L.J., laid down precisely the same principle, emphasising his view that negligence and carelessness did not deprive the plaintiff of his right to recover. He said, E at p. 426 :

> . . . although he had the means of knowledge . . . it was owing to his own carelessness or forgetfulness that he was in fact ignorant.

Therefore, *prima facie*, one would have thought that the plaintiff company had a very clear case. But two points were taken for the F defence. First, it was said that the mistake was a mistake as to the plaintiff's legal rights and obligations, that it thought its legal rights were different from what they in fact were, and, therefore, that the mistakes were mistakes of law. It is common ground that mistake of law does not entitle a person paying to recover money. A mistake of G construction of a contract is treated as mistake of law, and not as mistake of fact. The argument is that the plaintiff company's mistake was mistake of law, because it thought that its legal rights were different from what they in fact were. It seems to me that this argument begs the question. In most of the cases of payment by mistake the person H paying has paid because of mistake as to his legal right or obligation, and whether the payment can be recovered or not depends on whether that mistake as to legal right is due to a mistake of fact or a mistake of law. In *Kelly* v. *Solari* (2), obviously the payment was made under a mistake as to the extent of the company's legal obligation. It was a mistake as to the executor's right, a mistake as to the company's obligation. But that mistake of right was due to a mistake of fact, and therefore they could recover. *Cooper* v. *Phibbs* (7) is, I think, in itself a complete answer to this argument. It was a very complicated case, and turned on who in fact was entitled to a certain fishery. Lord Westbury there said, at p. 170:

> The result, therefore, is, that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said, *ignorantia juris haud excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.

Meadows v. *Grand Junction Waterworks Co.* (8) is another very good example of mistake as to legal right being based on a mistake of fact. There the plaintiff was seeking to recover an excessive payment of water rate. He did not know that his house was on the estate of the Bishop of London. Apparently if one is on the estate of the Bishop of London one pays water rates smaller than those paid by other people. He was ignorant of that fact, and therefore ignorant of his legal rights, but he had no difficulty in recovering his payments. *Barber* v. *Barber* (9) is also a very good example of a payment under a mistake of legal right due to a mistake of fact.

Therefore, I do not think that the first argument assists the defendant council in this case. But the second point was more formidable. Mr. Wallington argued that no payment can be recovered which is made with full knowledge of the facts, that the payment is the company's payment, that the knowledge of its servants and agents is the knowledge of the company, and that therefore the company in this case cannot be heard to say that it made these payments in ignorance of any relevant fact. It is said, doubtless with truth, that the managing director and the secretary at any rate knew of the second agreement, and that, although they did not know that the cheques were not in accord with it, Mr. Gostick, and therefore the company, voluntarily by Mr. Gostick, made payments in accordance with the first agreement, the company knowing all the time, by its managing director and secretary, that the payments ought to have been in accordance with the second agreement. That is how the argument is put, and it is based on *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10). That case was concerned with a fraudulent misrepresentation, and it is said that it established the proposition that, if an agent makes a representation on behalf of his principal which is untrue in fact, but which he honestly believes to be true, the principal is guilty of fraud, if the true facts are known to another agent, although that other agent knows nothing of the representation, supplies no inaccurate information, and in no way fails in his duty. In other words, that a principal may be held liable for a fraudulent misrepresentation although he and every agent have in no way fallen short of the highest standard of honour and rectitude. It is said that two rights may make one wrong, and it is argued that, if that proposition is well founded as to fraud, *a fortiori* it applies to mistake. It is put in this way. The payments are the company's payments, the knowledge of all its agents is the company's knowledge, and therefore the company has made the payments with full knowledge of all the relevant facts.

Before dealing with that case, I want to consider what the law was before that case was decided. This involves the consideration of only two authorities, the first being *Barwick* v. *English Joint Stock Bank* (11). There the plaintiff had given certain credit on a representation made to him by the manager of one of the branches of the defendant bank. The customer to whom the plaintiff was going to give credit was in fact indebted to the bank to the extent of over £12,000. The plaintiff knew nothing of that, but the manager did, and the plaintiff made his advance, or gave his credit, on the manager's giving a written guarantee to the effect that the customer's cheque on the bank in the plaintiff's favour, in payment of certain oats supplied, should be paid, on receipt of certain money, in priority to any other payment "except to this bank." It was held that that statement, so far as the manager was concerned, involved a fraudulent misstatement of fact, because it implied, I suppose, that there was nothing materially owing to the bank, and that the plaintiff would get paid, when in fact the £12,000 owing to the bank far more than swallowed up any money which could possibly be coming to the account of the person who was getting goods delivered to him. The point of law in that case was whether the defendant bank was liable for the fraudulent misrepresentation of its agent It was thought at that time that two cases, *Cornfoot* v. *Fowke* (12) and *Udell* v. *Atherton* (13), threw some doubt on the proposition that a principal was liable for the fraud of his agent, and that all that that case decided was that the principal was liable for the fraud of his agent in just the same way as he was liable for any other wrong committed by an agent. WILLES, J., at pp. 265, 266, said:

> The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws.

He went on to say that there was no reason at all why a principal similarly should not be liable in respect of fraudulent misrepresentations made by the agent in the course of his agency.

The next case I want to refer to is *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14). There the defendant corporation had invited the plaintiff company to tender for certain sewage works, and, for the purpose of enabling it to tender, plans with drawings and specifications were given to the plaintiff company by the defendant corporation. These plans and drawings and specifications had been prepared by engineers employed by the corporation, and on these drawings or plans were certain statements as to the relevant surrounding circumstances of the works. In particular, there was a statement as to the existence of a wall at a depth of 9 ft. The only relevance of that was that, if the statement were true, the cost of the work would be far less than if the statement were untrue. Relying on the truth of that statement, the contractors had agreed to do the work at a certain sum. They subsequently found out when they came to do the work that the statements were wholly untrue, and they therefore incurred a very much greater expense. Thereupon they brought an action for fraud, which PALLES, C.B., withdrew from the jury on the ground that one of the conditions in the contract was that the contractor had to:

> satisfy himself as to the dimensions, levels and nature of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works. . . .

PALLES, C.B., thought that that clause protected the corporation even from the fraud of its agent. He was reversed by the King's Bench Division in Ireland. That Division in its turn was reversed by the Court of Appeal, hence the appeal to the House of Lords. It must be appreciated that the real point of the case was whether the corporation was protected by this clause. The jury had never, of course, in fact found that the engineers had been guilty of fraud, but the EARL OF HALSBURY in his opinion quoted from some of the evidence which had been given, particularly from that of one of the engineers, from which it seemed fairly clear that the misstatement as to the existing wall and as to its depth had been made deliberately by all three engineers concerned, and made deliberately with the object of influencing the cost of the work. One question was, at p. 357:

> Was the object of this to induce the contractor to moderate his estimate?—Certainly.
>
> That is what it was intended for?—The design was intended for that.
>
> And deliberately designed in that way?—Certainly deliberately designed.
>
> By agreement and arrangement?—Certainly.

Therefore, the position was simply this, that certain agents of the defendant corporation had made dishonest representations which were handed on to the plaintiff company by an innocent principal, and on that the question arose whether the condition which, by common consent, would not have protected the principal from the principal's own fraud, was effective to protect him from the fraud of his agent. It was held that the fraud of the agent must be deemed to be the fraud of the principal for this purpose, and that the clause was no protection.

Two short quotations from that case were relied on in *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment*
A *Co., Ltd.* (10), and these I will read. LORD LOREBURN, L.C., said, at p. 354, that these clauses:

> contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

B LORD HALSBURY said the same thing at p. 359:

> . . . it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge.

C It will be observed that, in both those quotations, the expression used is "guilty knowledge." Mere knowledge of facts can never in itself be guilty. The word "guilty" in relation to knowledge must have some reference either to the mode of acquisition, or to its use or non-use, or to its disclosure or non-disclosure. The knowledge referred to in the
D words which I have cited was clearly the knowledge that the statement was being made and was untrue. In that case, the guilty knowledge was in the agent. But I am satisfied that those words clearly mean that the knowledge that the statement was being made, and was untrue, was the knowledge described as guilty. We have, therefore, this position.
E *Barwick* v. *English Joint Stock Bank* (11) decided that the principal was responsible for the fraudulent representation of an agent made directly by the agent to the third party. *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14) decided that a principal was liable for the fraudulent representations of his agent, although those representations reached the
F third party through and by the innocent channel of the principal, just as the principal would be liable if he, the principal, fraudulently caused an innocent agent to communicate a misrepresentation to the third party. It therefore decided that the conditions in the contract could not protect the principal against the fraud of his agent any more than
G they could protect him against his own fraud.

Bearing those decisions in mind, I come to the case here relied on, *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10). The facts are quite simple. The defendant company, which owned various blocks of flats, was negotiating the sale
H of four large blocks to the plaintiff company, which had been furnished with schedules of the names of the tenants, the terms of the leases, and the various rents. It had, in returning the draft contract, asked the question: "Are all the tenants' rents paid punctually and without dispute?" A Mr. Dixey was both the solicitor for, and managing director of, the defendant company. He personally, apparently, had nothing to

do with the conduct of this business, but his managing clerk, a Mr. De Rees, was acting for him. It had in its employ a Mr. Addis. I do not know exactly what his description was, but at any rate he was manager of the department which collected the rents, and he would know better than would anyone else what the position was as to the payment of rents. Mr. De Rees answered the question in the words: "There are no disputes and the rents are paid promptly with very few immaterial exceptions." That statement was untrue. A number of the rents were paid irregularly and were paid late. That statement was treated as a misrepresentation of fact. Mr. De Rees' evidence was that he had gone to Mr. Addis and had asked him about these rents, and that he had received that answer from Mr. Addis, and that Mr. Addis had seen and approved the answer which he, Mr. De Rees, was intending to make. There was a little complication, owing to the fact that Mr. Addis was ill at the time of the trial. His evidence had been taken on commission, and all this had not been put to him. He had simply been asked whether Mr. Dixey had come to see him and had made any inquiry about these matters, and he replied that Mr. Dixey had never been near him, which was perfectly true, but he never said anything about Mr. De Rees coming to him. The action was tried by Goddard, J., who held that the claim for fraud failed, but he found for the plaintiff company on a breach of warranty. There was an appeal and a cross-appeal, and the decision of Goddard, J., was reversed on both findings. The question is: What were the grounds on which the company was held liable for fraud? Slesser, L.J., having dealt with the warranty, and the facts relating to the misrepresentation, refers to the evidence of Mr. De Rees. That evidence was that Mr. Addis did approve the statements, and knew all about them. Slesser, L.J., then proceeded, at p. 1047:

> On these facts the case resolves itself into one where the agent who made the representation to the plaintiffs believed it to be true at the time he made it; that is the position of Mr. De Rees; but his informant, Mr. Addis, who was also an agent of the company, though he knew it to be untrue, did not make the representation to the plaintiffs, and the question arises in such a case: may the company in such circumstances be found liable in fraud, when the elements of the fraud have to be collected from different agents of the company?

It is to be noticed that Slesser, L.J., is treating Mr. Addis as one who had been referred to, who had given the information, and who knew the statement to be untrue. Slesser, L.J., then referred to *Cornfoot* v. *Fowke* (12) and to *Barwick* v. *English Joint Stock Bank* (11), and, finally, to *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14), and he quoted the words of Lord Loreburn, L.C.:

> The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

Slesser, L.J., continued:

> For myself, I cannot see why if the physical act of several agents may collectively be deemed in law to be the joint responsibility of a principal, the same principle should not apply to states of mind. The agent and principal are in law one for the purpose of the acts which make up the fraudulent misrepresentation; and

> equally the same considerations apply if, as here, both Mr. De Rees and Mr. Addis were servants of the same corporation and the ingredients of the fraud are all to be found in the acts of the agents of one principal. I think, therefore, that once it is held that Mr. Addis stated that which was untrue to his knowledge to Mr. De Rees and Mr. De Rees, albeit innocently, used that untrue material information to induce the plaintiff company to act to their detriment, the company may be said to have been guilty of fraudulent misrepresentation, and it matters not that one element in that wrong is to be traced to Mr. Addis and another element to Mr. De Rees. A

There is nothing whatever in that judgment to suggest the principle contended for by Mr. Wallington. There is nothing there to suggest that SLESSER, L.J., would have held the defendant company liable if the fact had been that Mr. Addis had not been communicated with in any B way at all, and if he had not communicated any untrue information to Mr. De Rees. On the contrary, it seems to me to indicate that the fraud of Mr. Addis was essential for a judgment against the defendant company. His knowledge could fairly and properly be described as guilty knowledge. He knew that the statement was going to be made, he knew that it was C untrue, and he knew that it was untrue because of the wrong information which he had himself supplied. That is the basis of the judgment of SLESSER, L.J. The real problem is created by the judgment of ROMER, L.J., and I frankly admit that that judgment has caused me the very greatest difficulty. ROMER, L.J., said, at p. 1050:

> D But I have also come to the conclusion that the cross-appeal of the plaintiffs should be allowed, for I think that the representation made by Mr. De Rees was untrue to the knowledge of the defendant company. It is quite plain that Mr. De Rees made the representation in all innocence, but he made it as agent for and on behalf of his principals, the defendant company, and they knew that the representation was false. Being a corporation, they could, of course, have no actual knowledge at all, but they must be deemed to have had the knowledge of their E agents who normally dealt with questions arising between them and their tenants, and the true facts of the case must have been known to one or more of those agents. Captain Dixey and Mr. Addis, for instance, must have known between them that the statement was untrue, and the fact, if fact it be, that they did not know that the representation was being made is, in my judgment, immaterial. I say "if fact it be," because though Mr. De Rees has sworn that Mr. Addis saw his note that contained the representation, I do not think that Mr. Addis, who was examined on commission before the trial, had an opportunity of giving his recollection as to F that matter. But even assuming that Mr. Addis did not see the note, the defendant company must be held to have made a fraudulent misrepresentation. There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue. But it has now been laid down by the House of Lords that in such a case the principal G is as much liable as though he had himself made the representation knowing it to be untrue: *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14). In that case it was said by LORD LOREBURN, L.C., at p. 354, that: "the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge."

Mr. Wallington says that that means that, if Mr. De Rees made the H representation innocently, none the less the representation was fraudulent on the part of the company, as the true facts were in the knowledge of Mr. Addis—fraudulent, even though Mr. Addis had never been consulted, and knew nothing of how the question was being asked, and how it was being answered. It might very well be that, on such facts, Mr. De Rees might be held to have made the statement recklessly, and without belief in its truth. But Mr. Wallington says that, apart altogether from that aspect of the case, Romer, L.J., was laying it down that the mere knowledge of a perfectly innocent agent, perhaps in another town, perhaps in another country, knowing nothing of the business in hand, makes the innocent representation fraudulent on the part of the company. I cannot persuade myself that Romer, L.J., meant to lay down A so broad a principle as that. After all, everything a judge says has to be construed with reference to the facts of the case before him. I cannot myself see how a principal can be held liable for fraud when there has been no fraud, no element of fraud, either on the part of himself or on the part of anyone for whose acts he is responsible. No such proposition B had been argued, or suggested in argument, in that case. Mr. Norman Birkett's argument was based on this: "The statement about which I complain was untrue on the facts and the answer given ought not to have been made. The statement was false to the knowledge of the defendant company because it was false to the knowledge of Mr. Addis." C Romer, L.J., many times referred to the knowledge that the statement was untrue. One cannot know that a representation is untrue unless one knows of the representation, and knows that it is to be made, or is being made. Take, for example, the passage most strongly relied on in the judgment of Romer, L.J., at p. 1050: D

> There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue.

What is the meaning of the last line? Can one know that a representation E is untrue if one has no knowledge of its existence? I think that the words relied on which I have just read mean this: "When the principal, though having no personal knowledge that the representation is made, yet knows through another agent that it is untrue." I am confirmed in that belief by what follows. Romer, L.J., relied on *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14), and cited the passage which I have F read which contains the words "guilty knowledge." That case was no authority at all for the passage which I have read from the judgment of Romer, L.J., if it be read in the sense in which Mr. Wallington would have me read it. Surely one cannot treat these words, "the principal G and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge," as authority for the proposition that "the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the innocent knowledge." Some importance H must be attached to the word "guilty," and no one can construe the word "guilty" as meaning the same thing as "innocent." On the other hand, *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14) is a precise authority for the passage from the judgment of Romer, L.J., in the sense in which I read it. It has been decided, in *Barwick* v. *English*

Joint Stock Bank (11), that a man is liable for the fraudulent misrepresentation of his agent made directly by his agent to the third party. Then came *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation* (14), which decided that a principal is liable for the fraud of his agent although the principal himself innocently hands on the fraudulent representation to A the third party. *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10) went one small step further, that a principal is liable for fraud where the fraudulent information supplied by one agent is handed on to a third party through an innocent agent.

B The judgment of ROMER, L.J., in *London County Freehold & Leasehold Properties, Ltd.* v. *Berkeley Property & Investment Co., Ltd.* (10), presents many difficulties of construction, and it may be that Mr. Wallington is right in the view which he presents, but I cannot bring myself to believe that it means what Mr. Wallington contends. EVE, J., who based his C judgment on the fact that Mr. Addis knew that the representations were untrue, said, at p. 1051:

> . . . I agree with the view of ROMER, L.J., that Captain Dixey and Mr. Addis must have known that the representations were untrue.

Therefore, I am not satisfied that a company can be saddled with D fraud unless some agent has guilty knowledge with reference to the representation complained of. Therefore, even if the principles applicable to fraud apply to mistake (and I am far from laying it down as a matter of law that they do), there is nothing to prevent my giving relief in this case, and holding that a mistake by an agent is the mistake of the principal.

E I might pause here to ask what is the effect, or what would be the effect, of Mr. Wallington's argument on the position of the defendant council, because, if his argument is right, the defendant council was putting forward demands which it knew were ill-founded, innocently put forward, doubtless, by one agent, but obviously the necessary information was in F the possession of another agent. In my opinion, the mere fact that some agent of the company knew of the second agreement is immaterial, so long as he had no idea that it was not being acted on. I think that this case is well within the principle of *Kelly* v. *Solari* (2), and certainly the point relied on here was not raised there, although obviously some G servants of the company knew all about the lapsing of the policy in that case.

The only other matter with which I have to deal is the Statute of Limitations. Normally, I have no doubt that time runs from the date of payment, and I think that the only exception is where there would be H no cause of action until notice of the mistake has been given to the payee, and demand made. The case relied on, or referred to, by Mr. O'Sullivan was *Freeman* v. *Jeffries* (15). The headnote in that case states:

> By agreement between the outgoing tenant of a farm (the defendant) and the incoming tenant (the plaintiff), the amount to be paid by the plaintiff to the defend-

> ant was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting £2,000 paid on account) was given by the plaintiff to the defendant; and the plaintiff entered into possession.

Later on, he found that this valuation had included matters for which he was under no obligation to pay, but he paid the promissory note at maturity without objection, and subsequently brought the action to recover the amount overpaid. He made no demand, and the defendant at no relevant time had any information as to the valuation having included matters which it ought not to have included. The relevancy of the case was in something which was said by MARTIN, BRAMWELL and PIGOTT, BB. MARTIN, B., said, at pp. 198, 199:

> It is clear this action is not maintainable without a demand, that is, an intimation from the plaintiff to the defendant that the money which has been paid was paid under such circumstances as render a part or the whole recoverable back. I think this is clear, and I am prepared to give judgment on this point alone.

He then dealt with other matters. BRAMWELL, B., in effect said the same thing, at p. 200:

> But if the plaintiff were under the circumstances entitled to be repaid the sum he claims, he ought to have given notice to the defendant of the facts by reason of which he was so entitled; because until he did so there could be no duty on the defendant to pay it over.

PIGOTT, B., said, at p. 201:

> I am much struck with the observations which my learned brothers have made as to the necessity of a demand to entitle the plaintiff to maintain the action, and I am disposed to acquiesce in their view; but I prefer to rest my judgment [on other matters].

That case was considered by HAMILTON, J., in *Baker* v. *Courage & Co.* (16). There the question arose as to when the cause of action—money paid by mistake—had arisen, and HAMILTON, J., said, at p. 65, that it did not appear, in the circumstances of that case:

> that notice of the mistake was necessary to raise a duty in Mr. Baker to pay the overpayment back. It was money had and received to the use of the defendants because it was money for which there was no consideration. Reliance was indeed placed by the defendants upon a case of *Freeman* v. *Jeffries* (15), the decision in which would bind me if the facts were the same, for both MARTIN and BRAMWELL, BB., held that the action there, which was an action for money paid by mistake, was not maintainable without previous demand. But in that case at the time the first instalment of the money was paid neither the plaintiff nor the defendant made any mistake. The mistake was made by the two valuers who were subsequently employed to value the farm which was the subject matter of the sale. It was not until the plaintiff afterwards consulted a third valuer on his negotiating for the resale of the property that he discovered that the former valuers had included in their valuation certain items which they ought not to have included, and after this he paid over the balance of the money to the defendant at a time when he knew of the valuers' mistake but the defendant did not. It was under those circumstances that MARTIN and BRAMWELL, BB., held that there was no duty on the defendant to repay the excess valuation until after notice of the mistake, which was not his mistake and of which he was unaware. I think it is clear that they so decided without reference to a case in which not only the party paying paid under a mistake, but also the party receiving the money was under a mistake at the time when he received it. In my opinion, therefore, the case of *Freeman* v. *Jeffries* (15) does not support the contention of the defendants. But then it was said that this principle of the necessity of notice and demand as a condition of the completion of the cause of action is of general application and applies to all cases in which the defendant is required to return something which has come innocently into his possession but which he is not entitled to keep.

HAMILTON, J., then dealt with some case which he said had no bearing on the matter, and he gave effect to his opinion that no notice was necessary to constitute the cause of action, and that, except in cases within the principle of *Freeman* v. *Jeffries* (15), time ran from the payment. I think that the same view was indicated in *Re Mason* (17). The matter is dealt with at some length by ROMER, J., and obviously he takes the view that *Baker* v. *Courage & Co.* (16) lays down the true principle to apply.

The position, therefore, is that from the sum claimed must be deducted the sum of £1,925. I think that the amount which can be recovered is £2,666 3*s.* 10*d.*, and that the plaintiff company is entitled to interest at 5 per cent. on each payment from the date of payment until judgment.

Solicitors: *Savery, Stevens & Nutt*, agents for *R. A. Young*, Nottingham (for the plaintiff company); *Smith, Rundell, Dods & Bockett*, agents for *Raymond W. Hastings*, Spalding (for the defendant council).

[*Reported by* J. MACGILLIVRAY ASHER, ESQ., *Barrister-at-Law.*]

ST. PIERRE AND OTHERS *v.* SOUTH AMERICAN STORES (GATH & CHAVES) LTD. AND CHILEAN STORES (GATH & CHAVES) LTD.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **June 14, 15, 16, 17, 1937.**]

Money—Lease—Governed by Chilean law—Proof of law of country where decisions not binding precedents—Rent reserved in pesos of a certain weight in gold—"Remit."

The plaintiffs, successors of the owner of premises in Santiago de Chile, by a lease executed at the Chilean consulate in Paris and drawn in the Spanish language, let the premises to the Chilean Stores for a term of 10 years from 1935, at a rental of 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly, to be paid at the option of the owner either in Santiago de Chile or remitted to Europe, according to the instructions which the owner might give, one month in advance on the first working day of each month. The second defendant, the South American Stores, joined in the lease as guarantor, but so as to become jointly responsible as primary obligor under the contract. The South American Stores carried on business in the Argentine. All parties by the lease elected domicil in Chile. There was evidence that there was no verbal agreement that the rental should be fixed on a gold basis. In July, 1935, the owner served a notice as follows: "Please take note, till further notice, of my option and of the following instructions," and then followed instructions for payment in sterling on a gold basis:—

HELD: (i) the contract must be construed according to Chilean law, even though part of the performance of it was to be in England.

(ii) evidence of the intention of the parties which would be admissible in a Chilean court to interpret the contract is admissible in England.

(iii) neither party had any intention other than that expressed in the contract as interpreted by experts on Chilean law.

(iv) the rent to be paid had been specified as an amount of Chilean money, and not as an amount of gold.

(v) the rent was to be remitted from Chile, and no claim could be made to have it remitted from the Argentine by the guarantors.

Decision of Branson, J. ([1937] 1 All E.R. 206), *affirmed.*

[EDITORIAL NOTE. The Court of Appeal have here upheld the decision of Branson, J., that a lease of property in a foreign country even in the peculiar circumstances of this case is governed by the foreign law. Though not necessary to the actual decision, the Court of Appeal have expressed the view that, where foreign law allows evidence of the intention of the parties in construing a written document, such evidence may be given and considered by the court in England. A

As to the Law Governing Contracts, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-268, paras. 321-322; and for Cases, see DIGEST, Vol. 11, pp. 387-392, Nos. 639-663.] B

Cases referred to:

(1) *R.* v. *International Trustee for the Protection of Bondholders Akt.*, [1937] 2 All E.R. 164; Digest Supp.

(2) *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198; 28 Digest 484, *890*; 38 L.J.Ch. 465; 20 L.T. 724.

(3) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; 6 Digest 451, *2884*; 45 L.J.Q.B. 748; 35 L.T. 179. C

(4) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 22 Digest 629, *6938*; 60 L.J.Q.B. 295; 63 L.T. 739.

(5) *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161; Digest Supp.; 103 L.J.Ch. 41; 150 L.T. 41. D

Appeal from a decision of Branson, J., dated Dec. 18, 1936, and reported in [1937] 1 All E.R. 206.

A. T. Miller, K.C., and *Ernest Hancock* for the appellants.

F. R. Evershed, K.C., and *S. H. Smith* for the respondent companies. E

Greer, L.J.: This case does not depend upon the view that an English lawyer would take of the words of the lease, but upon evidence as to what is the meaning of the words used in accordance with the law of Chile, which is the proper law of the contract for the purpose of ascertaining the meaning of the words which appear in the contract. The F contract is a contract in the language of Chile between a gentleman named Beéche, who is, though domiciled in Paris, a citizen of Chile, and two English companies registered in London; but for this purpose both of them have undertaken obligations in respect of immovable property in Santiago de Chile in a document in the course of which, G for the purpose of dealing with the rights of the parties, both parties chose an address in Chile as their domicil. The parties to that were Mr. Beéche, acting for himself and the other representatives of his deceased brother, and the two companies. Both these companies, though they are registered as English companies, do not carry on their H business in England; and for this purpose I think we must treat them as carrying on their business in Chile, though one of them is a company which normally carries on business in the Argentine, but for this purpose has undertaken all the responsibilities of a lessee of this immovable property in Santiago de Chile. The company carrying on business in the Argentine holds itself responsible for carrying on, and undertakes jointly with the Chilean Stores (Gath & Chaves), Ltd., to carry on, business entirely in Chile in respect of payments and other conditions and liabilities which the contract and lease imposes on the lessee, for which purpose both parties elect domicil at Santiago de Chile. In my view, the judge was quite right in the view which he adopted in the first part of his judgment, that the proper law of the contract, for ascertaining the rights and liabilities of the parties to the contract, was the law of Chile, and not any other law.

The question in this case arises with regard to what effect is to be given to the words of art. 2 of the contract, which, as stated in the agreed translation, is in these terms:

> The consideration for the lease is 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly which shall be paid at the option of the owner either in Santiago de Chile at the residence or office of the latter or of his representatives or remitted to Europe according to the instructions which the owner may give, one month in advance on the first working day of each month.

The question that arises for decision is as to whether that means that the two companies are undertaking to pay gold value, as it exists at any time, of the 93,500 pesos, or whether, on the other hand, the subsequent words are a mere statutory synonym, if I may use that word, of the expression 93,500 pesos. If the proper law for the construction of this contract is the law of Chile, I agree with the judge's view that it is right that we should accept and follow the evidence of the experts on behalf of the respondent company rather than that of the expert on the part of the appellants. I think the judge was quite right in coming to the conclusion, which is a conclusion of fact, being a question of foreign law, that he accepted the opinions and the evidence which were put forward by the witnesses for the respondent company as against the evidence which was put forward by the appellants' witnesses.

There is another rule of law in Chile which applies to the interpretation of contractual words, on which I desire to say something; but it may be quite unnecessary to decide this question, because, if the view I have just expressed is right, there is an end of the matter. The Chilean law is against the construction which we are asked to put upon these words, and, therefore, it would not matter whether or not some other construction could be put upon them, if Mr. Miller is right in suggesting that it would be wrong to permit evidence to be given, in an action going on in this country, of the intention of the parties. In my judgment, that view, which was pressed upon us, is not well founded. Though we have not heard the arguments on the other side, in my judgment, when an action is brought in London upon a contract which is a Chilean contract, to be interpreted by Chilean law, the Chilean law in relation to matters which may be taken into account in interpreting the contract applies just as much as it would apply if it were to be determined in Chile.

I have come to the conclusion that it is quite impossible to say that there was on the part of both parties—that is what is required by Chilean law—an intention otherwise than that which is conveyed by the words that were used in the contract. Therefore, one does not get, from the negotiations that took place on June 6, 1931, that agreement of both parties which it is necessary to establish in order to disturb the ordinary meaning of the words used. As I understand the law of Chile, it is that you take what is regarded as the literal meaning of the words, unless there is something, either in the circumstances or in the negotiations or in the letters, which proves a contrary intention. For these reasons, I agree with the judge's finding that there is nothing in the negotiations which would entitle this court, or any court, to put a construction on the words of the contract different from that which is spoken to by the experts on Chilean law.

Then Mr. Miller contends that, inasmuch as the performance from one point of view was a performance to take place in London, we must, therefore, put a different construction on the document, namely, that we must construe the question of performance according to English law, and not according to the law of the contract. I find myself in complete disagreement with that view. I think that, this being a Chilean contract, the obligations of both parties having to be determined by the law of Chile, if the performance takes place in this country, the law to be applied as to the rights and liabilities under the contract is the law of Chile, and not the law of the place of performance, if that happens to be different from the law of Chile. I have not thought it necessary to refer in detail to the various sections of the Chilean Code to which we have been referred, because I think it is quite clear what their meaning is. I am satisfied that no sufficient grounds have been put forward in the argument of Mr. Miller why we should reverse the finding of the judge. I was almost ready to say that I found myself in such complete agreement with what the judge has said that I was prepared to accept his judgment as my own judgment for this purpose; but, as this matter is one of considerable importance, I thought it right to add the few words that I have added.

It is suggested that the speeches in the House of Lords in *R.* v. *International Trustee for the Protection of Bondholders Akt.* (1) are inconsistent with this view of the case. I do not think that that is so. I think that the view of Lord Atkin supports the contentions which would have been put forward, if this court had called upon them, on behalf of the respondent companies in this case. In that case, there was an option, which had not been exercised in fact, to require payment in England. In the course of his speech, Lord Atkin used these words at pp. 177 and 178:

> I do not overlook that there is an option to be paid in England, that there is a clause stating that payment is to be made without deduction of British taxes, and, in particular, the weighty circumstance that the borrowers are the British government. But it is to be noted that the obligation to pay in England is secured only by the American pledge agreement, and that the provision as to British taxes is a provision which might well be inserted *ex majori cautela* in any contract under which a government has to make payment. But, taking all the circumstances into considera-

> tion, I think that the irresistible inference is that the proper law of the contract is American law, meaning thereby in this contract the law of the State of New York. I come to this conclusion without attempting to answer the question put in argument, what would have been the result of the issue in America in 1917 if there had been expressed in the pledge agreement or in the notes the term that the contract was to be governed by English law ?

I regard those words as meaning that, even if there is in the contract an option to have the amount remitted to England, in the view of LORD ATKIN the governing law would still be the law of New York. There are words to practically the same effect in the judgment of LORD RUSSELL OF KILLOWEN at p. 179 :

> I differ, however, from the Court of Appeal as regards the proper law of the contract, for in my opinion the proper law of the contract is the law which prevails in the City of New York. Both BRANSON, J., and the Court of Appeal would, I think, have been of this opinion too, had it not been for the fact that one of the contracting parties was the Crown. Their judgments on this point both proceed upon the view that because a contract cannot be enforced against a sovereign unless he submits himself to the jurisdiction of some court, and because a sovereign will presumably not submit himself to the jurisdiction of a foreign court, therefore the matter stands as if the parties had agreed to be bound by the jurisdiction and decision of the courts of a particular country, viz., the country of the sovereign. They both rely also upon certain *dicta* of LORD ROMILLY, M.R., in *Smith* v. *Weguelin* (2), and of LORD SELBORNE in *Goodwin* v. *Robarts* (3). The phrase " the proper law of a contract " is a phrase which, I conceive, bears the meaning attributed to it in r. 155 of Professor Dicey's rules, viz., " the law or laws by which the parties to a contract intended . . . the contract to be governed ; or (in other words) the law or laws to which the parties intended . . . to submit themselves."

I am definitely and clearly of opinion that the law which both parties, though they were living in England, intended to govern their rights and liabilities was the law of Chile. There are some words in the opinion of LORD ROCHE which appear to convey a slightly different meaning, but, on the whole, I have come to the conclusion that there is certainly nothing in that case, in the opinions of their Lordships, which compels me to say that, in considering what happened in London, we have to treat this matter as a matter to be determined by English law, and not by Chilean law.

I would like to record that there never has been any request by Mr. Beéche to remit these moneys to London or Europe, under the words of the contract relating to remission, except perhaps they can be inferred from the fact that the action was brought in London. One cannot possibly infer from that a request to remit from Santiago de Chile to Europe, because all that can be implied is a request to remit from London to Paris, which is quite a different thing, and is not the kind of thing contemplated by this contract.

For these reasons, I think that this appeal must be dismissed, with the usual consequences as regards costs.

SLESSER, L.J. : I am of the same opinion. The first question which arises in this case is : What law should be applied to the interpretation of the lease of the stores in Chile which we have had under consideration, and, more particularly, that part which deals with the consideration for the lease ? For the reasons stated by the judge, and by GREER, L.J., and, as I understand it, conceded by Mr. Miller, there is no doubt that this contract and its general construction must depend upon Chilean law. The domicil is said by both parties to have been elected as Santiago, for all purposes of the contract, which means they wish the contract to be considered as a contract made in that city, for the purposes of this case, although the companies are actually English companies registered in England. There are other reasons, such as the incorporation of sections of the Civil Code of Chile, and provisions as to powers of attorney, and other matters, which indicate, to my mind, that, without question, the intention of the parties, which is the matter primarily to be looked at, is that this contract should be construed according to Chilean law. But, says Mr. Miller, as I understand him, although that may be the general principle upon which this contract is to be construed, in so far as, under the provisions of the consideration for the lease, the owner has called upon the payment, whatever that payment may be, to be remitted to Europe according to his instructions, the principle which applies is what is known in international law as *lex solutionis*, and one has here to look at the place of performance, which is to be in Europe. Though I have had no difficulty in following many of the arguments which Mr. Miller addressed to us, I cannot understand this particular contention. What is here being debated is the construction of this contract. What has to be ascertained is the amount, be it in gold, in paper, or in other measurement of money, which has to be paid somewhere to the owner. That is a question of construction, and not a question of performance of the contract, the determination of that which has subsequently to be performed. That, by all views, must be taken to be a question of Chilean law, and not one of English law.

The case which was cited by Mr. Miller, *Chatenay* v. *Brazilian Submarine Telegraph Co.* (4), seems to me to deal with an entirely different question. There a contract was made by a Brazilian subject, and executed in Brazil, and a power of attorney was given to a broker in London to buy and sell shares. As was said by Lord Esher, M.R., it may be that, in different parts of the contract, different laws, in appropriate cases, might have to be applied. In that case, it was held, to quote Lord Esher, M.R., at p. 83: "[The performance] was to be wholly carried out in England." Here we are not dealing with the question of performance, but with the question of construction, which is a Chilean question. There is, though it is unnecessary to mention it, I think, a second objection which might be urged against Mr. Miller's contention on this point, assuming even that the *lex solutionis* was to be regarded. As I read this contract, the primary place of performance is to be Chile. It is true that, at the option of the owner, he may call upon the money to be remitted to Europe, and I read that obligation to remit to mean in its context remitted from Chile to Europe. In that case, the position is even weaker, from Mr. Miller's point of view, than was the situation in the case of *R.* v. *International Trustee for the Protection of Bondholders Akt.* (1), because there there was no question of remission. The bond simply stated that the obligation might be paid, at the option of the holder, in the City of New York or in the City of London. Nevertheless, in that case, as was pointed out by LORD ATKIN and by LORD A RUSSELL, in the passages to which GREER, L.J., has referred, the primary place of performance was New York, with the option of requiring performance in London. Their Lordships came to the conclusion that the intention of the parties was that the whole contract, in all its aspects, should be carried out in New York, apart from the question, which does B not arise here, as to the rights of a sovereign to carry his own laws with him, a point which was considered in the case of *Smith* v. *Weguelin* (2).

Chilean law being the law by which this contract has to be determined, our attention was called to an article in the Chilean Code, art. 1560, which undoubtedly does provide that, the intention of the parties being C clearly known, this should be abided by—which I understand means "should be understood," rather than the literal meaning of the words. How far that is an addition going to the equitable doctrine which applies in England, and finds its expression in the remedy of rectification, it is not necessary to inquire. In my view, on the finding of the judge here D on the facts, it is impossible to say that the parties have clearly proved that it was a mutual intention. Mr. Beéche does appear, as GREER, L.J., pointed out, to have said that he thought that he was contracting on the basis of a gold clause.

As GREER, L.J., has said, this being a question of foreign law, it is E a question of fact, and the judge, having regard to the opinions of the experts, and the authorities quoted by them, has come to the conclusion that it would not be right according to Chilean law to construe these words as meaning a gold clause, in the sense in which those words were used in the *Feist* case (5), but that they mean what the respondent com- F pany has contended, namely, a mere synonym for "Chilean pesos," that being in fact the definition of a Chilean peso to be found in the Monetary Law of 1925.

In those circumstances, Mr. Miller raises a second, and, as I understand it, alternative, case. He says: Even if this be not a gold clause, G it is an obligation to pay in gold pesos. There were no one peso gold coins, but there were, and this was recognised in the Law of 1892 and in earlier laws, coins called condors, equivalent to ten pesos. He says that there is an obligation to pay in gold in that form, and that, if it cannot be paid in that form, he is entitled to judgment for H an amount of paper equivalent to that amount of gold pesos.

The observations I have already made with regard to foreign law and the questions of fact and the decision of the judge seem to me to apply equally to this matter. It appears that, under art. 68 of decree 486 of 1925, the notes of the bank are to be received at par, and without any limit as regards quantity, in the payment of taxes and whatsoever other obligations, both public and private. That would seem to constitute the notes complete tender in that country. Mr. Miller, however, called our attention to the ensuing words, which are to this effect : " Notwithstanding, in private contracts payment may be stipulated in whatsoever other money." He argued that that is to keep alive the system which had previously obtained with regard to gold coinage, and said that the article, which repeals certain other provisions of the earlier law, does not apply to that particular law of 1892. On the other hand, it appears that by art. 20 of monetary law No. 606, also of 1925, it is provided :

> From the enactment of the present law, it shall no longer be obligatory to receive any foreign money in payment of debts or other obligations, with the exception of contracts entered into in accordance with law of Sept. 10, 1892, and in which a special currency is stipulated.

Under art. 21 of the same law, it is provided :

> All obligations contracted in legal tender, prior to the enactment of the present law, shall be fulfilled, peso for peso, in any of the units established in the present law and in accordance with its provisions.

It is said that the effect of that is that, although it is true that contracts may be made primarily for stipulations in other money, that refers to foreign currencies, and not to currencies or coinage of pesos in Chile. That is entirely a matter of Chilean law, which has to be determined on the evidence. In support of the views of the experts called on behalf of the respondent company, which the judge has accepted, there were cited authorities which are not for us to construe, but which were one of the grounds upon which the foreign experts gave their evidence, which do undoubtedly support their view, more particularly the cases of *Andreucic* and *Vergara*. It does appear, therefore, that, if the Chilean law be as stated and as found, it is now permissible to discharge an obligation of gold pesos in paper, as provided by the present currency law of Chile. That appears to be a sufficient answer to Mr. Miller's second point.

There remains the question of the remission of such moneys as may be decided, on that view, to be attributable to Mr. Miller's clients. I understand from the pleadings that a declaration is claimed as to the future position. It appears that the judge was of opinion that the present laws of Chile prevent the exportation from Chile of moneys which would be required to discharge these obligations. In my view, the judge was right when he came to the conclusion that the lease contemplated, not payment from anywhere in the world, but that, when the option is exercised, it must be an option of remission to Europe from Chile, from which it would follow that, if there be laws in Chile excluding the possibility of remission from that country, this contract can have its obligations discharged in Chile, but not elsewhere.

For these reasons, it seems to me that this appeal should fail.

MacKinnon, L.J. : I agree that this appeal should fail. It is only out of respect to the very careful and forceful argument of Mr. Miller that I think I need add anything.

The dispute concerns the construction of one clause in the lease of these premises at Santiago, namely, the clause which fixes the rent. The question is whether, as the tenant says, the clause specifies the amount of money of a certain currency which he has to pay, or whether, as the landlord contends, it specifies a certain weight of a commodity—
A to wit, fine gold—which is to be handed over, or its market value paid in its stead. The lease is in Spanish. This dispute, which has involved an argument on the part of Mr. Miller for the best part of 4 days, concerns solely the first sentence in art. 2, which contains 33 words in all in Spanish, of which only 28 are material. Except as to one word, when
B translated into English those 28 words are to this effect:

> The consideration for the lease is 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly which shall be paid at the option of the owner either in Santiago de Chile at the residence or office of the latter or of his representatives or remitted to Europe, according to the instructions which the owner may give.

The one word which is left in Spanish is "pesos." The word "peso"
C in Spanish has a double meaning, as our word "pound" has in English. It may mean weight, as I think "peso" does in Italian, or it may mean a Chilean or an Argentine coin; it is the equivalent of the peseta in Spain, the franc in France, or the lira in Italy. If one knew only that much, the meaning of this sentence might be doubtful. It might be a
D promise to pay 93,500 gold coins of a certain gold content or value, or it might mean a promise to hand over a certain weight of the commodity gold. The fact that "pesos" is in the plural, and that Spanish has retained declension in numbers, and that the word "pagados," which is translated "be paid," is relative to "pesos," and not to "oro," would
E point to the former meaning, though not at all conclusively. There is, however, further material for elucidating the meaning. The Chilean Monetary Law 606 of 1925, art. 1, says that the monetary unit of Chile shall be the peso and shall contain "183,057 millionths of a gramme of fine gold." Those are the exact words which are used in this clause.
F In fact no gold pesos ever have been coined, but the law, so far as Chile ever has been on a gold basis, fixed the amount of gold which could be demanded for peso notes or other tokens. Further, as I understand it, there was evidence to the effect that 183,057 millionths of a gramme of fine gold is $\frac{1}{40}$ of the amount of gold that was contained in the English
G sovereign, or was exchangeable for a £1 English note when England was, as she was in 1925, on the gold standard. In short, Chilean law made the gold standard value of the peso that of 6*d.* sterling. There is no dispute that the parties in this case had made a preliminary agreement that the rent should be £28,000 per annum. As 93,500 sixpences multi-
H plied by 12 gives £28,050, the selection of that number of pesos as the monthly rent is perfectly understandable. It seems to me obvious that the passage in the rent clause is directly referable to, and derived from, the monetary law of Chile of 1925. In short, the sentence might as well read: The consideration shall be 93,500 monetary units of Chile—that is, pesos—as defined by the law of Oct., 1925.

The result is that, purely as a matter of construction, I should not have the least doubt that the contention of the tenant was correct, namely, that the clause specifies the amount of money of a certain currency that is to be paid, and does not specify the amount of the commodity, gold, that is to be handed over, and the real truth is that, as to that matter of construction, the chief expert called on behalf of the plaintiff company agreed with it. However, the matter is not merely one of construction of the words that appear in the contract. I have no doubt whatever that the proper law applicable to this contract is the law of Chile, and, upon that point, I need add nothing to what has been said by my brethren.

Upon the ground that the proper law of the contract is the law of Chile, the plaintiffs rely upon certain provisions of the Civil Code, more particularly art. 1560. I think that that has to be read with certain other articles, arts. 1562, 1563, 1566 ; but I need not trouble about that. Art. 1560 deals with the intention of the contracting parties being clearly known. The translation says " provided by " ; I should imagine it probably means " given effect to," more than the literal meaning of the words. The plaintiffs say that, though the literal meaning of the words may be, as I think it clearly is, a promise to pay 93,500 Chilean pesos monthly, they can prove that the clear intention of both parties was that there should be handed over monthly a certain weight of fine gold.

With regard to that, it is to be observed that, if this matter arose, as it might have done, in English law, on a claim for rectification of the words written in the contract, if those words properly express the bargain made by the parties the plaintiffs in this case could not possibly have succeeded, because the words that are written in the contract were in fact drafted by Mr. Beéche himself, submitted *totidem verbis* by him to Sir Woodman Burbidge and Mr. Foucher, and, after consideration, accepted by the defendant company. In short, the plaintiffs cannot and do not dispute that these words written in the contract are the true words of the bargain. What they do seek to say is that, by agreement with the defendant company, they were to have a special meaning other than their literal meaning. They seek to establish that by giving evidence as to what passed at this interview in June, 1931, 5 years before the trial of this action. I am clear that, as a question of construction, the literal meaning of this paragraph in the lease is a promise to pay 93,500 Chilean pesos. If the plaintiffs rely on art. 1560 of the Civil Code, I am clear that the onus is on them to make it clearly known to us that Mr. Beéche and Sir Woodman Burbidge agreed that the words should have this other not literal and special meaning. This burden, I am quite clear, they have failed to discharge. Therefore, on the main question, I am satisfied that the judgment of Branson, J., was right. As to the other question, the question whether the plaintiffs have any ground for claiming that the money ought to have been remitted, that is the sort of question on which I need not add anything to what has been said.

I agree that the appeal fails, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Smiles & Co.* (for the appellants); *McKenna & Co.* (for A the respondent company).

Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Applied. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

B ROSE *v.* FORD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Roche), **April 27, 29, 30, June 25, 1937.**]

C *Negligence—Negligence causing death—Damages—Survival of action—Claim by administrator for benefit of deceased person's estate—Pain and suffering—Shortened expectation of life—Law Reform (Miscellaneous Provisions) Act,* 1934 (*c.* 41), *s.* 1 (1), (2).

As a result of a motor car collision, a woman aged 23 sustained a compound fracture of her right leg and thigh. Two days later, on Aug. 6, 1934, gangrene set in, and the leg was amputated, but the D infection had already spread above the point of severance, and on Aug. 8 she died. The deceased was in a state of coma for nearly all the four days after the accident. The father of the deceased woman, as her administrator, brought an action against the defendant to recover damages under the Fatal Accidents Act, 1846, and, in addition, under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of (*a*) pain and suffering, (*b*) the loss of the leg, and (*c*) the shortening of reasonable E expectation of life of the deceased. It was admitted that the collision was due to the negligence of the defendant (the present respondent). The questions raised in the appeal were as to what cause of action against the respondent was vested in the deceased at the time of her death, and, by virtue of the said Act of 1934, survived for the benefit of her estate, and as to the basis upon which damages in respect thereof should F be assessed. No question was raised in the appeal as to the cause of action under the Fatal Accidents Act, 1846:—

HELD: (i) a living person can claim damages for loss of expectation of life.

(ii) such right vested in the deceased in life, and, on her death, passed to her personal representative, under sect. 1 of the Act of 1934.

(iii) there was no duplication of damages under the Act of 1934 and G the Fatal Accidents Acts. *Per* LORD WRIGHT: if provision is made for dependants under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced.

Decision of Court of Appeal (SLESSER and GREENE, L.JJ., GREER, L.J., *dissenting*), [1936] 1 K.B. 90, *reversed.*

[EDITORIAL NOTE. At the trial of this case, HUMPHREYS, J., considered that H the reason for giving damages for loss of expectation of life in *Flint* v. *Lovell* (1) was the mental pain and suffering from the contemplation of that loss. The Court of Appeal and the House of Lords are all agreed that this was a mistaken view and hold that, in a case where a person is not killed by the accident, the damages should, and generally have, included a sum for loss of expectation of life, and the loss of that expectation is a loss of something of value, and when occasioned by negligence gives rise to a right to recover damages for the loss. The only question upon the appeal to the House of Lords is whether, in cases where the injured person dies, such right survives to the personal representative, or whether, despite the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, the common law doctrine laid down in *Baker* v. *Bolton* (3) still prevails to prevent such survival. The House were unanimous in their opinion that such a cause of action vested in the deceased before his death and survived to the personal representative, and that it was quite a separate cause of action from any pain or suffering. The question that has been raised whether there can be such a cause of action where a man is killed instantaneously by an accident is not dealt with, but the reasoning of the judgments herein would seem to suggest that there would and that the right to damages would survive to the personal representative. A paragraph at the close of the opinion of Lord Roche deals with the possibility of this decision causing an inflation of damages in accident cases, but there, as with the difficult question of making any assessment at all of such damages, one must rely upon the common sense of the tribunal.

As to Damages Recoverable in Cases of Negligence Causing Death, see HALSBURY, Hailsham Edn., Vol. 23, pp. 690, 691, paras. 975, 976 ; and for Cases, see DIGEST, Supp., Negligence, Nos. 953*b*-953*e*.]

Cases referred to :

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354 ; Digest Supp. ; 104 L.J.K.B. 199 ; 152 L.T. 231.

(2) *Admiralty Comrs.* v. *S.S. Amerika*, [1917] A.C. 38 ; 36 Digest 128, *846* ; 86 L.J.P. 58 ; 116 L.T. 34.

(3) *Baker* v. *Bolton* (1808), 1 Camp. 493 ; 36 Digest 127, *843*.

(4) *Armsworth* v. *South-Eastern Ry. Co.* (1847), 11 Jur. 758 ; 36 Digest 140, *941*.

(5) *Phillips* v. *London & South Western Ry. Co.* (1879), 5 Q.B.D. 78 ; 17 Digest 176, *784* ; 41 L.T. 121.

(6) *Halliday* (*or Reid*) v. *Lanarkshire Traction Co.*, [1934] S.C. 79.

(7) *M'Master* v. *Caledonian Ry. Co.* (1885), 13 R. (Ct. of Sess.) 253.

(8) *Jackson* v. *Watson & Sons*, [1909] 2 K.B. 193 ; 36 Digest 128, *851* ; 78 L.J.K.B. 587 ; 100 L.T. 799.

(9) *Osborn* v. *Gillett* (1873), L.R. 8 Exch. 88 ; 36 Digest 138, *930* ; 42 L.J.Ex. 53 ; 28 L.T. 197.

(10) *The Vera Cruz* (*No.* 2) (1884), 9 P.D. 96 ; 30 Digest 194, *686* ; 53 L.J.P. 33 ; 51 L.T. 104.

(11) *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141 ; 36 Digest 122, *810* ; 53 L.J.Q.B. 476 ; 51 L.T. 529.

(12) *Fitter* v. *Veal* (1701), 12 Mod. Rep. 542 ; 17 Digest 87, *59*.

(13) *Slater* v. *Spreag*, [1936] 1 K.B. 83 ; Digest Supp. ; 105 L.J.K.B. 17 ; 153 L.T. 297.

(14) *Liesbosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449 ; Digest Supp. ; 102 L.J.P. 73 ; 149 L.T. 49.

Appeal from an order of the Court of Appeal setting aside so much of the judgment of Humphreys, J., in favour of the appellant as adjudged that he should recover £500 under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, as damages, and in lieu thereof entering judgment for the appellant for the sum of £22 as damages under the said Act without costs, and dismissing with costs the appellant's cross-appeal against the amount awarded by the said judgment as damages under the said Act of 1934. The facts and the arguments are fully set out in the judgments and the relevant section of the Act of 1934 is set out in the opinion of Lord Wright.

Marquis of Reading, K.C., Arthur Ward and *A. H. Glenn Craske* for the appellant.

Sir William Jowitt, K.C., R. P. Croom-Johnson, K.C., and *Montague Berryman* for the respondent.

A LORD ATKIN : My Lords, this case involves a question of damages for personal injury in a claim brought by the administrator of the injured person under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The deceased was a girl of 23 years of age who was seriously injured in a motor car collision by reason of the negligent driving of the B respondent, the defendant. The accident happened on Aug. 4; the girl's right leg was seriously injured; on Aug. 6, it was amputated, and on Aug. 8, she died, as the direct result of the injury to the leg. The plaintiff, the father, who had taken out letters of administration to the girl's estate, sued in two capacities: first, to recover damages for himself C and his wife as dependants under the Fatal Accidents Acts, 1846 to 1908; second, to recover damages for the benefit of the estate of his daughter under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The case was heard before HUMPHREYS, J. Under the first head, he awarded £300 damages. The judge further awarded D the sum of £29 2*s.* 11*d.* special damage, which included funeral expenses, and this sum has been treated as awarded under the first head. On this sum of £329 2*s.* 11*d.* no further question has arisen. Under the second head, the judge awarded the sum of £500 for pain and suffering and the loss of the right leg. He refused to award any damages for loss of E expectation of life, being of opinion that the only ground for such damages was the mental suffering caused to the girl by the shortening of her expectation of life, and that, in the circumstances of this case, no such pain or suffering was proved.

The defendant appealed against the award of £500, and the plaintiff F cross-appealed against the refusal to award damages in respect of loss of expectation of life. In the Court of Appeal, all the members of the court were agreed that the judge was mistaken in thinking that the reason for giving damages for loss of expectation of life in the decision in *Flint* v. *Lovell* (1) was mental pain and suffering from contemplation G of the loss. The majority, however, SLESSER and GREENE, L.JJ., held that no such damages could be recovered after the injured person had died. GREER, L.J., was of opinion that the right to such damages vested in the injured person at the moment of injury, and survived to the administrator. All the judges were agreed that there could be no H damages for loss of the leg other than for the loss for four days. They agreed that damages for pain and suffering and loss of leg should be reduced to £22. They were also all agreed that, if damages for loss of expectation of life could be given, the proper sum was £1,000. In the result, the damages of £500 awarded by the trial judge were reduced to £22. The appeal succeeded to that extent, and the cross-appeal was dismissed. The appellant appeals, therefore, in respect of appeal and cross-appeal.

My Lords, it appears to me important to distinguish between two principles of law which are involved in this case. The first is that claims for personal injuries caused by tort by the common law did not survive to the executor: *actio personalis moritur cum persona.* The second is that the law did not recognise the death of a person as giving a claim for damages. This had no application to the death of a supposed plaintiff, for the first maxim prevented his personal representatives from suing, but, if a third party negligently killed either wife or servant of the plaintiff, he could not recover. The rule is crystallised in *Admiralty Comrs.* v. *S.S. Amerika* (2). The reasons given, whether historical or otherwise, may seem unsatisfactory, but it is of little purpose, in a legal decision, to criticise them, for the rule has the authority of this House. But the question is, does the rule affect the calculation of damages the right to which is vested in a living person? Now, in *Flint* v. *Lovell* (1) the plaintiff was alive at the trial. Indeed we are told that he is still alive. The Court of Appeal held that, if a person suffered personal injuries from negligence, there could be included in the estimate of damages consideration of the fact that, by the wrongful injury, his normal expectation of life had been shortened. My Lords, this decision seems to me simple and inevitable, and I am satisfied that it has always been a usual element in assessment of damages in such cases. A man is injured in the prime of life. Evidence is given that he is not likely to live more than two or three years. The tribunal estimating damages will take this fact into account, not only in estimating actual money loss, for he may not be in a position to earn, or be capable of earning, anything, but also as an item of personal damage. It does not seem to me necessary to say that a man has a personal right, of the nature of property, in his life, so that, when it is diminished, he loses something in the nature of valuable property. I do not say that this is not so, but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life, and that the loss, *damnum*, is capable of being estimated in terms of money, and that the calculation should be made. There seems to me to be a substantial distinction between damages awarded to the living because life is shortened and damages to a third person because of some other person's death. I see no reason for extending the illogical doctrine of the *Amerika* case (2) to any case where it does not clearly apply. As to the supposed foundation of the doctrine in the law relating to felony, I will only say that, if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum, for deaths by negligence are often not felonious, and, where they happen more than a year and a day after the wrongful act, cannot be.

I am of opinion, therefore, that a living person can claim damages for loss of expectation of life. If he can, I think that right is vested in him in life, and, on his death, under the Act of 1934, passes to his personal representative. I do not see any reason why the fact that the expectation is realised, i.e., that death comes at the time anticipated, or sooner, should make any difference. How the damages are to be calculated is A a question which this House has not to decide, for there has been no quarrel with the amount, fixed by the Court of Appeal, in this case of £1,000. Whether the rich man's life has greater potentialities of pleasurable enjoyment than the poor man's, and what consideration should be given to physical weaknesses other than those caused by the accident, B and not affecting the duration of life, I prefer to consider when, if ever, the points are raised. I can see the possibility of discussion in the provision of sect. (2) (*c*) that the damages "shall be calculated without reference to any loss or gain to his estate consequent on his death." Plainly this does not mean that his estate is not to gain by the award of C any damages at all, for this would be absurd. Can the damages include a calculation of loss of income which the deceased would have received during normal expectation of life, but would not have saved so as to increase his estate? I express no opinion. As to the damages for loss of the leg, I think that it must be taken that the award of £1,000 assumed D a normal two-legged life. If so, no further damages can be given for the particular loss, and I express no opinion as to whether, on another basis of calculation, the Court of Appeal would be right in fixing the damages in respect of the loss of the leg for four days only.

I should add that I see no difficulty as to the alleged duplication of E damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase to the deceased's estate in which they take no share should affect the F measure of damages to which they are entitled under the Act.

For these reasons, I am of opinion that the appeal should be allowed, that the order of the Court of Appeal on appeal and cross-appeal be set aside, that the judgment of HUMPHREYS, J., be varied by increasing the sum awarded under the Law Reform (Miscellaneous Provisions) Act, G 1934, to £1,022 and directing that judgment be entered for the plaintiff for £1,351 2*s.* 11*d.* with costs, and that the defendant do pay to the plaintiff the costs of the appeal and cross-appeal, and the costs in this House appropriate to a successful pauper appellant.

H **LORD THANKERTON**: My Lords, I concur.

LORD RUSSELL OF KILLOWEN: My Lords, the legal personal representative of the deceased girl, bringing an action under and by virtue of sect. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, recovered damages for the benefit of her estate under two heads, viz.,

(i) special damage, including funeral expenses, £29 2*s.* 11*d.* and (ii) £500 for pain and suffering, including the loss of a leg. I disregard the further sum of £300 recovered for the benefit of dependants under the Fatal Accidents Acts, as to which no question arises. HUMPHREYS, J., who tried the action, refused to award any damages for the girl's loss of expectation of life, which damages had been claimed upon the authority A of *Flint* v. *Lovell* (1). He thought that the basis of that decision was the view that damages should be awarded for the suffering caused to a person by the knowledge that the term of her life had been shortened, and that, as there was no evidence that any such suffering had been caused to the girl, no damages could be awarded. The defendant appealed against B so much of the judgment as awarded the £500. The plaintiff, by notice of cross-appeal, asked to have the damages awarded for the benefit of the estate increased by a sum of damages in respect of the shortening of the girl's expectation of life. The Court of Appeal unanimously reduced the £500 to the sum of £22, composed of £20 for pain and suffering, and C 40*s.* as damages for the loss of the leg, those damages being treated as nominal in view of the fact that the girl lived for only two days after the amputation. On the cross-appeal, the court was not unanimous, except upon two points. They agreed that, if damages for loss of expectancy of life were recoverable, the amount should be fixed at the sum of £1,000. D They further agreed that HUMPHREYS, J., had taken a wrong view as to the basis of the decision in *Flint* v. *Lovell* (1), the basis of that decision being that a person may obtain damages *simpliciter* for the shortening of his expectation of life, not for the pain which he suffers from the knowledge that his life will be of shorter duration. E

GREER, L.J., was of opinion, upon the authority of *Flint* v. *Lovell* (1), that such damages would have been recoverable by the deceased, that such damages, therefore, were damages which the defendant would have had to pay in respect of the cause of action vested in the deceased at her death, and that, accordingly, the right to them survived to her F legal personal representative, by reason of the words of sect. 1 of the Act of 1934. SLESSER and GREENE, L.JJ., took a different view. SLESSER, L.J., while being of opinion that the deceased could have sued for and obtained damages for loss of expectation of life, held that no cause of action on this head could survive for the benefit of her estate, G his reason, apparently, being that it would be essential to prove *at the trial* that she then possessed an expectation of life which the defendant's negligence had curtailed, and that this proof had become impossible by reason of her death. That is what I understand SLESSER, L.J., to mean when he says, at p. 107: H

> Before the passing of the 1934 Act, her death would have put an end to such right of action as she possessed by reason of the *actio personalis* doctrine; that right now survives, but, nevertheless, I do not think it operates to extend the condition on which she would otherwise have had to rely—namely, that she, a living person, *still* possessed an expectation of life which the accident had curtailed.

He then holds, on the view that her death converted the defendant's wrongful act into a felony, that to award damages to the estate for the girl's loss of expectation of life would in fact be to award damages in respect of the felony of causing her death, within the principle of the *Amerika* case (2). GREENE, L.J., thought that the principle laid down in *Flint* v. *Lovell* (1) should be confined to cases where the injured person is still alive at the date of the action, and that, in the present case, the substance of the claim was a claim by an administrator for damages for loss of the deceased's life, and not a claim originally vested in a living person. He also relied on the *Amerika* case (2).

My Lords, I find a difficulty, if *Flint* v. *Lovell* (1) was correctly decided, in following the reasoning of the majority in the Court of Appeal. The question which we have to consider is not what would be the rights of a deceased person if defined and adjudged at some date subsequent to his or her death; nor is there any question of extending any principle. It is simply a question of the meaning and effect of the Act of Parliament which, as I read it, has made available and realisable for the benefit of a dead person's estate causes of action which were vested in him when alive. Sect. 1 (1) does not apply to certain specified causes of action, but, with those exceptions, which are irrelevant to this case, on the death of a person after July 25, 1934, I quote the relevant words: "all causes of action . . . vested in him shall survive . . . for the benefit of his estate." Sect. 1 (2) restricts the damages recoverable. They are not to include exemplary damages, and, where the death has (as here) been caused by the act or omission which gives rise to the cause of action, the damages recoverable are to be calculated without reference to any loss or gain to the estate consequent on the death, except that a sum in respect of funeral expenses (which would be such a loss) may be included. Sect. 1 (2) has no application to the present case, for the damages claimed are not for loss to the estate consequent on the death, but for loss to a living person consequent on the wrongful act of the defendant.

My Lords, I agree with GREER, L.J., that the object of the statute, as appearing from its language, is to put a person who has, by his negligence, caused damage to someone who has subsequently died in the same position as regards liability (subject to certain qualifications which do not apply to the present case) as that in which he would have been if the injured person had sued and recovered judgment while still alive. If *Flint* v. *Lovell* (1) was correctly decided, there was vested in Mabel Alice Rose before she died a cause of action which entitled her to sue for and obtain judgment for £1,000 damages in respect of her loss of expectation of life. Under the section, that cause of action is made to survive for the benefit of her estate, and, so surviving, is enforceable by her legal personal representative against the defendant. I can see no escape from the plain words of the section.

The question then remains, was *Flint* v. *Lovell* (1) correctly decided? I think it was. I am of opinion that, if a person's expectation of life is curtailed, he is necessarily deprived of something of value, and that, if that loss to him is occasioned by the negligence of another, that other is liable to him in damages for the loss. That cause of action was vested in the deceased before and when she died, and, by virtue of the Act of 1934, it survives for the benefit of her estate. It is no new cause of action created by that Act ; it is a cause of action existing independently of the Act, which by the Act is preserved from the extinction which the A death of the deceased would otherwise have brought about.

In regard to the suggestion that this claim is in some way defeated by the doctrine enunciated in *Baker* v. *Bolton* (3), and affirmed by this House in the *Amerika* case (2), I am unable to appreciate how that doctrine can have any application here. As I understand the doctrine, B it is this, that at common law no one can maintain an action against a person who by his wrongful act, neglect or default, has caused the death of another. The action there contemplated is clearly not an action by anyone asserting a claim in right of the deceased, but an action by a person asserting a claim in his own right to be recouped the damages C occasioned to him personally by the death of the deceased. That common law doctrine is capable of alteration by statute, and the Fatal Accidents Acts exemplify such an alteration. But the Act of 1934 stands on quite a different footing. It in no way affects or deals with the common law doctrine. It creates no cause of action against a person causing the D death of another, for damages occasioned to the plaintiff by that death. It does not (except as regards funeral expenses) contemplate, much less does it create, any cause of action in anyone for damages resulting from death. What it does is (with certain exceptions) to preserve, notwithstanding the death of a person, all causes of action vested in that person E when he died, but the claim to be asserted is a claim in right of the deceased person.

For the reasons which I have endeavoured to indicate, I would allow the appeal, the plaintiff recovering judgment for the sum of £1,000 in addition to the sum covered by the order of the Court of Appeal. F

In regard to the reduction of the damages for the loss of the leg to a nominal sum, I think that a jury at the trial might, in assessing the damages claimed on behalf of the estate for the loss of the limb, properly be influenced by the fact that, in the events which actually happened, the use of the limb was lost for only a nominal period of time; I am not G prepared to disagree with the views and conclusions of the Court of Appeal in this regard.

Lord Wright : My Lords, this appeal requires your Lordships to decide an important question of construction arising on the Law Reform (Miscellaneous Provisions) Act, 1934. The portions of the Act which H are material are those contained in sect. 1, which are referred to in the statutory heading of the Act which describes it as "An Act to amend the law as to the effect of death in relation to causes of action." The vital words are to be found in sect. 1 (1) :

> Subject to the provisions of this section, on the death of any person after the

> commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.

The various qualifications which follow do not touch the essential scope of this provision. They are not in fact directly material for the decision of this case, but may be summarised thus. There is first a proviso that the survival of causes of action is not to apply to certain specified claims for damage, namely, for defamation, seduction, enticing away a spouse, or adultery. Next, specific restrictions are placed on the amount of damages recoverable in certain cases where the Act applies; thus, exemplary damages are excluded, and, in the case of a breach of promise to marry, the claim is limited to the damage, if any, to the estate. Then, in sect. 1 (2) (*c*), there is the important proviso that:

> where the death of that person has been caused by the act or omission which gives rise to the cause of action [the damages] shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

The other terms of the section, and the terms of sect. 2, may, so far as material, be left for reference later. I need here observe only that sect. 1 (5) and sect. 2 deal with a different form of action, that is, an action brought by, and for the benefit of, a limited class of third persons who have suffered particular damage by the death. Such actions are statutory, and were first made competent under the Fatal Accidents Act, 1846, and are maintainable only under the particular limitations and conditions specified in that Act and the later amending Acts. They are independent of the survival of the cause of action in or against the dead man, that is, in or against his personal representative. The purpose of these Acts was to abolish, in a special and particular way, the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died. This rule was expressed in the maxim *actio personalis moritur cum persona*. I do not intend to discuss the early history of this rule. No one has claimed that it is logical. The legislature and the judges have from time to time limited its application, but have done so on the basis of convenience rather than of logic. One most important type of personal actions, that of actions for breaches of contract, was long ago held to be outside its range, so that, for personal wrongs of that character, compensation for the benefit of the estate was recoverable just as if the plaintiff had not died. It was, however, settled that, if, in the case of what were called "purely" personal wrongs, a category which included torts of negligence causing personal injuries, the victim died before judgment, the action abated, with the result that the wrongdoer paid, and the victim's representative received, no compensation. I have made these brief observations because they constitute all the extraneous matter which, to my mind, is necessary for the construction of the Act. I have stated, I think sufficiently, the existing law, and the existing mischief, in view of which the measure was enacted. No other extraneous considerations are either necessary or permissible. The words of the Act must, with this introduction, be construed as they stand.

The first sentence of sect. 1 (1) is perfectly general, and is unqualified, save in so far as express limitations follow. These limitations must receive effect where they apply. But they also throw light on the general scope of the opening words. They identify certain wrongs, which *prima facie* would have fallen within the Act, by expressly excluding them. Again, sect. 1 (2) (*c*) is especially significant, because it particularises certain classes of losses and gains. It presupposes that damages may, in general, be calculated where death has been caused by the wrong, but excludes from the calculation losses or gains to the estate consequent on the death. I need not examine the full scope of this proviso, which is not directly material in this appeal. Obvious instances of what are referred to are such items as, on the one side, insurance moneys falling due on death, and, on the other, annuities ceasing on death. These are irrelevant to the question of what damages can survive, because the dead man could neither have collected such gains nor experienced such losses. They are subsequent to, and only remotely, for present purposes, connected with, his death. Funeral expenses form a clear example of the same category. The claim now in question is, by contrast, one for personal injuries suffered by the deceased girl while alive. The provision I have just discussed is, however, material to meet the contention that, where the wrong has caused death, damages for that wrong are to be calculated only after eliminating altogether the fact that death has been caused. I shall later discuss that contention more fully. It is enough here to say that it seems to contradict the unqualified words of sect. 1 (1) and also the implication of sect. 1 (2) (*c*). It is also, I think, incorrect to say that the Act creates no new rights. Sect. 1 (5) in express terms refers to the rights conferred by this Act. The Act gives rights of survivorship where, before the Act, there was no such right. It gives a new right, because it prevents a right from being extinguished. It is, however, true that the personal representative has no right but that which the deceased, if alive, could have enforced.

The facts of this case are simple. Mabel Alice Rose was, on Aug. 4, 1934, injured in a collision between the motor cycle combination, in which she was riding as a passenger, and a motor car driven by the respondent. At the time of the accident she was a strong healthy girl of 23 years of age. She was very seriously injured, her right leg being fractured in two places. At the hospital, on Aug. 6, it was found necessary to amputate her leg, as gangrene had set in. The amputation was not successful, and she died on Aug. 8. The doctor gave evidence that the girl was conscious at times while in hospital, but in a state of coma. It was not denied that the collision was due to the respondent's negligence. The appellant, as administrator of the deceased girl's estate, issued a writ against the respondent. He claimed damages under the

Fatal Accidents Acts on behalf of himself and his wife as dependants. He also claimed damages, under the Act of 1934, as for a cause of action which had vested in the girl while alive, and survived for the benefit of the deceased's estate. The action was tried before HUMPHREYS, J., without a jury. Liability was not denied, but the proper measure of A damages was the subject of dispute. The judge awarded to the appellant £300 under the Fatal Accidents Acts. Under the Act of 1934, he awarded £500, with £29 2*s*. 11*d*. for special damages, including hospital and funeral expenses. The appellant's counsel at the trial had claimed that the general damages should be calculated with reference to three elements, B pain and suffering, loss of the leg, and shortening of expectation of life. The judge held that, under the Act, the estate of the deceased person was entitled to recover any damages which the deceased herself could have recovered. He treated the damage under the Fatal Accidents Acts as a separate matter, in virtue of sect. 1 (5) of the Act of 1934. C He awarded general damages of £500, to cover pain and suffering (which could not, he held, be serious or prolonged on the facts), and to cover also loss of the leg, which he said was a permanent loss, to be regarded as a great deprivation, and a cause of substantial damage. He seems to have proceeded on the view that the common law would take the D infliction of the serious injuries, which in a moment converted the girl from a healthy human being into a crippled wreck, as a ground for substantial damages, whether she died or not. He rejected the claim for the shortening of the expectation of life based on the decision of the Court of Appeal in *Flint* v. *Lovell* (1). His ground for doing so was that E there was no evidence of mental suffering caused to the girl by the shortening of the expectation of life. This he regarded as the basis of that decision. On appeal, the Court of Appeal unanimously held that the elements of damage should be separately analysed and considered. The court held that substantial damages could not be given for pain F and suffering, as the girl lived only four days after the accident, or for the loss of the leg, as she lived only two days after the amputation. They awarded £20 for the former and £2 for the latter element of damage. But they differed on the question as to whether damages could in law be given in respect of the shortening of the expectation of life, though G they all agreed that, if such damages were allowable, £1,000 was a proper sum. They all agreed, also, that the judge was wrong in thinking that the decision in *Flint* v. *Lovell* (1) rested on the victim's mental suffering, caused by contemplating that her life was being shortened. But they differed on the question as to whether the loss of the opportunities of H working, and enjoying the normal period of life, was admissible as an element of damage. GREER, L.J., thought that it was because it was a head of damage vested in the deceased at the time of her death, on the principles of *Flint* v. *Lovell* (1). SLESSER and GREENE, L.JJ., came to a different conclusion, holding that this element of damage should in law be excluded. They distinguished *Flint* v. *Lovell* (1) on the ground that the plaintiff there was a living person when the action was tried. GREENE, L.J., thus summed up his opinion at p. 110 :

> The principle laid down in *Flint* v. *Lovell* (1) is to be confined to cases where the injured person is still alive at the date of the action. It appears to me to be no more possible to disregard the fact of death in the case of the claim for damages for loss of expectation of life than it is in the case of the loss of the leg. The substance of the claim on the facts of the present case is, in my opinion, a claim by an administrator for damages for loss of the deceased's life, and I do not think that it can be treated as a claim originally vested in a living person for damages for loss of expectation of life upon the principle of *Flint* v. *Lovell* (1). A

This way of looking at the case involves, in my judgment, a failure to give effect to sect. 1 of the Act of 1934. The moment before the girl died, there was, as I think, apart from her actual death, a cause of action B vested in her, for deprivation of loss of expectation of life. Before the Act, that cause of action would have ceased with her death. That same cause of action, by force of the Act, now survives in the administrator. It is not correct to say that the administrator acquires, under the Act, a new or changed cause of action, as would be the case if he were a third C party suing for the deceased's death. Obviously, she could not have sued herself for her own death. The administrator simply stands in the shoes of the deceased, and, in a sense, may be said to continue her life. The damages for loss of expectation of life are indeed on a different footing from those for loss of the leg. The former damages are to be D based on her state, as a young and healthy woman, with the use of both legs, at the moment before she was struck down. If, in addition, she got damages for the loss of her leg for the period of the normal expectation of life, she would be getting *pro tanto* damages twice over. But, on the view of the Court of Appeal, the defendant would be in the para- E doxical position of being entitled to plead, in mitigation of damage, that he had not merely maimed, but killed, the plaintiff. It was some such idea that, before the Act of 1934, inspired the cynical comment that it was cheaper to kill than to maim or cripple. The Act has, however, not merely stated that it is amending the law as to the effect of death F in relation to causes of action, but has done so. The fact that the plaintiff has died before judgment is now in truth an irrelevant circumstance, save that it obviates, to some extent, the necessity of medical evidence, that the accident has shortened the person's life. The damage claimed is not for the death, for which the victim herself could not have sued, G any more than can the administrator, who merely stands in her shoes. I venture respectfully to think that the view of the Court of Appeal illustrates a tendency common in construing an Act which changes the law, that is, to minimise or neutralise its operation, by introducing notions taken from, or inspired by, the old law which the words of the H Act were intended to abrogate, and did abrogate. A similar tendency is illustrated, I think, by the references to a dogma, of somewhat obscure import and uncertain application, that, in a civil court, the death of a human being cannot be complained of as an injury. For reasons already stated, that is not what is complained of here by the administrator, any more than it would, or could, have been complained of by the girl, if alive at the date of trial. But I shall discuss this point more fully later, observing merely, at the moment, that the objection appears to me to be irrelevant.

In passing, I shall seek to eliminate a possible source of confusion, tentatively touched on in the judgment of Slesser, L.J., by very briefly adverting to the question of felony in relation to the girl's death. There is—indeed here it is admitted—no reason to suggest that the negligence of the defendant, which caused the girl's death, was felonious. In any event, whatever the old law may have been, the modern law is quite clear that, if the act complained of constitutes a felony, the civil remedy is not drowned, but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism, now that the police prosecute, or are assumed to prosecute, in every case of probable felony. Nor do I see how it can ever be alleged, in any case where a person has been killed by negligence in driving a motor car, or by any other negligence, that the act is felonious, unless and until the jury have so decided. No pleader would, I imagine, go out of his way to allege felonious negligence.

I can now deal with the argument strenuously pressed by Sir William Jowitt, that *Flint* v. *Lovell* (1), which bound the Court of Appeal, was wrongly decided. If it was, it becomes irrelevant whether, at the time of the trial, the injured party is living or dead. Damages for loss of expectation of life, or for shortening of life, it is said, cannot in law form an admissible element of damage. In *Flint* v. *Lovell* (1) the facts, very briefly stated, were that the plaintiff was, at the date of the trial, living. He was awarded £4,400, as damages for injuries sustained owing to the defendant's negligence, by Acton, J., who tried the case without a jury. In enumerating the circumstances which he took into account in assessing the damages, the judge found that the plaintiff's life would be materially shortened, that he was not expected to live more than a year, that he had lost the prospect of an enjoyable, vigorous and happy old age. Such was the medical evidence, which, like other sworn evidence, may have been mistaken ; but, if the injured party died before the trial, that doubt on the facts would at any rate be excluded. The defendant on appeal objected that the amount awarded was excessive, because, among other reasons, the judge had included that particular element of damage. The Court of Appeal unanimously upheld the judge on that point of principle. I think their decision was right. I accept here the statement of Parke, B., in *Armsworth* v. *South-Eastern Ry. Co.* (4), used, perhaps, in a somewhat different context, that a man has a legal right in his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering, and disability, but also in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. It is true that it has been considered that it is impossible to form an estimate of the value of human life, whether to the man himself or to others connected with him, to quote again the words of Parke, B., in *Armsworth's* case (4), but, in that very case, Parke, B., was directing the jury to award damages under Lord Campbell's Act. It was the first case under that Act, and Parke, B., did not, it seems, appreciate the precise limits which were subsequently to be fixed for assessing the damages claimable by dependants. He seems to have directed the jury as if they were to award general damages for loss of the deceased man's life. He warned them that they could not give an exact compensation, which, he said, was impossible, just as much as in the case of loss of limb, or a wound; they were not to consider the value of existence as if bargaining with an annuity office, but were to calculate all accidents and give a fair compensation.

This direction might, it seems to me, in principle be applied to a case where a man's life has been wrongfully shortened, and damages are claimed under the Act of 1934. It answers the objection that it is impossible to put a value on human life. In the case under appeal here, all the members of the Court of Appeal were able to fix on £1,000 as a fair compensation for shortening of life. Acton, J., was able to include some sum in the damages awarded in *Flint* v. *Lovell* (1). In one sense, it is true that no money can be compensation for life, or the enjoyment of life, and, in that sense, it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all, because none could be adequate. I do not think it can be said that the idea of taking this element of damage into calculation is novel. Acton, J., a very experienced judge, took it into account as a matter of course. I observe that, in the summing up of Field, J., to a special jury, in *Phillips* v. *London & South Western Ry. Co.* (5), the judge refers specifically to the plaintiff's "prospect of a speedy death" as a matter which the jury were entitled to take into account. I remember, in my own experience while a judge of Assize at Manchester, some years before 1934, in a personal injuries case, that an element of damage of this nature was left to the jury without objection, even though the plaintiff was kept in ignorance that his life was being seriously shortened by cancer supervening on the injury. Your Lordships in argument were referred to two Scottish authorities. In *Halliday* v. *Lanarkshire Traction Co.* (6), Lord Sands, after putting the fanciful case of a Chinaman bartering for a price to induce him to commit suicide, in which case he would be compensated for loss of life, by having money to leave, observed that it was proper to leave to the jury the matter of shortening of life as an element to be taken into consideration in measuring the damage suffered by the deceased, and to leave it to them, without any strict analysis of the content, to assess it in a moderate way. He added that the doctrine of award in respect of shortening of life was now matter *positivi juris*, irrespective of the presence or absence of the sufferer's state of mind. In an earlier case, *M'Master* v. *Caledonian Ry. Co.* (7), INGLIS, Lord President, and LORD ADAM both referred to shortening of life as A an element of damage. In both these cases, the injured man had died before the trial, but the circumstances were such that, by Scots law, which is different from English in this regard, the action by the representative was competent.

I think that, both on principle and on authority, this element of B damage—that is, for the shortening of life or for the loss of the normal expectancy of life — was properly taken into calculation in *Flint* v. *Lovell* (1), and should be considered here, as GREER, L.J., thought. The jury should be directed that they are entitled to take it into consideration along with other relevant elements of damage, using their common C sense to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant, or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties. The judge or jury must do the best they can, in the circumstances, in this as in other cases. The precedents cited D above show that an assessment can be made.

These considerations seem to me to dispose of the appeal in the appellant's favour, but I must briefly advert to arguments based on the decision of this House in the *Amerika* case (2), or perhaps, rather, to *dicta* to be found in it. In that case, as LORD SUMNER pointed out, E at p. 60, the maxim *actio personalis moritur cum persona* was irrelevant, because the maxim relates to the death of one of the parties to the action (the *persona*), whereas, in the *Amerika* case (2), both plaintiff and defendant were alive. The Admiralty had claimed to include in their damages, consequent on a collision for which the owners of the *Amerika* F were liable, sums which they had paid by way of pensions to the relatives of seamen drowned in the collision, One sufficient ground on which this House disposed of that claim was that the payments were voluntary, and hence did not directly flow from the collision, but were too remote. But, in addition, their Lordships dealt with an G alternative defence, viz., that the law did not allow damages in favour of a plaintiff resulting from the death of a third party caused by the negligence for which the defendant was liable, as, for instance, damages for loss of service, if master or servant, or of *consortium*, if husband and wife, or of pensions. I need not discuss the judgments H on this point given by LORD PARKER and LORD SUMNER, or the criticisms which have been passed upon them. It is enough to say that, just as the maxim *actio personalis* was irrelevant to the case, so is the case irrelevant to a discussion of *actio personalis*, and, in particular, to a discussion of the effect of the Act of 1934, which abolishes the maxim. But it is said that this House approved of the rule in *Baker* v. *Bolton* (3).

In that case, Lord Ellenborough is reported to have said that "in
a civil court the death of a human being could not be complained of as
an injury." These words, it was contended, have the same sanctity
and universality of application as if they were to be found in an Act
of Parliament of general scope. But it may be noted that this House
did not, in the *Amerika* case (2), disapprove of *Jackson* v. *Watson &* A
Sons (8), where the Court of Appeal held that a husband was entitled
to recover damages resulting from the death of his wife, due to the
defendants' breach of contract. That was clearly a case in which the
death of a human being was successfully complained of as an injury.
It was sought to limit the rule of *Baker* v. *Bolton* (3) by saying that it B
applied only where death is an essential part of the cause of action.
But, in the case of a tort like the present, though the cause of action
requires both *injuria* and *damnum*, there is, apart from the death,
damage sufficient to found the action. Reliance was further placed on
the words of recital to Lord Campbell's Act: C

> Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another.

These words, together with the statement of the rule by Lord Ellenborough
in *Baker* v. *Bolton* (3), were sufficient, it was contended, to
establish a general rule of law sufficient to defeat the plaintiff's claim in D
this action, because the injured girl had died in fact as a result of the
defendant's negligence. But I think that the recital in Lord Campbell's
Act is no more relevant here, and no more universal in its application,
than the statement of principle of Lord Ellenborough. As Lord
Sumner pointed out, in the *Amerika* case (2), at p. 51, the preamble E
to the first section of Lord Campbell's Act should be read as applying
to the particular defect in the existing law which it was passed to remedy,
namely, the disadvantageous position of widows and children. This
limited view of the recital agrees with that expressed by Bramwell, B.,
in his powerful dissenting judgment in *Osborn* v. *Gillett* (9), at p. 95. I F
do not regard these authorities, or others, which I need not here quote,
to the same effect, as of any application to the problem involved in this
case, for several reasons. The observations in these authorities were
all directed to cases where a living person was suing another living person
for damages caused by the death of a third person. It was not, indeed, G
even before the Act of 1934, pertinent, or even sensible, to refer to the
case of a man suing for his own death. Literally, not the common law,
but the law of nature, prevented that being even imagined. Further,
the maxim *actio personalis* prevented the executor from suing for damages
in tort for the death, or, indeed, for personal injuries anterior to the H
death, even though the death was subsequently and independently
due to a separate cause. But the Act of 1934, in changing the law,
has made it competent to sue for any cause of action actually vested
in the deceased man at the moment of death. Natural reasons still
operate to prevent a man from suing for his own death, but he can now

sue so long as he lives for the injury caused to him by shortening his life, or depriving him of his normal expectancy of life. Such causes of action vest in him before he dies, and, under the Act of 1934, they survive if he dies before an action is commenced, or judgment is given. They are, in truth, wholly independent of the killing of the deceased A *per se*, if I may quote, as did KENNEDY, L.J., the language of BOWEN, L.J., in *The Vera Cruz* (*No.* 2) (10), at p. 101. They involve a concept entirely different from that of the mere fact of death.

One other point I ought to mention. It is said that, if this element of damage is allowed, there may be a risk of duplication of damages B in particular, because the Act of 1934, by sect. 1 (5), provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act, or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced, but, in my opinion, the Act does not. C I think that, in practice, no duplication of damage need occur. I think the jury would be properly directed to take into account, either that they were at the same time giving damages under Lord Campbell's Act, as they did here, or that such damages had been, or might be, given. The object of damages in these cases is compensation for the D benefit of the estate. It is true that the claims under Lord Campbell's Act are independent, and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate, in which quite different persons, creditors, legatees, or other beneficiaries may be interested. But one of the fruits of continued E life is, generally, provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the F jury or judge. I think the appeal should be allowed.

LORD ROCHE: My Lords, I agree that this appeal should be allowed, and that the plaintiff should have judgment for £1,000 in addition to the sum he recovered under the judgment of the Court of Appeal. I can G the more easily make my reasons for this opinion clear if I first make some observations as to the case of *Flint* v. *Lovell* (1), and as to my own judgment in that case. I dissented from the conclusion of the majority of the court only on the ground that the amount awarded to the plaintiff by the trial judges was, in my opinion, so excessive that it ought to be H reduced by the Court of Appeal. On the point that is material to the case now before your Lordships, namely, whether a shortening of the expectation of life, due to the accident, was proper to be taken into account as a head or element in the damage, I agreed with the majority of the court, though with certain doubts which I thought it right to express. Thinking, as I still do, that the case of *Flint* v. *Lovell* (1) was not rightly decided on the facts, and, in particular, that this element of damage, admissible though it was, was too amply allowed for in money, I am unable to say that I think the actual decision in that case was correct. My view on the facts was, perhaps, confirmed by the information given to the House by counsel, as a matter of interest, that Mr. Flint was fortunately still alive to-day. But, upon the only topic now A of importance, namely, the question of principle decided in *Flint* v. *Lovell* (1), I have been satisfied, by the full discussion of the matter before and by your Lordships, that the decision was right, and that the considerations which gave rise to my doubts are of insufficient force to debar the plaintiff from his remedy here. As regards the reasons assigned by B the majority in the Court of Appeal for holding that, in the present case, accepting, as they were bound to do, the decision in *Flint* v. *Lovell* (1) as correct, still the plaintiff was not, owing to the death of Mabel Rose, entitled to recover the damages now in question, I am of opinion that those reasons are not well founded in law. C

My grounds for these conclusions are as follows: the rule of law which was laid down by LORD ELLENBOROUGH in 1805 in *Baker* v. *Bolton* (3), and re-affirmed in this House in the *Amerika* case (2), is formulated, and, I think, correctly formulated, in the preamble to Lord Campbell's Act in the following language: D

> No action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person.

The same rule is also formulated by KENNEDY, L.J., in *Jackson* v. *Watson & Sons* (8), in similar language. KENNEDY, L.J., who was, of course, speaking of matters other than those covered by statutes such E as Lord Campbell's Act, said, at p. 205:

> Where a person's death has been caused by the actionable conduct of another . . . no one, whatever his connection with the deceased may be, can maintain an action of tort for damage resulting to himself from the death.

This rule, it may be added, is clearly not abrogated by the Law Reform F Act, 1934, s. 1 (2) (*e*), which seems to re-affirm it with the express exclusion from its operation of claims for funeral expenses. The historical origin of the rule, and questions as to its utility and reasonableness, have been much, and even hotly, debated. I have no inclination to contribute anything to these discussions, or to do otherwise than to recognise that G the rule is there, and binds your Lordships. It is enough to make sure what is the scope of the rule, and what are the limits of its application. In my judgment, it clearly applies only to actions by persons other than the person whose life or death is in question. In this connection, it is to be observed that, while probably there are more reasons than one for H the existence of the rule, one reason which is given, by no less an authority than PARKE, B., in *Armsworth* v. *South-Eastern Ry. Co.* (4), is that "a man has not such a legal right in the life of his parent as he has in his own." The same reasoning would apply to persons other than parents.

Such being, in my view, the scope of the rule, is the present action within that scope ? I think it is not, for the reasons admirably expressed by GREER, L.J., at p. 99. He thought that, by reason of the statute, i.e., the Law Reform Act, 1934 :

> It is beyond dispute . . . that the personal representative can recover the damages which could have been recovered by the deceased and which were a liability on the wrong-doer at the date of the death. It is to be observed that the cause of action vested in the deceased was not her death, nor had she a separate cause of action for each item of damage. The cause of action was negligence causing damage, and it seems clear to me that all items of damage suffered by her are recoverable by her administrator by reason of the survival of the cause of action, now vested in the plaintiff as her administrator.

Thus, the cause of action is the cause of action, not of a stranger to the deceased, but of the deceased herself, when alive. As to this cause of action, the statute renders inoperative the maxim *actio personalis moritur cum persona*, and, on her death, this cause of action survived, and could be enforced by the plaintiff. So, also, it is of importance to note what is the essential nature of that cause of action. As GREER, L.J., pointed out, with complete accuracy, in the passage quoted above, the cause of action is not the deceased's death, but damage before death. In the days when forms of action were of moment, the form of action appropriate for the deceased to avail herself of in her lifetime would have been either trespass (to the person) or case. To-day, the action is ordinarily and conveniently styled an action for personal injuries caused by negligence—injuries, in this connection, meaning, of course, not legal wrongs, but bodily hurts. Though it may be both convenient and proper, at the stage of the inquiry to be reached when the money assessment of the damage is taken in hand, then to concentrate on the effect of the injuries on the expectation of life, yet it is no less proper at this stage to recognise that it was the injuries or bodily hurts of the deceased, which, with the negligence, made and completed the deceased's cause of action, and that, amongst those injuries, was the pathological or traumatic condition of her body, which set up and caused infection and gangrene. The gist of such a cause of action, both in modern and olden times, has been considered and defined in connection with pleas of *res judicata* to meet claims for personal injuries : see *Brunsden* v. *Humphrey* (11), and, of the old cases, *Fitter* v. *Veal* (12). In the latter case, the plaintiff had sued and recovered a modest sum for damages for battery, constituting trespass to the person. Subsequently a piece of his skull, which, unknown to him, had been loosened by the battery, fell out, but, as he had recovered once, he could not recover again. So here the deceased's death added nothing to the cause of action, but was merely evidence of the gravity of the injuries, and of the extent to which her expectation of life was diminished owing to such injuries. There was called to your Lordship's attention a note on the decision in *Flint* v. *Lovell* (1) under the initials of that great and much lamented lawyer Sir Frederick Pollock (*Law Quarterly Review*, Vol. 51, p. 268). This note is very succinct, and is thereby rendered a little obscure, but I take the comment to be in line with what I have tried to express, viz., that it is theoretically wrong, in such a case, to start from death as shortening life, but right to start with the initial bodily injuries carrying with them from the outset a diminished expectation of life, which sooner or later will end with death. On this analysis of the cause of action of the deceased and of the plaintiff, I am impelled to the conclusion that this cause of action is not within, and is not touched by, the rule of law laid down in *Baker* v. *Bolton* (3) and the *Amerika* case (2). This does not mean that I am not acutely sensible of an apparent contradiction, or inconsistency of principle, between that rule of law and the existence of the right to the damages now in question ; but, on a consideration of that matter, I am unable to see that it is the duty or the right of your Lordships, sitting in a judicial capacity, either to enter upon a task of rendering the law uniform and consistent, where lack of uniformity or of consistency may manifest itself at present, or, for the sake of uniformity, to extend the rule to cases and circumstances not actually within its scope.

I now pass to a consideration of the other objections raised against the plaintiff's claim to the £1,000 for diminution of the deceased's expectation of life. The ground of the decision in the Court of Appeal seems to be, as Slesser, L.J., expresses it, that, on the death, the defendant's wrongful act became a felony, and that the right of action became merged in the felony, or, as Greene, L.J., expresses it, more broadly, that it is not possible to disregard the fact of death, and that the substance of the claim is, in his opinion, a claim by an administrator for damages for loss of the deceased's life, which cannot be treated as a claim originally vested in a living person for damages for loss of expectation of life upon the principle of *Flint* v. *Lovell* (1). There is in fact no evidence that the defendant was guilty of a felony in the way he drove. The claim in the action is based on negligence only, and, at the trial, liability was admitted on that basis. Your Lordships were informed by counsel, in answer to a question, that the defendant, so far as criminal proceedings were concerned, had been dealt with, not for manslaughter or dangerous driving, but for careless driving, which is not a felony, or even an indictable offence. As to the broader ground of objection, I have endeavoured to show what I conceive to be the cause of action, and that, on the facts, and the true construction of the statute (Law Reform Act, 1934), the cause of action is what Greer, L.J., held it to be, and not what Greene, L.J., held it to be. Indeed, on the latter view, I think the action ought to have failed altogether, and not to have succeeded even to the limited extent allowed by the judgment of the Court of Appeal. I would add one other observation in this connection. If *Flint* v. *Lovell* (1) is right in principle, then, in my view, death makes no difference, whether it is due to a defendant's wrongdoing or to some extraneous and different reason. In the latter case, would it be contended that the cause of action was gone ? I think not. In the former case, it would, I think, be an extension of the rule as to killing not being actionable to hold that killing extinguished, or merged in itself, a subsisting right of action for inflicting bodily hurt. It would certainly give to a wrongdoer an advantage from his own wrong. GREENE, L.J., also thought that, just as the fact of death was used to reduce the amount awarded at the trial, and expressed to be for the loss of the leg, so also it should be used in respect of the claim for loss or diminution of the expectation of life. But there is, in my opinion, no real analogy between these two cases. The reduction by the Court of Appeal of the trial judge's award of £500 for the loss of the leg was justified, not on this ground, but on a different ground, namely, that, once adequate damages had been given for loss of expectation of life, i.e., for shortened life, then to give other damages for physical injuries, on the basis of a life of normal length, would be to give them twice over.

There remains the argument advanced before your Lordships, based on the view that the matter of expectation of life ought to be regarded only subjectively, that is to say, as it bore upon the question of an injured person's mental anxiety, or pain and suffering. This was the ground of the decision of HUMPHREYS, J., on this point. He apparently thought that this was the ground of the decision in *Flint* v. *Lovell* (1), and MACKINNON, J., in *Slater* v. *Spreag* (13), appears to have thought the same. The judges were mistaken as to the ground of the decision in *Flint* v. *Lovell* (1). All the Lords Justices held the contrary. I think they were right, and that the subjective ground ought not to be the sole ground upon which this element or consideration is to be taken into account. I regard impaired health and vitality, not merely as a cause of pain and suffering, but as a loss of a good thing in itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such a loss, there is a loss of a temporal good, capable of evaluation in money, though the evaluation is difficult. PARKE, B., in *Armsworth* v. *South-Eastern Ry. Co.* (4), in a passage cited by GREENE, L.J., said "that it was impossible to form an estimate of the value of human life." I respectfully do not agree that it is impossible, though it is doubtless difficult. Damages frequently have to be estimated in a case such as the following: A person suffers physical injuries of a nature to prevent him or her from living as full and complete a life as before, not in the matter of earning power, but in the matter of performing the functions and reaping the enjoyments of a normal life. An analogous problem is now presented. In the case I have outlined, partial loss of the good of life over the normal period of life has to be measured. Here a total loss of the good of life over part of the normal period of life has to be measured. I do not doubt that the measurement can be made.

Nevertheless, it is this question of the assessment of damages which gives me more anxiety than any other part of this case, and I venture to make some further observations upon this aspect of the matter. I am very conscious that this discussion leads into paths of abstruse thought and technicalities of the law far remote from the practical directions which judges will have to give to themselves and to juries for the purposes of determining questions of amount, but, when the task of giving such directions has to be undertaken, abstruse thought and technicalities can be left behind, and, as a starting point, there can be taken the simple fact that, in a proper case, this is an element of damage which ought A to be taken into account. I derive assistance as to the method of proceeding from that point from two sources. The first source is certain decisions of the courts of Scotland which were cited in argument here, but which are helpful rather on the question of damages than on the question of principle, because the law of Scotland is not troubled with B the same rule as the *Baker* v. *Bolton* (3) rule. The second source is the method adopted by the Court of Appeal in the present case. The Scottish decisions to which I would refer are *M'Master* v. *Caledonian Ry. Co.* (7), in which a court presided over by INGLIS, Lord President, dealt with the matter of a shortened life both from an objective and C from a subjective point of view, and *Halliday* v. *Lanarkshire Traction Co.* (6). In the latter case, LORD SANDS, dealing with a similar matter, said :

> Still there is something in it which I confess puzzles me, once it is conceded that a man is entitled to compensation for the shortening of his life. But the matter D is so hedged about with metaphysics that, were I charging a jury, I think I should be disposed to be content to tell them that the shortening of life was an element which they were entitled to take into consideration in measuring the damages suffered by the deceased, and to leave it to them, without any strict analysis of the content of the idea, to assess the damages, contenting myself with warning them that the weight to be given to this element must be moderate, and that they must not consider what price the man would have put upon his life. E

I also should be very content with a direction such as this, but it might be supplemented with advice as to how to proceed in such a manner as the Court of Appeal proceeded here. The effect of what the Court of Appeal has done as to amount is this : As GREER, L.J., has said, there is not a question of a separate cause of action for each item of F damages, but it is customary, in order to arrive at a lump sum, which is to constitute the judgment or verdict, to direct attention to and quantify various items or elements of damages, such as pain and suffering, loss of earnings during incapacity, and permanent disablement, if any. Accordingly, in the present case, it was quite correct, where, obviously, G the principal element was that the expectation of life was cut down so greatly, to treat that as the main matter. That element was quantified at an amount, which seems to comply with the recommendations of LORD SANDS, and it was obviously and rightly arrived at without regard to the question of the amount of future earnings, and solely on H the basis of what life was going to be worth to a healthy young woman, earning her own living, with dependent parents, and with some prospects of marriage. This method seems to me to be correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the normal and the average. A rich miser living in squalor, or a very poor man deeply sunk in misery, might require special treatment, but, ordinarily, a person may be assumed to have, or be able to earn, enough to live his or her life, and to enjoy it. Earnings or income are otherwise, and to an extent beyond this, irrelevant. This having been done, it was justly said that the pain and suffering were slight, in the circumstances, and that the other injuries, and, in particular, the loss of the leg, were in effect swallowed up in the estimates made for the first and main element. Clearly, in other cases, the relative importance of these several elements might be very different, and would receive the appropriate explanation, but the building up of a whole sum out of several items or elements is both in accordance with general practice and in accordance with the method adopted in this House in the *Liesbosch* case (14), where the problem was to ascertain the value of a vessel to its owner as a going concern.

I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and, by becoming common form, may result in the inflation of damages in undeserving cases, or, more probably, perhaps, may become stale and ridiculous, to the detriment of real and deserving cases, such as the present. But the abatement of these possible evils may be left to the good sense of judges and juries, and I may be permitted to express the hope that the assistance of a jury—in my judgment, a most admirable tribunal for such a purpose—may be not seldom availed of in the future. For these reasons, I would allow the appeal as to the sum of £1,000, and I have nothing to say as to the award of £300 under Lord Campbell's Act, save that this was the proper place to deal with the deceased's future earning power, cut off by death, and that, accordingly, there was no clashing or overlapping as between the two causes of action and the judgments thereunder.

Appeal allowed, with costs. Order of Court of Appeal set aside, and judgment of HUMPHREYS, J., *varied.*

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Cross, Son & Hodgetts*, Evesham (for the appellant); *Berrymans* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

MOSS' EMPIRES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **June 1, 24, 1937.**]

Income Tax—Annual payment—Guarantee of fixed dividend payable by company—Liability to tax—Income Tax Act, 1918 (c. 40), *Sched. D, Case III, r.* 1 (a), *All Schedules Rules, r.* 21*—Finance Act,* 1927 (c. 10), *s.* 26.

By an agreement between three companies, two of the companies, one being the appellant company, jointly and severally guaranteed that, in case the profits available for distribution as dividend on the ordinary shares of the third company should be insufficient to pay a fixed dividend at the rate of 7½ per cent. (less income tax at the current rate) for each of the then next 5 years, the guarantors would make up and pay to trustees on behalf of the ordinary shareholders a sum equivalent to the amount by which the profits available should fall short of the sum required to pay the dividend as aforesaid for any year during that period of 5 years, or, in case there should be no profits available for distribution in respect of any of such years, then the guarantors would pay a sum equivalent to the sum required to pay the dividend for that year. In each of the 5 years the appellant company was called upon to make payments under its obligation, such payments being in each case its share of the amount required, less tax. In each of those years the appellant company in computing the amount of its profits and gains for tax purposes was permitted to deduct the sum paid under the agreement as being a disbursement or expense wholly and exclusively laid out or expended for the purposes of its trade. The appellant company was assessed under All Schedules Rules, r. 21, in respect of the sums paid under the agreement :—

Held : the payments in question were " annual payments charged with tax under Sched. D " and, it being admitted that they were not " payable out of profits or gains brought into charge," they were properly charged to tax.

[EDITORIAL NOTE. The main question here is whether payments made under a guarantee of dividends are annual payments, although such payments may not have to be made every year and, in any case, are of uncertain amount, as the obligation is only to make up the sum available for dividends to a stated sum. The short opinion of Lord Maugham not only states the matter very concisely, but distinguishes the meaning of the word " annual " in rule 21 from its meaning in the phrase " annual profits or gains arising from trade." In the latter case the meaning has been fixed by the decision in *Martin* v. *Lowry* (1) and means " in any one year." In rule 21 the meaning is recurrent or capable of recurrence, and it is immaterial that the payment may be variable in amount. It was also argued that when as a result of these payments, the shareholders received their dividends, such receipt would not be a receipt of income, but of compensation for not receiving income. This contention was rejected as it was in *Aeolian Co., Ltd.* v. *I.R. Comrs.*, [1936] 2 All E.R. 219 ; Digest Supp.

As to Amounts Received in Lieu of Trade Receipts, see HALSBURY, Hailsham Edn., Vol. 17, pp. 126, 127, para. 237 ; and for Cases, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-99.

As to Annual Payments, see HALSBURY, Hailsham Edn., Vol. 17, p. 233, para. 471 ; and for Cases, see DIGEST, Vol. 28, pp. 50, 51, Nos. 255-260.]

Case referred to :

(1) *Martin* v. *Lowry*, [1927] A.C. 312 ; 28 Digest 22, *114* ; 96 L.J.K.B. 379 ; 136 L.T. 580.

Appeal against an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland, dated Feb. 27, 1936, in a case stated for the appellant company, Moss' Empires, Ltd., on appeal by it from a determination of the commissioners for the special purposes of the Income Tax Acts. The facts and the arguments are set out in the judgments.

The Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26, provides :

(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D. . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such

payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

(2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the commissioners of inland revenue, for the use of the special commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the special commissioners shall assess and charge the payment of which an account is so delivered A on that person.

(2A) The special commissioners may, where any person has made default in delivering an account required by this rule . . . make an assessment . . .

A. M. Latter, K.C., and *R. H. Sherwood Calver* for the appellant company.

B *J. S. Wardlaw Burnet, K.C.*, *Reginald P. Hills* and *T. B. Simpson* for the respondents.

LORD ATKIN: My Lords, I have had the advantage of being able to see in advance the opinion which is about to be delivered by my noble C and learned friend LORD MACMILLAN. I entirely agree with it, and I have nothing to add.

LORD THANKERTON: My Lords, I have had the same privilege of considering the opinion about to be delivered by my noble and learned D friend LORD MACMILLAN, and also an opinion about to be delivered by my noble and learned friend LORD MAUGHAM, in both of which I concur.

LORD MACMILLAN: My Lords, the question is whether certain payments made by the appellant company in fulfilment of an obligation E undertaken by it in an agreement dated Jan. 31, 1928, were "annual payments charged with tax under Sched. D," within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 21 (1). If so, then it was the duty of the appellant company under the rule on making the payments to deduct therefrom income tax at the current rate, and to F account to the commissioners of inland revenue for the tax so deducted. The parties to the agreement in question were (i) the appellant company and Theatre Royal Drury Lane, Ltd., thereinafter called "the guarantors"; (ii) two named gentlemen on behalf of themselves and all other holders of ordinary shares in Dominion Theatre, Ltd., thereinG after called "the trustees"; and (iii) Dominion Theatre, Ltd., thereinafter called "the company." It is unnecessary to detail the circumstances which led up to the agreement, or the business reasons which induced the parties to enter into it. In the recitals, it is stated that the holders of the ordinary shares of Dominion Theatre, Ltd., were entitled H to receive a fixed preferential dividend at the rate of 7½ per cent. per annum on the capital paid up thereon out of the profits of the company available for distribution and determined to be distributed by way of dividend. The purpose of the agreement was to ensure the payment of this return on the ordinary shares for 5 years, and with this object the appellant company and Theatre Royal Drury Lane, Ltd., jointly and severally guaranteed and covenanted to and with the trustees, as trustees for and on behalf of the holders for the time being and from time to time of the said 250,000 ordinary shares of the company :

> that in case the profits which may be available for distribution as dividend as aforesaid on the said 250,000 ordinary shares of the company shall be insufficient to pay the said fixed dividend at the rate of 7½ per cent. (less income tax at the current rate) for each of the first 5 financial years of the company ending on Jan. 30, 1933, the guarantors will make up and pay to the trustees in respect of each and every such 5 years a sum equivalent to the amount by which the profits available as aforesaid shall fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of 5 years, or in case there shall be no profits available for distribution as aforesaid in respect of any of such years then the guarantors will pay to the trustees a sum equivalent to the sum required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such ordinary shares for that year. Provided and it is hereby declared that in such last-mentioned event the liability of the guarantors shall be limited to a sum equivalent to the sum which would have been payable by way of fixed dividend at the rate of 7½ per cent. per annum on the ordinary shares for that year if there had been profits of the company available for distribution in respect thereof.

Clauses followed providing that all sums paid by the guarantors should be distributed by the trustees or by the company amongst the ordinary shareholders in the same proportions as if they were distributions by way of fixed dividend ; that any sums so distributed were to be deemed to be *pro tanto* payment and satisfaction of the 7½ per cent. dividend ; and that, in case in any year the profits available for distribution should not be sufficient to pay the 7½ per cent. dividend, the company should notify the guarantors of the sum " required to make up the said fixed dividend to 7½ per cent. per annum (less tax) or to pay the said fixed dividend." In each of the 5 years covered by the agreement the appellant company was called upon to make payments under its obligation. In some of the years the company made no profits, in others the profits made were insufficient to pay the 7½ per cent. dividend in full. The sums so paid by the appellant company (as now adjusted) were as follows (shillings and pence discarded) : 1929, £3,322 ; 1930, £7,438 ; 1931, £1,655 ; 1932, £6,797 ; 1933, £7,031. It is to be noted that the sum which the appellant company paid in each case was its share of the amount, less tax, required for the payment of the 7½ per cent. Thus in the last instance, where the company made no profits, the sum of £7,031 which the appellant company was called upon to pay was calculated as follows :

	£	s.
250,000 ordinary shares at 7½ per cent.	18,750	0
Less tax at 5*s*. p. £	4,687	10
	14,062	10
Whereof one-half	7,031	5

In each of the 5 years, the appellant company, in computing the amount of its profits and gains for tax purposes, was permitted to deduct the sum paid under the agreement as being a disbursement or expense wholly and exclusively laid out or expended for the purposes of its trade. Consequently, the payments were not " payable out of profits or gains brought into charge," and thus satisfied one of the conditions of the applicability of r. 21. The sums paid by the appellant company and its co-obligants were duly utilised in paying to the ordinary shareholders a return of $7\frac{1}{2}$ per cent., less tax, on their shares. In at least two instances, dividend warrants in ordinary form were sent out by the company to the shareholders, with the usual certificate that income tax had been deducted, and had been or would be duly accounted for to the proper office.

For the 5 fiscal years 1928/29 to 1933/34, assessments were made in respect of the sums paid by the appellant company under the agreement. The appellant company appealed to the special commissioners, who affirmed the assessments, and, at the appellant company's request, stated for the opinion of the court the two following questions :

> (1) Whether the sums payable under the said guarantee by the appellant company were annual payments from which income tax was deductible, and if so
> (2) Whether the appellant company was correctly assessed under All Schedules Rules, r. 21 as amended by the Finance Act, 1927, s. 26 ?

The First Division of the Court of Session (LORD MONCRIEFF dissenting) answered both questions in the affirmative. At your Lordships' bar it was argued for the appellant company that the payments were not annual payments, inasmuch as they were casual, independent, not necessarily recurrent, and throughout subject to a contingency. This argument commended itself to LORD MONCRIEFF, but I am unable to accept it. There was a continuing obligation, extending over each and all of the 5 years, to make a payment to the trustees for the shareholders in the event of the company earning no profits, or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments. Rule 21 is not primarily a charging section, but is part of the machinery of collection. The charging enactment is to be found in Sched. D, Case III, r. 1, whereby tax is imposed on :

> any interest of money, whether yearly or otherwise, or any annuity, or any other annual payment . . . payable . . . as a personal debt or obligation by virtue of any contract.

I am of opinion that the payments in question fall within these words. Mr. Latter sought to argue (contrary to the admission recorded in the Lord President's opinion) that the sums paid were not payments of income, inasmuch as they were payments made in lieu of income, or by way of compensation for not receiving income, but I am quite unable to accept this view. The payments were indisputably income in the hands of the recipients.

There was some discussion as to the correct interpretation of the obligation undertaken by the appellant company. Was it to pay one-half of the gross sum required to pay or make up the dividend, with the right (and duty) to deduct the tax when making payment ? Or was it to pay one-half of the net sum required to pay or make up the dividend after deduction of tax ? To take the last year as an illustration : was the obligation to pay one-half of £18,750, with the right to deduct tax, or was the obligation to pay one-half of £14,062 ? It is unnecessary to determine this point, for, whichever be the true reading, the appellant company was, in my opinion, bound when making payment on either basis to deduct and account for tax. It may, however, be pointed out that, on the first basis, the sums allowed to be deducted by the appellant company as disbursements, as also the sums assessed, would have been different from those actually allowed and assessed ; while, on the second basis, the agreement would not achieve its purpose, for the payments, if the appellant company retained out of them the tax payable, would not be sufficient to put the company in funds to make a distribution of 7½ per cent., less tax, among the shareholders.

Being of opinion, as I am, that the payments in question were " annua, payments charged with tax under Sched. D," and it being admitted that they were not " payable out of profits or gains brought into charge," I move your Lordships to affirm the interlocutor of the First Division of the Court of Session, and dismiss the appeal with costs.

Lord Wright : My Lords, I agree with the opinion which has just been delivered by my noble and learned friend Lord Macmillan. I have also had the advantage of reading in print the opinion about to be delivered by my noble and learned friend Lord Maugham, in which also I concur.

Lord Maugham : My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Macmillan, with which I entirely concur. I will add for myself only some brief observations. The sole difficulty in the case, as I see it, is the question whether sums paid under the agreement of Jan. 31, 1928, were annual payments within the language of the Income Tax Act, 1918, All Schedules Rules, r. 21. The sentence runs : " Upon payment of any interest of money, annuity, or other annual payment . . ." The charging section is to be found in Sched. D, 1 (*b*) taken with the words of Sched. D, Case III, r. 1, as stated by Lord Macmillan.

It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin* v. *Lowry* (1) would be decisive to show that, in that context, " annual " means " in any one year." In r. 21, " annual " must be taken to have, like interest on money, or an annuity, the quality of being recurrent, or being capable of recurrence. The payments we are concerned with were to continue for 5 years, subject to their being required to make up the guaranteed annual dividend, and were plainly payments intended to supplement, so far as necessary, the income of the recipient company during each of the years in question. In these circumstances, I am of opinion that they had the necessary quality of recurrence, and are within the terms of r. 21. In so deciding, I apprehend that your Lordships are not travelling in any way beyond the existing decisions with regard to "annual payments" in that rule. On the other points, I cannot usefully add anything to what has fallen from my noble and learned friend LORD MACMILLAN.

A LORD ATKIN: My Lords, I ought to add that I also agree with the opinion which has just been delivered by my noble and learned friend LORD MAUGHAM.

Appeal dismissed with costs.

Solicitors: *Burton & Ramsden*, agents for *Allan, Dawson, Simpson &* B *Hampton*, W.S., Edinburgh (for the appellant company); *Solicitor of Inland Revenue*, England, agent for *Solicitor of Inland Revenue*, Scotland (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

C

WHELAN AND OTHERS *v.* BILLINGHAM URBAN DISTRICT COUNCIL.

[CHANCERY DIVISION (Clauson, J.), **June 24, 1937.**]

D *Public Health—Fire brigade—Pensions—Professional fireman—Wholly and permanently employed on fire brigade duties—Fire Brigade Pensions Act*, 1925 (*c.* 47), *s.* 23 (2).

The plaintiffs were firemen employed in the defendant council's fire brigade. Their primary duties were to act as members of the fire brigade and to maintain the equipment of that brigade. The plaintiffs E were available at any hour of the day or night, with certain exceptions for leave, to attend the alarm and to go out with the fire brigade. By arrangement with the defendant council it was one of the conditions of the employment of each of the plaintiffs that he would be required to carry out on behalf of the defendant council any work in the depot yard (which was near the fire station) which the various heads of departments could find for him. Such work was carried on during such times F as the plaintiffs were not attending fires or drills or engaged in attending to the fire appliances:—

HELD: the plaintiffs were not wholly and permanently employed on fire brigade duties, and were, therefore, not professional firemen within the Fire Brigade Pensions Acts, 1925 and 1929.

[EDITORIAL NOTE. This case turns wholly upon the statutory definition of G professional fireman; and it is held that an arrangement whereby the fireman fills in otherwise idle moments by doing useful work for his employers prevents the fireman from obtaining a pension.

AS TO FIRE BRIGADES, see HALSBURY, 1st Edn., Vol. 23, Public Health, pp. 549, 550, paras. 1108-1111; and FOR CASES, see DIGEST, Vol. 38, pp. 226, 227, Nos. 570-584.]

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ACTION for a declaration that each of the plaintiffs was a professional fireman within the meaning of the Fire Brigade Pensions Acts, 1925 and 1929, that each had been a professional fireman within the meaning of those Acts since the dates of their respective appointments as firemen in the employment of the defendant council, and that the service of the plaintiffs and each of them respectively as professional firemen in the employment of the defendant council had been approved service within the meaning and subject to the provisions of those Acts. The facts are set out in the judgment.

W. P. Spens, K.C., and *Harold Williams* for the plaintiffs.

Cyril Radcliffe, K.C., and *H. O. Danckwerts* for the defendant council.

CLAUSON, J.: The defendant council in this action is a local authority. The plaintiffs in the action are firemen employed in the defendant council's fire brigade. The primary duties of each of the plaintiffs are to act as members of the defendant council's fire brigade, and to maintain the equipment of that brigade in a state of efficiency. At any hour or time the defendant council can require the plaintiffs to carry out those duties. Accordingly, arrangements are made under which the plaintiffs are available at any hour of the day or night, with the exception, of course, of certain occasional leave periods, at any moment to attend the alarm and go out with the fire brigade. Their normal working hours are, on week-days other than Saturdays, from 7.30 a.m. to 5 p.m., and on Saturdays from 7.30 a.m. to 12 noon. The routine, as I was informed in evidence, is this, that the plaintiffs, as the brigade, with their two officers, parade at 7.30 in the morning at the headquarters of the fire brigade. Their duties are then allocated to them; one man has to be detailed to be the ambulance driver, another to be the ambulance assistant, and they have to be detailed to various duties in case of fire calls, and they are detailed for those duties. But this also happens, that, in the normal way, the members of the fire brigade will be from 7.30 a.m. to 5 p.m. at the headquarters of the brigade, and, during a certain period of the day when all the necessary routine duties, as to cleaning the apparatus and that sort of thing, exercise and so forth, have been performed, there will be periods during which, but for the arrangement I am about to mention, they would be standing still and doing nothing, waiting for an emergency to arise. The arrangement made between the plaintiffs and the local authority, their employer, however, is this—it is one of the conditions of the employment of each of the plaintiffs, as stated in para. 2 of the statement of admitted facts:

> he would be required to carry out on behalf of the defendants any work in the depot yard [in the very near vicinity of the brigade headquarters, the station] which various heads of departments could find for him. Such work . . . is carried out during such time as the plaintiffs are not attending fires or drills or engaged in attending to the fire appliances.

Accordingly, at the morning parade, as I understand it, the officer not only details the various fire duties to be performed during the day, who is to be responsible for the ambulance and one thing and another, but he also gives them directions as to the work they are to do of an additional character, during the time during which they would otherwise be sitting idle waiting for a call. He may say to one man: "The surveyor wants you to do so and so; keep yourself in touch with such and such foreman, and you will be given such and such work at the depot." It appears to be fairly true, not entirely true, to say that the additional work of that character parcelled out is of such a nature that it can be performed quite close to the fire brigade headquarters, and does not interfere with the capacity of the fireman to be ready at a few A seconds' notice to deal with any alarm and go out and perform duties strictly in connection with the fire. It is fairly true to say that, because, as one would well understand, in parts where fires are not very frequent, there is a little latitude about the matter. Occasionally one of the additional duties of a fireman is to look after the mortuary, some 100 yards B away, which would mean some little delay in attending to his fire duties. There are instances of that sort of work done for the benefit of the local authority, but I disregard that, because I want to deal with the matter as a matter of principle.

The question is whether these firemen, so employed, are professional C firemen, within the definition of that term as appearing in the Fire Brigade Pensions Act, 1925, s. 23 (2). If they are, they are entitled to certain pension benefits under the Act; if they do not come within that definition, they are not entitled to the benefits of that Act. The definition is in these terms:

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> "Professional fireman" means any member of a fire brigade maintained by a local authority who is wholly and permanently employed on fire brigade duties, and to whom the Police Pensions Act, 1921, does not apply.

I can disregard those latter words: nothing turns on them. What I have to concentrate upon is this: on the facts which I have stated, E are the plaintiffs members of a fire brigade, maintained by a local authority, who are wholly and permanently employed on fire brigade duties? It is suggested for the plaintiffs that "fire brigade duties" there means what the local authority lays down as being the work to be performed by the fire brigade, and that, accordingly, additional duties, as F mentioned in para. 2 of the statement of admitted facts, which are placed upon an individual fireman in accordance with the conditions of his employment, can be construed to be fire brigade duties. I do not see my way to accede to that argument. I think "fire brigade duties" means duties which the fireman performs as a member of a fire brigade. G I am not spending time to consider the interesting question as to how far it is within the purview of a fire brigade to use their apparatus and their skill in emergencies that occur in common life, but are not necessarily connected with a fire. I am not troubling about that at all. The definition seems to me to imply that a man cannot be a professional fire- H man unless he is a member of a fire brigade, and is employed on duties such as appertain to members of a fire brigade as members of a fire brigade.

The question with which I have to deal is this: in the particular circumstances of this case, are the plaintiffs wholly and permanently employed on fire brigade duties? They are permanently employed on fire brigade duties in this sense, that, throughout the day, whatever they may be doing with their hands, they must be ready to answer the alarm. I think it is clear that a man who is sitting waiting for an alarm, although for the moment he may be doing nothing but reading a newspaper, is employed on fire brigade duties, because it is essential that the members of the fire brigade should be immediately available for the active performance of their duties. It is one of their passive duties to be there. It would be an attractive theory, at first sight, to say that a man may still be permanently employed on fire brigade duties if, instead of sitting still, he is in the immediate vicinity of the place, where he can answer the call employed, and is doing some other useful work. In my view, he would be still permanently employed on fire brigade duties, although he might in fact be doing some job of work which had nothing whatever to do with the fire brigade. But in this case the plaintiffs cannot qualify to come within the Act, unless they are not only permanently employed on fire brigade duties, but are wholly and permanently employed on fire brigade duties. It appears to me that what is stated in para. 2 of this statement of admitted facts makes it impossible for me to hold that, in this case, the plaintiffs come within that definition, and can be said to be wholly employed on fire brigade duties. It is one of the conditions of the employment of each of them that he is to carry out, if so required, any work in the depot yard which various heads of department —that means the people acting under the borough surveyor, presumably, and the local authority's surveyor—could find for him ; in other words, he is not wholly employed on fire brigade duties. He is employed on other duties as well, which, though they may be quite compatible with the efficient performance of his fire brigade duties, are part of his employment. Accordingly, in my view, it is impossible to say of the plaintiffs that they come within the definition in the Act.

In those circumstances, I think probably the best course is that I should make a declaration negativing the first declaration in the plaintiffs' claim, and declare that the plaintiffs are not professional firemen within the meaning of the Fire Brigade Pensions Act.

Declaration made as above, plaintiffs to pay solicitor and client costs as provided for by the Public Authorities Protection Act, 1893.

Solicitors : *Carter & Barber* (for the plaintiffs) ; *Lees & Co.* (for the defendant council).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

PHILADELPHIA NATIONAL BANK *v.* PRICE.

[KING'S BENCH DIVISION (Porter, J.), **June 2, 3, 4, 25, 1937.**]

Insurance—Bank—Indemnity against loss due to advances on invalid documents—Payment to be for excess of named sum lost " by each and every loss or occurrence "—Daily advances on security of invoices—Fictitious invoices—Whether series of losses or one large loss.

By a policy of insurance, under which the plaintiff bank was to be indemnified against all losses to which it might be put by reason of its having made loans against documents which might prove to have been invalid, it was provided that the insurers were to pay claims only for the excess of $25,000 ultimate net loss " by each and every loss or occurrence." The plaintiff bank agreed in Mar., 1924, to make advances to one B., upon the security of B.'s promissory notes and invoices in respect of goods sold by B., in the course of his business. Almost daily from Apr., 1924, to Nov., 1930, B. sent to the plaintiff bank a number of invoices together with a promissory note for the total amount of the invoices. The amount of the note and invoices was debited to B.'s loan account and credited to his current account, upon which B. was able to draw. From time to time payments of the invoices were received from B. and these were credited to the loan account. The total amount of the invoices on any one day never exceeded $25,000. By sending fictitious invoices, B. obtained from the bank on loan $400,000 more than was owed to him by his customers. In Nov., 1930, B. was insolvent, and in Apr., 1931, he was adjudicated bankrupt. The bank sought to recover the amount of its loss under its policy of insurance :—

HELD : each day's loan was a separate loss or occurrence, and, as the loan on any one day never exceeded $25,000, the plaintiff bank could recover nothing under the policy.

[EDITORIAL NOTE. The construction of this policy is of importance, since it is impossible in a commercial sense for bankers to deal with such business otherwise than from day to day and it is, therefore, necessary to adjust the terms of such policies in view of the decision here made.

AS TO BANKERS' POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 506, 507, paras. 784-786 ; and FOR CASES, see DIGEST, Vol. 29, p. 418, Nos. 3264, 3265.]

Cases referred to :

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572 ; 3 Digest 179, *334.*

(2) *Pennsylvania Co. for Insurances on Lives & Granting Annuities* v. *Mumford*, [1920] 2 K.B. 537 ; 29 Digest 418, *3264 ;* 89 L.J.K.B. 651 ; 123 L.T. 248.

(3) *Equitable Trust Co. of New York* v. *Whittaker* (1923), 17 Ll.L.R. 153.

ACTION upon two policies of insurance. By the first policy, dated June 12, 1930, and subscribed by the defendant and other underwriters, the defendant agreed to insure the plaintiff bank for the defendant's proportion of $175,000 for 12 months ending at noon on July 13, 1931, for and against :

> all losses and damages in excess of $25,000 which the plaintiffs might during that period discover that they had sustained by reason of their having during the ordinary course of business in good faith taken received or otherwise in any manner or for any purpose whatsoever come into possession of transferred delivered made advances or loans against or otherwise acted upon any documents whatsoever which might prove (*a*) to have been forged in whole or in part or invalid and/or (*b*) to have other want of or defect in title.

By the second policy, also dated June 12, 1930, the defendant agreed to insure the plaintiff bank on identical terms for the defendant's proportion of $300,000 for losses in excess of $200,000. The facts giving rise to the action are set out in the judgment.

A. T. Miller, K.C., and *David Davies, K.C.*, for the plaintiff bank.

H. U. Willink, K.C., *W. L. McNair* and *C. A. Roberts* for the defendant.

Porter, J.: This action was brought by an American bank against a Lloyd's underwriter upon two policies of insurance, each of which is headed: "Lloyd's (Special) Forged Securities Policy." I need not consider the two policies separately, or, indeed, refer to more than one, since both are in similar terms, except in respect of the franchise taken by the assured, and both raise the same point. Leaving out what is not essential for the determination of this case, the vital terms of the first policy are as follows: The insurers hold the assured harmless and indemnified from and against all losses to which the assured may be put by reason of its having made loans against documents which may prove to have been invalid. Then it goes on:

> The occurrence of any loss or losses hereunder and the corresponding subsequent payment of such loss or losses shall not reduce the amount of this policy as to any other loss or losses hereunder, whether occurring before or after the loss or losses so paid; Provided, however, that in no event shall the underwriters be liable on account of any one loss or series of losses caused by the acts or omissions of any one person, or combination of persons, or caused by the same casualty or event, for a greater sum than the amount of this policy. . . . Notwithstanding anything to the contrary herein contained this insurance is only to pay claims for the excess of $25,000 ultimate net loss, by each and every loss or occurrence.

The second policy differs only in that it had a franchise of $200,000. The policy is a general cover to the bank in respect of all losses coming within the ambit of its terms, but the particular circumstances in which the claim is made are as follows. The genesis of the present claim was an agreement made in Mar., 1924, by one Robert Y. Brown, and the predecessors of the bank, which is the plaintiff in this case. When I say "predecessors," that absolves me from giving any steps by which the succession took place. Mr. Brown was a coal merchant, carrying on business in New York; the bank was in Philadelphia. Mr. Brown was of good standing when the agreement was made in Mar., 1924. He was also the owner of all the shares, president, and in complete control, of the Fairmont West Virginia Gas Coal Co. The agreement, which was made in 1924, was to the effect that the bank should make advances to Brown to the extent of $250,000; that is to say, at any one time he might draw up to $250,000. He was to give certain security, and the security was to be a promissory note of his own, and, also, as he sold coal, he was to send the invoices to the bank with the promissory note as further security. In each case the security was not to be in respect of any particular invoices, or any particular amount of coal, or any particular loan, but was to be general cover for the whole indebtedness. The reason for the system adopted is this: In America a bank is not allowed to advance except against some written document showing at least what the advance is. The way in which the business was carried out appears in para. 10 of the statement of facts. It is put there as follows:

(*a*) On most business days of the period during which the agreement was in operation i.e. from Apr., 1924, to Nov., 1930, Brown would send an envelope containing two letters to the bank. (*b*) One of these letters enclosed: (i) a number of duplicate invoices; and (ii) a promissory note payable on demand for the aggregate A amount of the said invoices. The note gave particulars of the said invoices (described in the note as collateral security for the note) and contained *inter alia* the following provision.

I need not read the provision, which merely says that anything held by the bank shall be collateral security for all indebtedness, and not for B any particular indebtedness. Then it goes on:

This letter also included a request that the bank should credit Brown or the company, as the case might be, with the proceeds of the enclosures.

Now, as I say, there were duplicate invoices:

One of each set of duplicate invoices had upon it a statement signed by Brown C or the company in the following form: "For value received we hereby sell, assign, transfer and set over this account to the Philadelphia National Bank, Philadelphia, Pennsylvania."

That, as I understand it, is what we should call an equitable assignment of the indebtedness of the customer to Brown by way of security to the bank. The other invoice contained the statement:

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This account has been assigned to the Philadelphia National Bank, Philadelphia, Pennsylvania, to whom remittance should be made. Payment to any other party will be at your risk.

In fact the second invoice was never acted upon, but it was a method of enabling the bank, as we should say, if the law be the same in America E as it is in this country, to give notice to the customer that an assignment had been made, that the customer must pay the bank and not Brown, the original creditor, and make the assignment, which had hitherto been an equitable assignment, into a legal assignment. Then the other letter enclosed a number of cheques, and directed the bank to apply F them in payment of specified invoices held by the bank, but on one day a week, on an average, this letter would be omitted. It goes on:

The cheques were mainly cheques given to Brown by his customers. The aggregate of the cheques rarely coincided exactly with the aggregate amount of invoices directed to be paid off, but was either slightly over or under. If the amount was over, Brown directed the excess to be credited to his account. If it was under, G he included a cheque of his own to balance. In many cases the cheques included a cheque of Brown's for a substantial amount, varying from several hundred to several thousand dollars, and in a number of cases, more especially during the latter part of the period, no customers' cheques were enclosed, but simply a cheque of Brown's for the whole amount of the invoices directed to be paid.

Then the statement goes on to deal with the records kept by the bank. H As I have said, it had a loan account, and it had a current account. Then, as I have not stated, it had a ledger account, and in the ledger account it entered the amount of each of those invoices which had been sent, and which had been equitably assigned to the bank by Brown. Then the statement goes on to say that, when the bank received the documents "it debited to the loan account and credited to the current account the amount of each fresh note received after the note had been initialled " by some high official of the bank, which was necessary before the loan would be granted. The bank collected the customers' cheques, and credited the proceeds to the loan account. In cases where the customers' cheques exceeded the amount of the invoices directed to be paid off, it credited the excess to the current account. It credited the A amount of Brown's own cheques forwarded as before described to the loan account, and debited them to the current account. It crossed off, on the customers' ledger account, the invoices directed to be paid, and returned the invoices to Brown. It released and returned to Brown such promissory notes as the aggregate amount of the said cheques B sufficed to pay off in full. The cheques were applied against notes in the order of the date on which the notes had been received, and no regard was paid to whether or not the invoices directed to be paid off had been received with the notes to which the payment was applied. After paying off such notes in full, there was always a balance over. This balance C was credited to the next note in date, the amount being endorsed thereon. The bank thus always held one partly-paid note and a large number of unpaid notes. Then it goes on to say that Brown's operations were checked by a clerk of the bank, to see that they were accurate. The statement says that the loans granted during the previous week were D entered in a board report, which was placed before every director at a weekly meeting, with a certificate from the cashier. They show the total amounts advanced to Brown during the week and the aggregate amount of the loans outstanding. Actually, though the report would show the amount lent during the week, it would sometimes appear in E more than one document, because the officials of the bank, or the employees of the bank, would start to make up the records before the final loan was made, and, therefore, one would have one or two documents showing what the loan actually was. Then one ought just to say this, that, at a period after the original agreement had been made in 1924 F with Mr. Brown, in 1925 the Fairmont West Virginia Gas Coal Co. was, so to speak, taken in, in this sense, that separate transactions were made, and, in those circumstances, separate accounts were kept, and separate loans made by the bank, yet the ultimate limit which was given upon the loans, and the initial franchise in respect of the loans, was G applied to both the company and Brown. The maximum limit remained the same, and the maximum franchise remained the same in respect of each of the two entities. Ultimately the maximum limit to be paid was raised to $492,000. I have said that at this moment, because the statement of facts goes on to say that in the case of the company exactly H the same course of business was followed as was followed in the case of Mr. Brown. This further fact is material, that a considerable number of invoices was sent in each day, and I think I can say that the average was 16, but the total day's loan as secured by the note and the invoices never amounted to $25,000, and never, of course, amounted to $200,000.

The invoices never amounted to $25,000; they would vary from $100 to even as much as $6,000, but no more. One perhaps ought to say this, that the total amount of notes and invoices from Apr., 1924, to Nov., 1930, amounted to some $10,000, and the payments in the same period also amounted to a little over $10,000, but some $400,000 less than the
A payments made. In the case of the company there was the same divergency, but a much smaller one.

Now, the way in which the case arose was this: Mr. Brown ought to have sent, and had agreed to send, genuine invoices, after proper weighing and so forth, of coal actually sent to his customers. Almost from
B the start, instead of doing that, he began to defraud the bank by sending fictitious invoices, invoices which in fact represented coal not yet shipped. In fact, of course, as he had to cover his tracks, he knew that he was going to send coal to the particular people in respect of whom he sent fraudulent invoices, but the fictitious invoices in fact were gradually
C larger than the actual invoices, so, by a kind of snowball process, in the course of the years he succeeded, by means of fictitious invoices, in getting the amount which he had on loan up to a sum of $400,000 or thereabouts more than actually was owed him by his customers, in respect of the two, the firm and the company. The result is that he defrauded
D the bank to the extent of $400,000. I ought to say that the bank acted throughout entirely in good faith and in the ordinary course of business, but Brown was unable to keep up the pretence for ever. Whether owing to the slump or otherwise, by Nov., 1930, he and the company were both insolvent; he was adjudicated bankrupt on Apr. 18, 1931. Some
E small dividend was received, about which I need not worry; it is not really material. The company was struck off because it could not pay its licence tax, and therefore ceased to have any existence. The bank, therefore, undoubtedly has lost some sum greater than $400,000, and the question is whether, in those circumstances, it is entitled to recover from
F the underwriter or not.

Now, to me the question appears to be one solely of construction. Mr. Blinn, who gave evidence on behalf of the bank, said that the cover was useless to it if it meant what the defendant said it did. No doubt that is true of this particular transaction, more particularly in regard to
G the second cover, where the franchise was $200,000, but it must be remembered that, as Mr. Blinn said, the bank had, in certain cases, advanced more than $200,000, even without cover, and it is at least possible that, by some fraudulent device, more than $200,000 might be obtained by one forgery or one fraudulent act, or, to put it more exactly,
H by one loss or occurrence other than the loss or occurrence which is suggested to be the loss or occurrence in this case. To my mind, matters of this kind are not material to the question I have to decide. The question is, what is the true construction of the policy when applied to the facts agreed? The two opposing views are (i) that there is only one ultimate net loss by one loss or one occurrence; (ii) that there are

daily occurrences, daily losses, and daily forged documents, that the loss is the sum of many forged documents, and that each day's loan and the note and invoices accompanying it are a separate loss or occurrence, and, as no daily loan and no day's invoices reached a franchise of $25,000, no one loss or occurrence can amount to that sum. In determining which is the true view, it must be remembered that, in order that the A plaintiff bank may recover, the loss must result from invalid documents. On which invalid document does it sue? On each invalid document, says the plaintiff bank. In its argument, as I understand it, one should regard the loss or occurrence as all one, and the true analogue is of a tank, from day to day regularly filled, and partially emptied again, so B that one can never say that any individual part of the contents is gained or lost, but only that, when the filling and emptying process comes to an end, a loss or gain is found to exist. The defendant says that each day's loan is a separate one, and that the losses are the amounts of each day's loan which remain unpaid. In analysing which particular loans C remain unpaid, he says that each loan is paid off in its due turn, either because the note which evidences it is handed back in the order of its date, or in accordance with the rule in *Clayton's Case* (1). The invoices, he says, are, it is true, security for the whole outstanding loan, and not merely for the daily loan obtained by their presentation, but, neverthe- D less, they cannot be security for a loan which has been repaid, and, in any case, by agreement between the parties, the invoices were treated as ceasing to be effective as soon as Brown indicated which invoices had been paid, and the bank accepted that indication, and struck off the amount of the invoices in the customers' ledger account. The result E is that the invalid security causing the loss, he says, is the bundle of invalid invoices outstanding in the bank's hands when it discovered the fraud.

In my view, the defendant's contention ought to prevail. Each day's loan is, I think, a separate loss or occurrence. One could, indeed, F contend that each forged note was a separate loss or occurrence, but I think this is too narrow a view. They may be separate forgeries, but I do not think they are separate occurrences. It is true that the loans are in accordance with a pre-arranged scheme granted daily, and that the invoices are intended regularly to accompany them, but each loan G seems to me a separate event, the giving of each daily bundle of invoices a separate occurrence, and the loss by their invalidity a separate loss. Indeed, the circumstances seem to me to be described better as a series of losses or occurrences than as one loss, or one occurrence. If this be so, one must remember that, whereas the underwriters limit their liability H to $175,000 for any one loss or series of losses, they promise to pay only for the excess of $25,000 ultimate net loss by each and every loss or occurrence, not the excess of $25,000 by each and every series of losses or occurrences. After all, if the plaintiff bank's argument is right, it would nevertheless be all one loss or one occurrence if Brown had at intervals of, say, one year, forged on one day a number of invoices, and then ceased to forge again until another year had elapsed, and so on, until the loss was found out. Some meaning must be given to "one loss or occurrence," and I do not think that the mere repetition of the forgery once a day, even if the invoices are by arrangement presented A daily, and the forgeries repeated daily for many years, makes the loss one loss, or the occurrence one occurrence.

The decision is a matter of outlook and impression rather than one for logical argument. I can only say that, to my mind, the view presented by the defendant is more consistent with the reasoning in the two cases B quoted, namely, *Pennsylvania Co. for Insurances on Lives & Granting Annuities* v. *Mumford* (2) and *Equitable Trust Co.* v. *Whittaker* (3), than is the view presented by the plaintiff bank, and that in any case it ought to prevail. This view makes it unnecessary for me to determine whether the company and Mr. Brown are separate entities, and whether the C loans in respect of them are separate matters. If I had to decide that, I should say that they were separate.

Judgment for the defendant with costs.

Solicitors: *Parker, Garrett & Co.* (for the plaintiff bank); *Hair & Co.* (for the defendant).

D [*Reported by* MALCOLM LOGAN, ESQ., *Barrister-at-Law.*]

BYNOE *v.* GENERAL FEDERATION OF TRADES UNIONS APPROVED SOCIETY (110).

E [CHANCERY DIVISION (Simonds, J.), **June 17, 18, 1937.**]

Work and Labour—National health insurance—Dentistry—Medical practitioner not on dentists' register—Right to give dental treatment to member of approved society—Dentists Act, 1921 (*c.* 21), *s.* 1 (3) (*a*)—*Dental Benefit Regulations*, 1930 (*S.R. & O.*, 1930, *No.* 1060), *regs.* 2, 21 (1).

F The plaintiff, a legally qualified and registered medical practitioner, whose name was not on the dentists' register, gave dental treatment to a member of the defendant society, an approved society within the National Health Insurance Acts, 1924 to 1932. He then sent to the defendant society an account of his charges which the society refused to pay:—

HELD: (i) although the plaintiff was, under the Dentists Act, 1921, G entitled to practise dentistry, he was not a "dentist" within the Dental Benefit Regulations, 1930, from whom a member of an approved society was entitled to obtain dental treatment, and he was not, therefore, a person who could send in charges and obtain payment of them from the approved society.

(ii) the regulations, which confined the giving of dental treatment to H those persons who were dentists as defined by the regulations, were not *ultra vires.*

[EDITORIAL NOTE. The result of this case is that a registered medical practitioner, who is not also on the dentists' register, is not entitled to recover payment under the National Health Insurance Act and the regulations thereunder in respect of dental treatment given to a panel patient.

AS TO MEDICAL AND DENTAL BENEFIT, see HALSBURY, 1st Edn., Vol. 28, WORK AND LABOUR, pp. 946, 947, para. 1682 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1312, 1313, Nos. 163-169.]

Cases referred to :

(1) *Patent Agents Institute* v. *Lockwood*, [1894] A.C. 347 ; 42 Digest 613, *139* ; 63 L.J.P.C. 75 ; 71 L.T. 205.

(2) *Minister of Health* v. *R., Ex p. Yaffe*, [1931] A.C. 494 ; Digest Supp. ; A 100 L.J.K.B. 306.

ACTION for an injunction to restrain the defendant society, its servants and/or agents from writing, publishing or uttering any letter, document or publication or words to the effect or implying that the plaintiff was not a person entitled to give dental services and to receive in respect B thereof payment from the defendant society or any other person under para. 21 of the Dental Benefit Regulations, 1930 and 1935, or the National Health Insurance Acts, 1924 to 1932, or otherwise howsoever, and for a declaration that the plaintiff was a person so entitled and that the defendant society ought to include him in its list of dentists (if any) C and make payments to him for dental services rendered to its members conformably to para. 21 of the regulations. The facts and the relevant parts of the Acts and regulations are set out in the judgment.

Archibald Pocock for the plaintiff.

Alexander Grant, K.C., and *A. de W. Mulligan* for the defendant D society.

SIMONDS, J. : In this case, the plaintiff is a legally qualified and registered medical practitioner ; the defendant society is an approved society within the meaning of the National Health Insurance Acts, E 1924 to 1932, and of that society one W. J. Evans was, in Jan. and Feb., 1935, and at all material times, a member. In the course of those months, the plaintiff gave dental treatment to the said W. J. Evans, and, having given that treatment, sent an account of his charges, amounting to £1 12*s*. 6*d*., to the defendant society, on the prescribed F form, which is known as the "dental letter." The defendant society refused to pay those charges, writing to Mr. Evans this letter, dated Feb. 6, 1935 :

> We have received a letter from Mr. C. A. Bynoe [the plaintiff] in respect of you. We desire to state, however, that Mr. Bynoe's name does not appear on the dentists' G register, and this we have confirmed with the Dental Board. We are, therefore, unable to deal with the dental letter. We are enclosing a duplicate dental letter, and if you care to visit another dentist and obtain an estimate and send same in to us, we shall be pleased to give your case further consideration.

Now, the plain meaning of that letter was this, that the plaintiff was not a person who was entitled to give dental treatment under the H National Health Insurance Acts and the regulations made thereunder, and the question which I have to determine is, in effect, this, whether a person who is not a dentist in the sense that he is not on the dentists' register, is a person who, under the National Health Insurance Acts and the regulations made thereunder, is entitled to give dental treatment and to receive payment from approved societies in respect of that treatment. The dentists' register was a register which was established under the Dentists Act, 1878. By sect. 3 of that Act, a penalty was imposed on unregistered persons using the title of "dentist." A register was established, and sect. 6 of the Act provided what were to be the A qualifications for registration, and they were these: (i) a licentiate in dental surgery or dentistry of any of the medical authorities as defined in the Act; (ii) a person who was entitled to be registered as a foreign or colonial dentist; and (iii) a person who was, at the passing of the Act:

B *bona fide* engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy.

Those three classes of persons were entitled under the Act to have their name put on the dentists' register. In 1921, it was further provided, by the Dentists Act, 1921, s. 1 (1), that no person should, unless he was C registered in the dentists' register under the Dentists' Act, 1878:

practise or hold himself out, whether directly or by implication, as practising or as being prepared to practise dentistry.

But by sect. 1 (3) it was provided that nothing in that section should operate to prevent "(*a*) the practice of dentistry by a registered medical D practitioner." The result of those Acts is this, that the plaintiff, being, as it is admitted, a qualified medical practitioner, is entitled to practise dentistry, though he is not on the dentists' register. He is not on the dentists' register and he is never likely to be on the dentists' register: that is his position. Now I turn to the legislation dealing with National E Health Insurance. First of all, sect. 22 of the Act of 1924 provided for approved societies, as defined by the Acts, making:

rules with regard to the manner and time of paying or distributing and the mode of calculating benefits. . . .

Sect. 24 provided for the administration of what is called "medical benefit"; that is to say, really the setting up of a panel of doctors F who would give their services for the purposes of those persons who were entitled to relief under the Act. Sect. 74 of the Act of 1924 provided for a valuation of the assets and liabilities of approved societies, and sect. 75 made provisions for the application of any surplus upon a valuation of those assets and liabilities, and provided, amongst G other things, that, if there were a surplus, a scheme for additional benefits amongst the members should be established. I think the last thing to which I need refer in the Act of 1924 is this, that sect. 93 provided for the making of regulations and orders. Sect. 93 (1) provided as follows:

H Regulations may be made under this Act for any of the following purposes, that is to say:—(*a*) for any purpose for which regulations are expressly authorised to be made by any of the provisions of this Act; (*b*) for prescribing anything which under this Act is to be prescribed; and (*c*) generally for carrying this Act into effect.

Then sect. 93 (2) provided:

All regulations made under this Act shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this

> Act, and if an address is presented to His Majesty by either House of Parliament within the next subsequent 21 days on which that House has sat next after any such regulation is laid before it, praying that the regulation may be annulled, His Majesty in Council may annul the regulation, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

The result is that a regulation made under the Act, if not annulled as the result of the action of either House of Parliament, is to have effect as if enacted in the Act.

In 1928, an amending Act was passed, and it is relevant to my present purpose only in this regard, that, by sect. 16 (3), the scope of regulations to be made under sect. 93 of the principal Act was enlarged. It provided that the following subsection should be added to sect. 75 of the principal Act:

> (7) Regulations may be made with respect to the administration of schemes under this section and of any additional benefit, and with respect to the arrangements for the provisions of any service or appliances towards the cost of which payment may be made by way of additional benefit, and any scheme providing for any additional benefit shall, except so far as the Minister may otherwise direct, have effect as if the regulations relating to the benefit were incorporated in the scheme, and the provisions of the scheme made subject thereto.

Then there is this provision, upon which reliance was placed by the plaintiff:

> Provided that such regulations shall not restrict the right on the part of any insured person to obtain treatment from any practitioner, clinic, or other institution with whom arrangements with respect to that form of treatment have been made in accordance with the regulations.

In the case of the present approved society there was a surplus which provided room for additional benefit, and therefore it became subject to, amongst other things, the Dental Benefit Regulations made under the Act in the year 1930. Reg. 2, the interpretation clause, defines, amongst other things, "dentist":

> "Dentist" means a person who is duly registered in the dentists' register kept under the Dentists Acts, 1878 to 1923, or any Act amending those Acts.

I have already referred to the provisions, so far as they are relevant, of the Dentists' Acts, and explained how the plaintiff is not, and is never likely to be, on the register, and, accordingly, is not a "dentist" within the meaning of these regulations. Reg. 21 (1) provided:

> Subject to the provisions of these regulations a member shall be entitled to obtain dental treatment from any dentist who is prepared to provide such treatment at fees not exceeding those set out in the Second Schedule to these regulations (hereinafter referred to as the "scale fees"), not being a dentist who is for the time being declared by the Minister to be unsuitable for service in connection with dental benefit as a result of an inquiry under the [regulations].

Now, it is quite clear that the plaintiff is not a "dentist" within the meaning of the Dental Benefit Regulations, 1930. He is not on the register. He is not a dentist from whom a member of an approved society is entitled to obtain dental treatment, and he is not a person, therefore, who can send in charges and obtain payment of them from the approved society. Therefore, upon these regulations as they stand, to my mind, it is quite clear that the plaintiff is not entitled to the relief which he claims, asserting, as he does, that he is a person entitled to give treatment under the regulations of the Act, and entitled, having given treatment, to obtain payment out of the funds of the society.

But then it is said that these regulations are *ultra vires* and void, that they are not authorised by the Act under which they purport to A be made. For my part, I can see no substance whatever in that suggestion. It appears to me that they are precisely such regulations as, under the amending section of the Act of 1928, can properly be made. Reliance, as I have said, was placed upon the proviso, to which I will refer again, namely, the proviso that the regulations are not to:

> B restrict the right on the part of any insured person to obtain treatment from any practitioner . . . with whom arrangements with respect to that form of treatment have been made in accordance with the regulations.

I am quite unable to see how that proviso can in any way protect the plaintiff in the present case. He is not a person "with whom arrange- C ments . . . have been made in accordance with the regulations." There is nothing in the regulations which restricts the right of Mr. Evans or that of any other person to obtain treatment from any practitioner with whom arrangements have been made in accordance with the regulations. Therefore, in my view, these regulations fall precisely D within the language of the Act authorising regulations to be made. A suggestion was made that somehow, by inadvertence, persons with the qualification of the plaintiff have been omitted from the class of persons who may give dental treatment under the Act. On the contrary, it appears to me to be plain that, although there may be persons not E on the dentists' register who are competent to give dental treatment, and although it may well be that the plaintiff himself is such a competent person, yet I can well understand the Ministry, making a regulation under this Act, coming to the conclusion that it is safer in the public interest to confine the class of persons who can give dental treatment F to those persons who are on the dentists' register, and who have, therefore, a *prima facie* qualification; because it is clear that there may be medical practitioners competent to give medical treatment who are not competent to give dental treatment, though equally there may be some such persons who are so competent, but, as a matter of precaution, and in the public G interest, it appears to be, not a matter of inadvertence, but a matter of proper precaution to confine the giving of dental treatment to those persons who are dentists as defined by the regulations, persons who, for one reason or another, are qualified to have their names registered on the dentists' register.

H Coming to the conclusion to which I do, it is unnecessary for me to embark upon a consideration of the cases to which I have been referred, the well known cases of *Patent Agents Institute* v. *Lockwood* (1) and *Minister of Health* v. *R., Ex p. Yaffe* (2), but, if it were necessary to consider those cases, I should have no hesitation whatever in coming to the conclusion that I must be bound by what was said in *Lockwood's* case (1) to hold that, by virtue of sect. 93 (2) of the Act of 1924, these regulations, when made, have effect as if enacted in this Act, and it would not be competent for me to canvass their validity.

Holding the opinion which I do upon the matters with which I have dealt, I can do no other than dismiss the plaintiff's action with costs.

Action dismissed with costs.

Solicitors: *Hardy Bain & Co.* (for the plaintiff); *Vivian J. Williams & Co.* (for the defendant society).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

FENDER *v.* MILDMAY

[House of Lords (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Roche), **April 15, 16, 19, 20, 22, June 28, 1937.**]

Husband and Wife—Breach of promise—Promise by married man after decree nisi of divorce but before decree absolute—Public policy.

The respondent's wife petitioned for a divorce on the ground of the respondent's adultery with the appellant, and a decree *nisi* was duly pronounced. On two occasions after the pronouncement of the decree *nisi*, but before the decree was made absolute, the respondent promised to marry the appellant immediately after the decree had been made absolute. The decree was made absolute in due course, but the respondent then refused to marry the appellant, who thereupon brought an action for breach of promise:—

Held [Lord Russell of Killowen and Lord Roche dissenting]: (i) there was no rule of public policy which prevented the contract from being enforced.

(ii) the enforcement of a contract is not against public policy unless the impugned contract leads, or is likely to lead, to injurious action.

(iii) the duty of the courts is to expound and not to expand public policy, and the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.

(iv) the whole position of married parties is changed and fixed not by a mere separation or the lodging of a petition for divorce, but by the pronouncement of a decree *nisi*, and the further period of waiting after that decree is imposed in the public interest in order to secure full disclosure before the court.

Decision of the Court of Appeal (Slesser and Greene, L.JJ., Greer, L.J., *dissenting*), [1936] 1 K.B. 111, *reversed.*

[**EDITORIAL NOTE.** Here, as in the recent case before the Court of Appeal *Beresford* v. *Royal Insurance Co., Ltd.*, [1937] 2 All E.R. 243, there is a conflict between two "sanctities," or two grounds of public policy, and, strangely enough, the sanctity of contract, which was considered in each case, was there overborne, whereas here it is upheld. The court has a duty to enforce contracts and also a duty to safeguard the marriage tie, and it is not surprising that in the conflict of these doctrines there should emerge a difference of judicial opinion. Generally speaking, the law has chosen to regard the decree absolute as the crucial point at which the relationship of married parties is changed, but now, at any rate for some purposes, the tie must be regarded as virtually dissolved upon the pronouncement of the decree *nisi*. After that decree it is now clear that either the innocent or the guilty party may enter into a new engagement to marry so long as it is conditional upon the decree being made absolute. In considering how far it is the duty of the court to protect the marriage tie, the decisions with reference to separation agreements are discussed, and assist the court to come to the conclusion that the contract here in question is not against public policy.

As to Promise by Person already Married, see HALSBURY, Hailsham
Edn., Vol. 16, pp. 553, 554, para. 816; and for Cases, see DIGEST, Vol. 12, pp.
A 267, 268, Nos. 2186-2190.]

Cases referred to:

(1) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 12 Digest
243, *1983*; 71 L.J.K.B. 857; 87 L.T. 372.

(2) *Egerton* v. *Brownlow* (*Earl*) (1853), 4 H.L. Cas. 1; 12 Digest 240, *1971*;
B 23 L.J. Ch. 348; 21 L.T.O.S. 306.

(3) *Printing & Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. 462;
12 Digest 244, *1992*; 44 L.J. Ch. 705; 32 L.T. 354.

(4) *Re Mirams*, [1891] 1 Q.B. 594; 12 Digest 242, *1979*; 60 L.J.Q.B. 397;
64 L.T. 117.

(5) *Re Wallace, Champion* v. *Wallace*, [1920] 2 Ch. 274; 12 Digest 246, *2011*;
C 89 L.J. Ch. 450; 123 L.T. 343.

(6) *Spiers* v. *Hunt*, [1908] 1 K.B. 720; 12 Digest 267, *2188*; 77 L.J.K.B. 321;
98 L.T. 27.

(7) *Wilson* v. *Carnley*, [1908] 1 K.B. 729; 12 Digest 267, *2189*; 77 L.J.K.B.
594; 98 L.T. 265.

(8) *Mortimer* v. *Mortimer* (1820), 2 Hag. Con. 310; 27 Digest 300, *2768*.

D (9) *St. John* (*Lord*) v. *St. John* (*Lady*) (1803), 11 Ves. 526; 27 Digest 222, *1930*.

(10) *Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (1821), Jac. 126; 27 Digest 222,
1932.

(11) *Wilson* v. *Wilson* (1848), 1 H.L. Cas. 538; (1854), 5 H.L. Cas. 40; 27 Digest
226, *1965*.

(12) *Hunt* v. *Hunt* (1862), 4 De G. F. & J. 221; 27 Digest 243, *2144*; 31 L.J.
E Ch. 161; 5 L.T. 778.

(13) *Noice* v. *Brown* (1876), 20 Am. Rep. 388; 23 Am. Rep. 213.

(14) *Paddock* v. *Robinson* (1871), 14 Am. Rep. 112.

(15) *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982; 27 Digest 223, *1939*;
22 L.J. Ch. 841; 31 L.T.O.S. 214.

(16) *Rodriguez* v. *Speyer Brothers*, [1919] A.C. 59; 2 Digest 160, *306*; 88
F L.J.K.B. 147; 119 L.T. 409.

(17) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ltd.*,
[1916] 2 A.C. 307; 9 Digest 541, *3565*; 85 L.J.K.B. 1333; 114 L.T. 1049.

(18) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 12 Digest 234,
1938; 61 L.J.Q.B. 295; 66 L.T. 1.

(19) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535;
G 12 Digest 241, *1973*; 63 L.J. Ch. 908; 71 L.T. 489.

(20) *Thellusson* v. *Rendlesham, Thellusson* v. *Thellusson, Hare* v. *Robarts* (1859),
7 H.L. Cas. 429; 30 Digest 188, *565*; 28 L.J. Ch. 948; 33 L.T.O.S. 379.

(21) *Gilbert* v. *Sykes* (1812), 16 East, 150; 25 Digest 397, *24*.

(22) *Kingston* (*Earl*) v. *Pierepont* (*Lady Elizabeth*) (1681), 1 Vern. 5; 44 Digest
459, *2805*.

H (23) *MacMahon* v. *MacMahon*, [1913] 1 I.R. 154; 27 Digest 224, case *k*.

(24) *Norman* v. *Villars* (1877), 2 Ex. D. 359; 27 Digest 458, *4759*; 46 L.J.Q.B.
579; 36 L.T. 788.

(25) *Prole* v. *Soady* (1868), 3 Ch. App. 220; 27 Digest 553, *6069*; 37 L.J. Ch.
246.

(26) *Wild* v. *Harris* (1849), 7 C.B. 999; 27 Digest 24, *14*; 18 L.J.C.P. 297; 13
L.T.O.S. 283.

(27) *Millward* v. *Littlewood* (1850), 5 Exch. 775; 27 Digest 25, *15*; 20 L.J. Ex. 2; 16 L.T.O.S. 128.

(28) *Skipp* v. *Kelly* (1926), 42 T.L.R. 258; Digest Supp.

(29) *Ousey* v. *Ousey & Atkinson* (1874), L.R. 3 P. & D. 223; 27 Digest 322, *3004*; 43 L.J.P. & M. 35; 30 L.T. 911.

(30) *Prevost* v. *Wood* (1905), 21 T.L.R. 684; 27 Digest 26, *24*.

A

Appeal from an order of the Court of Appeal dismissing an appeal from an order of Hawke, J., directing that judgment be entered for the present respondent (the defendant in the action) on the issue of breach of promise of marriage.

J. P. Eddy, K.C., *D. W. Conroy* and *I. M. Noordin* for the appellant. B

R. P. Croom-Johnson, K.C., and *P. B. Morle* for the respondent.

Eddy, K.C.: After the granting of a decree *nisi*, the relations of husband and wife change vitally, and the husband shows no disloyalty to his wife if, after she has obtained a decree *nisi*, he asks a woman with whom he has been associating to marry him if and when the decree C *nisi* is made absolute. While a promise by a married man to marry a woman other than his wife during the subsistence of his marriage is contrary to public policy, the granting of a decree *nisi* makes a great difference, because promises of marriage made after the date of the decree *nisi* are not contrary to public policy. The rule of public policy D merely means that it is contrary to public policy for a married man whose matrimonial status is unimpaired to promise to marry another woman. Such an impairment is, for example, the granting of a decree *nisi* which has the effect of substantially altering the rights of the parties. The rule does not cover a conditional promise of marriage made after the granting E of a conditional decree of divorce. As soon as a wife gets a decree *nisi*, the husband loses his right to cohabit with her. A promise of marriage after a decree *nisi* is not contrary to public policy, but in accordance with it, as it tends to regularise the life of the woman to whom the promise is made. It means that marriage could take place, rather than that the F husband and the woman should continue to commit adultery. Ideas of public policy with respect to matrimonial relations have changed, and necessarily vary from time to time. Public policy requires that contracts be kept. After the date of the decree *nisi*, the spouses were under no obligation to prevent disruption of the marriage tie. [Counsel G referred to *Prole* v. *Soady* (25), *Ousey* v. *Ousey & Atkinson* (29), *Noice* v. *Brown* (13), *Prevost* v. *Wood* (30), *Spiers* v. *Hunt* (6), *Wilson* v. *Carnley* (7), *Paddock* v. *Robinson* (14), *Cartwright* v. *Cartwright* (15), *Skipp* v. *Kelly* (28), *Wild* v. *Harris* (26), *Millward* v. *Littlewood* (27).]

Croom-Johnson, K.C.: The promises sued on were illegal, void, and H unenforceable, on the ground that they were promises made by a married man, known by the other party to be married, and the fact that they were made after the date of the decree *nisi*, and before the date of the decree absolute dissolving the marriage, is immaterial, and creates no exception to the rule. The rule of public policy is that the court refuses to admit the enforcement by legal process of contracts which tend adversely to affect the public interest. Marriage does not merely create a contractual relationship, but also affects the status of the parties. A decree *nisi* relates only to a future, and not to a present, dissolution of the marriage. It is only a suspension of the rights of the spouses. In the event of a reconciliation after the granting of a decree *nisi*, the parties need not go to the court for the purpose of having the petition dismissed. If there is no application to make the decree *nisi* absolute, the court can dismiss the petition, but the status of the parties remains unaffected throughout. The fact that the promises were made by a husband to the woman with whom he had committed adultery, upon which the wife had obtained a decree, and with whom he was continuing to commit adultery, is immaterial, and creates no exception to the rule. The tendency of such a promise is towards sexual immorality. There is no substantial difference between a promise made before the granting of a decree *nisi* and a promise made after the granting of a decree *nisi*. The present case is governed by existing authorities, and is not distinguishable from them. [Counsel referred to *Wilson* v. *Carnley* (7), *Spiers* v. *Hunt* (6), *Noice* v. *Brown* (13), *Skipp* v. *Kelly* (28), *Paddock* v. *Robinson* (14).]

Eddy, K.C., in reply.

LORD ATKIN: My Lords, this is an appeal by the plaintiff from an order of the Court of Appeal, who by a majority affirmed a judgment of HAWKE, J., on the trial of the action before himself and a special jury. The action was for breach of promise of marriage. The jury found for the plaintiff for £2,000 damages. HAWKE, J., entered judgment for the defendant, holding that the promise of marriage was unenforceable, as being contrary to public policy. The defendant, who was married at the time, met the plaintiff at a nursing-home, where she was a nurse. He told her that he was unhappy with his wife, and later asked her whether if his wife divorced him, she would marry him after the divorce. She consented, and thereupon sexual relations took place between them. The wife petitioned for a divorce on the ground of his adultery with the plaintiff, and a decree *nisi* was pronounced on Jan. 16, 1933. In Feb. and Apr., 1933, the defendant promised to marry the plaintiff immediately after the decree had been made absolute. These are the promises for breach of which the present action was brought. The parties continued their relations until June, 1933, when, by the agency of his solicitor's clerk, the defendant intimated to the plaintiff that he did not intend to marry her. The decree was made absolute on July 31, 1933. In August, the defendant again repudiated his promise, and, in May, 1934, he married another lady. The question is whether a promise made by one spouse, after a decree *nisi* has been pronounced, to marry a third party, after the decree has been made absolute, is void on the grounds of public policy. I state it in these simple terms because it was not suggested in argument, and indeed could not be, that it made any difference whether the promise was made by petitioner or by respondent, and, if by the latter, to the man or woman with whom the adultery charged in the petition had been committed. Is it, then, contrary to public policy that a promise, made between decree *nisi* and decree absolute, to marry after decree absolute should be enforceable ? It is not without significance that there is no judicial authority on this matter. The nearest authority in the English courts that has been found consists of two cases in 1908 which were not concerned with divorce proceedings, but decided that promises, made by a married man to a woman who knew he was married, that he would marry her after the death of his wife were contrary to public policy and void. It will be necessary to refer to these cases later, but I propose, in the first instance, to say something upon the doctrine of public policy generally. My Lords, from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of HOBART, C.J., is commonplace. I will content myself with two passages, both of which have the authority of the approval of the EARL OF HALSBURY, L.C., in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1) :

> To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain [MARSHALL ON INSURANCE, 3rd Edn., p. 32].

> [Public policy] is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights ; it is capable of being understood in different senses ; it may, and does, in its ordinary sense, mean "political expedience," or that which is best for the common good of the community ; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only ; the written from the statutes : the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference ; not to speculate upon what is the best in his opinion for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good : for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law ; and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise [*per* PARKE, B., in *Egerton* v. *Brownlow* (*Earl*) (2), at p. 123, cited in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), at p. 496].

I will add three other well known propositions.

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice [*per* JESSEL, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* (3), at p. 465].

> Certain kinds of contracts have been held void at common law on this ground —a branch of the law, however, which certainly should not be extended, as judges

are more to be trusted as interpreters of the law than as expounders of what is called public policy [*per* CAVE, J., in *Re Mirams* (4), at p. 595].

Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline [*per* LORD DAVEY, in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), at p. 500].

A In *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), the EARL OF HALSBURY, L.C., indeed appeared to decide that the categories of public policy are closed, and that the principle could not be involved anew unless the case could be brought within some principle of public policy already recognised by the law. I do not find, however, that this view received the B express assent of the other members of the House, and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning, illustrated by the passages cited above, that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of C a few judicial minds, I think that this should be regarded as the true guide. In popular language, following the wise aphorism of SIR GEORGE JESSEL, M.R., cited above, the contract should be given the benefit of the doubt.

But there is no doubt that the rule exists. In cases where the promise D is to do something contrary to public policy, which, for short, I will call a harmful thing, or where the consideration for the promise is the doing, or the promise to do, a harmful thing, a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The contract is unreasonably to restrict a man's economic activities, to procure a marriage E between two persons, to oust the jurisdiction of the court. These things are decided to be harmful in themselves. To do them is injurious to public interests. But the doctrine does not extend only to harmful acts, it has to be applied to harmful tendencies. Here the ground is still less safe, and more treacherous. One cannot resist the tendency test. It F was applied in this House in that remarkable case *Egerton* v. *Brownlow* (*Earl*) (2), not, indeed, to a contract, but to a condition. In that case, the seventh Earl of Bridgewater had attached a condition to limitations under his will that, if the person taking did not in his lifetime acquire the title and dignity of Duke or Marquess of Bridgewater, the estates G were to pass over from his heirs male to other reversionaries subject to a like condition. The fulfilment of the condition of the grant of an honour by the Crown was of necessity lawful, but the majority of the learned Lords, LYNDHURST, BROUGHAM, TRURO and ST. LEONARDS, differing from LORD CRANWORTH, L.C., and from the advice of the majority of H the judges, held that the condition was bad, inasmuch as it had the tendency to cause the holder of the estates to use unlawful and corrupt means to secure the rank of a peer, which involved public duties as legislator and the like. I do not stay to comment. I doubt whether at the present day such a tendency would be held to exist, or to invalidate such a condition. It has been negatived in recent times in the case of a similar condition of obtaining a baronetcy : *Re Wallace, Champion* v. *Wallace* (5). The uncertainty of " tendencies " as a criterion of rights is illustrated by the rule, much in vogue in earlier days, and in countries other than our own, that seamen could not validly insure their future wages, which then depended upon the ship earning freight. Such insurance would have a tendency, so it was supposed, to induce seamen to relax their efforts A to bring the ship to port, being more interested, one must suppose, in those days, in their wages than in their safety. This rule is expressly abrogated in our country by the Marine Insurance Act. But, assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency ? It can only mean, I venture to think, that, B taking that class of contract as a whole, the contracting parties will generally, in a majority of cases, at any rate, in a considerable number of cases, be exposed to a real temptation, by reason of the promises to do something harmful, i.e., contrary to public policy, and that it is likely that they will yield to it. All kinds of contracts provide motives C for improper actions, e.g., benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract, it is not enough that it affords a motive to do wrong : it must surely be shown that such a contract generally affords a motive, and that it is likely to be effective. Tendency I find defined in the Oxford Dictionary as a constant disposition D to move or act toward some present end or purpose. I think that, even in *Egerton* v. *Brownlow* (*Earl*) (2), this element of what I may call " effective motive " was assumed by the majority. Thus, LORD LYNDHURST said, at p. 162 :

> What, then, would be the *practical result* [the italics are mine] of this state of E things with reference to the proviso now under consideration ? If an estate, in this case of great extent and value, is made to depend upon a creation or promotion in the peerage, is it reasonable to suppose, *speaking generally* (for we must so consider the subject, and without reference to particular individuals), that such a state of things would not have at least a tendency to lead the party thus interested to act, and without much inquiry, in accordance with those who could insure the permanence of the estate to his descendants ; to induce him to support their F opinions. . . . That there may be exceptions, honourable exceptions, to such an influence I do not mean to doubt.

LORD BROUGHAM said, at p. 178 :

> It is, therefore, idle to represent the condition . . . as not likely practically and in fact to sway that conduct.

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LORD TRURO said, at p. 196 :

> The law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition ; and if the law is to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate.

I think the substance of these judgments is that you must have a general H rule, a general tendency to wrong, to which there may be exceptions, but, if the contract has to be applied to an act of social or other relations, in which there will be generally no tendency to do wrong, though there may be exceptions, the contract will not be avoided. A rule is not proved by exceptions, unless the exceptions themselves lead one to infer a rule.

The evil tendency, in such a contract as the present, has been expressed in various ways by the judges. HAWKE, J., said that the promise was inconsistent with the obligations of the subsisting marriage, and the mutual loyalty required in marriage. He also thought that the wife might have changed her mind, and induced the husband to return to her. He seems to suggest an approval of the suggestion that such contracts have a tendency to create immoral relations. SLESSER, L.J., appears to apply the principles which had been expressed by PHILLIMORE, J., in *Spiers* v. *Hunt* (6), and the Court of Appeal in *Wilson* v. *Carnley* (7), in respect of promises to marry another after the death of the promisor's spouse. He cites PHILLIMORE, J.:

> The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to crime. Its very probable result is sexual immorality.

He cites VAUGHAN WILLIAMS, L.J., who said that such a contract, i.e., to marry after the death of the wife, had a tendency to make the husband do something which was in contravention of the obligations which are recognised in this country as owing from a husband to a wife, FARWELL, L.J., who thought it was not only inconsistent with that affection which ought to subsist between married persons but was also calculated to act as a direct inducement to immorality, and KENNEDY, L.J., who said that it was against public policy, as tending to immorality. He himself also thought that the contract was void, because it must necessarily tend to prevent reconciliation. GREENE, L.J., thought that the contract in this case was void, because it tended to induce the promisor to act contrary to the rules of morality, it tended to encourage or facilitate immorality. It also tended to prevent reconciliation. Inasmuch as the judgments below were largely based on the cases of *Spiers* v. *Hunt* (6) and *Wilson* v. *Carnley* (7), it is necessary to say something about those decisions. They were both cases in which a husband during the lifetime of his wife had promised to marry another woman on the death of his wife. In the first case, the promise to marry after the death was express; in the second, it was implied from the fact that both parties knew the wife to be alive. In the first case, immoral relations followed the promise; in the second case, there is no statement that they did. Husband and wife in both cases were living together in normal conditions, though, in the former case, the wife was already an invalid, though she survived the promise seven or eight years. Here the judges appear to have thought that a promise made in such circumstances tended to cause immoral relations. They may be right. Speaking for myself, I really do not know whether that result would follow as a rule. I can only say that, if the lady yields to a promise with such an indefinite date, she is probably of a yielding disposition, and it would appear difficult to predicate that immorality is either facilitated or accelerated by the promise. As to the suggestion that such a promise is bad, because it tends to induce the husband to murder his wife, I reject this ground altogether. ALDER-

SON, B., in *Egerton* v. *Brownlow* (*Earl*) (2) incontinently classes such objections as ridiculous. They appear to afford another instance of the horrid suspicions to which high-minded men are sometimes prone. But I think that there is real substance in the objection that such a promise tends to produce conduct which violates the solemn obligations of married life. The obligations are not all included in the legal phrase rendering conjugal rights, but it can hardly be doubted that a betrothal to another would almost necessarily interfere with, hamper, and embarrass the married *consortium* which, on the hypothesis, is existing, and will continue to exist. If the moral ideal and the legal obligation are expressed in the promise to love and to cherish, it may well be doubted whether they can exist unimpaired in the presence of a betrothal to another.

But what application has this reasoning to circumstances as they exist after decree *nisi* ? Not only are the parties not living together but they are not entitled to require that conjugal rights should be restored. The *consortium* is broken. The petitioning spouse has in effect said, "You have in such a degree violated your marriage obligations that I am proposing to treat myself as free, and I obtain an order from the court which, after 6 months, unless it is shown that I have done something to justify the court in interfering, will put our marriage to an end." It is said that the status of marriage exists until decree absolute. Of course it does. It is said that, if either of the spouses has immoral intercourse with a third party, he or she commits adultery. Certainly. That follows from the continued existence of the status of marriage. But let us consider how far the normal obligations and conditions of marriage continue in ordinary circumstances, after decree *nisi*. They have disappeared. There is no *consortium*, and the parties are living apart. They owe no duties each to the other to perform any kind of matrimonial obligation. The custody of the children is provided for by the court. The maintenance of the wife, if petitioner, is similarly provided for : the petitioning spouse has said : "I have done with you." In these circumstances, what possible effect can a promise to marry a third person have by way of interference with matrimonial obligations ? There is no single duty which is being observed by either to the other, and it appears to me merely fanciful to suggest that the public interests are in any respect being impaired. If a respectable man, whose wife has fled with the lodger, leaving the children in his charge, engages himself to another respectable person, to marry her as soon as he is free, no public interests suffer. In my opinion, they benefit. Similarly in the converse case of a wife whose husband is living with another woman, of whose child he is the father. Does either of these persons still owe any kind of duty to love or cherish the other spouse, to whom no doubt he or she is still married, or owe him or her any duty which, in the interests of themselves or of the public, will be impaired by a promise to marry a third person when free ? From the point of view of law, it ought to be remembered, as an essential factor in this discussion, that, by legislation, it has been established that it is not contrary to public policy that married persons should obtain a divorce, and not contrary to public policy that, immediately after final divorce, either of them should marry. To me, I must confess it appears lamentable that the law should set its ban upon promises made to do a lawful act by persons who, in the interval between the promise and its fulfilment, do nothing, and are not induced by the promise to do anything, contrary to the public interests. I dismiss with some indignation the idea that public policy is to be involved, on the ground that such promises tend to immorality. No doubt a promise to marry is one of the weapons of the seducer, but no one has yet sought to invalidate on this ground a promise to marry made by unmarried persons, and I am quite unable to see why any different view should be taken of promises to marry which differ only in respect of the short period, six months or less, which must elapse between promise and performance.

It remains to consider the ground for avoiding such promises, that they tend to prevent reconciliation. On this part of the case, I would wish to refer to what I have already written on "tendency." If the public policy of enforcing contracts to do lawful acts is to be maintained, it must be defeated only where there is a practical danger of injury to the public by enforcing particular classes of contracts. There must be a general tendency to harm. This topic is sometimes discussed as though a petition for divorce, and the proceedings taken to obtain a decree, were casual steps in matrimonial life, capable of being, and indeed likely to be, retraced at any time before decree absolute. In fact, they constitute the most serious and deliberate decision which a man or woman now takes. I should say that it is very seldom that parties hurry into divorce. There is much consideration and much advice tendered before a matrimonial offence or offences are regarded as decisive. The fact, at any rate, is that, in an enormous proportion of cases, when once a petitioner has got as far as decree *nisi*, no reconciliation does, or, in most cases, can, take place. The parties have shown themselves not to be of a reconciling mind. No doubt figures could be obtained, but, from the information available to the public, it is obvious that the number of decrees *nisi* that are not made absolute, in relation to those granted, expressed as a percentage, would be a minute fraction of 1 per cent. In other words there are no facts upon which the alleged general tendency can act. The so-called exceptions are the rule, and the working of the alleged rule is acutely exceptional. I come, therefore, to the conclusion that to enforce a contract such as that under discussion would harm no public interest, would leave all the obligations of marriage unimpaired, while the performance of the contract is innocent, in accordance with the policy of the law, and, in some circumstances, very much to be encouraged.

I attach importance to repelling the attack upon such contracts, for I seem to detect a resurgence of ecclesiastical principles as expressed in ecclesiastical law, which at one time found favour with common law judges, and certainly with equity judges, where they had to deal with separation agreements, and which were finally repressed more than 100 years ago. Separation agreements are indeed much more open to attack on the principles asserted in this case than is the present class of contract, and they were assailed on grounds which might have taken from the judgments in favour of the respondent in this case. In *Mortimer* v. *Mortimer* (8), Sir William Scott, speaking for an ecclesiastical court, said, at p. 318 :

> This court considers a private separation as an illegal contract, implying a renunciation of stipulated duties, a dereliction from those mutual offices, which the parties are not at liberty to desert, an assumption of a false character, in both parties, contrary to the real *status personae* and to the obligation which both of them have contracted in the sight of God and man to live together " till death them do part ", and on which the solemnities both of civil society and religion have stamped a binding authority from which the parties cannot release themselves by any private act of their own or for causes which the law itself has not pronounced to be sufficient and sufficiently proved. These courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract have uniformly rejected such covenants as insignificant in a plea of bar : and leave it to other courts to enforce them, so far as they deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of the matrimonial contract.

In other words, in the ecclesiastical courts a present agreement to live separate was no bar to a suit for restitution of conjugal rights. The language of this distinguished judge undoubtedly found a sympathetic response in the mind of his equally distinguished brother, Lord Eldon, whose sad fate it was, as presiding over those " other courts " to which Lord Stowell referred, to have to enforce the contracts which the latter so vividly described. His own agreement he barely conceals : see *St. John* (*Lord*) v. *St. John* (*Lady*) (9), at p. 537, *Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (10), at p. 140. But that courts of equity would enforce such agreements was established in this House in *Wilson* v. *Wilson* (11), and the final emancipation of law and equity from ecclesiastical domination in this respect was established by the judgment of Lord Westbury in *Hunt* v. *Hunt* (12), at p. 226, in reversing the decision of Lord Romilly, M.R., who had refused to grant an injunction to restrain a husband from bringing a suit for restitution of conjugal rights in breach of a covenant by him in a separation agreement :

> Before the Reformation, as we all know, marriage was regarded by the Church and therefore regarded by the law as a sacrament. It was a contract of the highest possible religious obligation. All its duties and the obligations which it created were matters of ecclesiastical cognisance, and above all it is to be recollected, if I am not mistaken, that the duty of cohabitation—the primary duty arising from the contract—was enforced by the spiritual tribunal by spiritual punishments acting as they did *pro salute animae*. It was therefore quite correct to say anterior to the Reformation in speaking of the policy of the law that voluntary separations were forbidden by law, and that contracts made for giving effect to voluntary separations were therefore invalid as being contrary to the policy—that is, contrary to the prohibition—of the law. But then came the Reformation and the statute of Henry VIII which, providing for that which unhappily never took place, the revision of the common law enacted that the rules of ecclesiastical law should prevail as far as they were not contrary to the common law. The ecclesiastical law and the rules and doctrines of the Courts Christian were therefore subordinated to the common law, and what the common law did not prohibit in the ordinary relations of life could no longer be dealt with as an offence by the ecclesiastical law. As expressed by one of our older writers the ecclesiastical law was thenceforth put *sub graviore lege*. Then, by the common law, voluntary separations, that is the

cessation by mutual agreement of the *consortium vitae* of matrimony, was not a thing forbidden, prohibited or in any manner made the subject of punishment. It seems to me therefore impossible to say after the Reformation as a general proposition that voluntary separations were contrary to the policy of the law.

Now, if that be true of an agreement between the spouses, is it not straining at good sense to declare to be contrary to the policy of the law A an agreement which does not in itself directly affect the matrimonial relations, which takes account of a judicial decree, which has for practical purposes the effect of a separation order, and which creates an obligation to do that which the law permits, and indeed often welcomes ?

It is said that there is a class of contract, viz., contracts to marry B another person made during the marriage of the promisor, which has been decided to be void, that the contract in question is such a contract, and that no further discussion is possible. The major premise, with great respect, is unsupported by authority. The only authority, viz., the two cases of *Spiers* v. *Hunt* (6) and *Wilson* v. *Carnley* (7) is concerned with C cases where the spouses are living together, and the promises were to be fulfilled after the death of one spouse. It appears to me wrong to assume that the doctrine of public policy applies to any class of contract, without regard to the public mischief on which the decision or decisions are based. I have pointed out that all the material circumstances which lead to D mischief, in the one case, are absent in the present, for the simple reason that, after decree *nisi*, the bottom has dropped out of marriage. In the words of GREER, L.J., with which I agree, nothing but a shell is left. I do not myself understand a doctrine of public policy which is founded merely on a statement that one contract is inconsistent with, or incom- E patible with, another. I venture to say that the doctrine is unmeaning, unless the impugned contract leads, or is likely to lead, to injurious action, and I have pointed out that this cannot be predicated of these contracts, in the circumstances in which they are made. The whole notion of any danger to public interests seems to me fanciful and unreal. F For these reasons, I think that public policy demands that these contracts should be enforced, and that this appeal should be allowed, and judgment entered for the plaintiff for the amount found by the jury.

LORD THANKERTON : My Lords, on Jan. 16, 1933, the respondent's G wife obtained a decree *nisi* for the dissolution of their marriage, on the ground of his adultery with the present appellant. On Feb. 21, 1933, the respondent promised to marry the appellant immediately after the decree had been made absolute. This promise was repeated in Apr., 1933. The decree *nisi* was made absolute on July 31, 1933. The H respondent thereafter failed to implement his promise, and the question is whether the court is entitled to enforce the promise so as to enable the appellant to recover damages for its breach. The Court of Appeal, GREER, L.J., dissenting, has held that public policy disables the court from enforcing such a contract, thereby affirming the judgment of HAWKE, J., before whom the case was tried.

One of the constant principles of public policy in this country, which it is the duty of the courts to maintain, is that of freedom of contract, but it is certain that there are some classes of contract, whose characteristics are such that their enforcement by the courts is barred by a paramount principle of public policy. Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, A
or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits. Where, as in the present case, the principle B
invoked may be said to relate to the social conditions of the people, one is necessarily led to scrutinise the decided cases, to discover whether the principle has been clearly defined, and the reasons assigned for the enforcement of the principle in the particular case may be very helpful in determining the limits of the policy by ascertainment of the social evils the C
prevention of which was held to be in the interest of the state and its people.

My Lords, the principle of public policy relied on by the respondent concerns the freedom of contract of married persons, and the number of decided cases on this subject is very limited. There are only two cases D
in the Court of Appeal in 1908 relating to a promise of marriage by a married person given to a third party, and the only other cases bearing on this matter are those relating to separation agreements. Beyond the general principle that the law will not enforce contracts which will induce one of the parties to do something against the general rules of E
morality, which applies to contracts generally, I have been unable to find in any one of these cases a clear statement of any principle of public policy as to protection of the married state, except in references to the American decisions, to which I will refer later.

I have had the privilege of considering the opinion which my noble F
and learned friend on the woolsack has just delivered, and also the opinions about to be delivered by my noble and learned friends. I have anxiously and carefully considered them, and, after much thought, I have arrived at a decided view on the matter. I find it unnecessary to go through all the cases in detail, as they have been fully dealt with G
in these opinions. In the first place, there can be little question as to the proper function of the courts in questions of public policy. Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances H
are clearly within the scope of the policy. Such a case might well arise in the case of safety of the state, for instance. But no such case is suggested here. Further, the courts must be watchful not to be influenced by their view of what the principle of public policy, or its limits, should be. It is conceded that public policy prevents the enforcement of a

promise of marriage by a married person to a third party made prior to the decree *nisi*, but the appellant maintains that the principle no longer applies after the decree *nisi* is pronounced. While, on the one hand, the marriage tie is not dissolved until the decree is made absolute, and misconduct with a third party still constitutes adultery, the *con-*
A *sortium vitæ* of the spouses is suspended from a stage prior to the decree *nisi*, and the petitioning spouse has done all he or she can or need do, except, after the expiry of the necessary period, to apply to have the decree made absolute. It is true that, if a reconciliation is effected during the intervening period, the parties will remain married, and the
B *consortium* will be resumed.

Now, my Lords, it is somewhat natural to the logical mind to expect the principle to be the broad one of protection of the sanctity of the marriage tie, as being one of the essential institutions of a Christian and monogamous people, and that, therefore, every act which would
C impair such sanctity would be barred by the principle so long as the marriage was undissolved. I confess that I was much impressed by this view, but the fact is that the breadth of such a principle is, in my opinion, seriously affected by the settled law as to the lawfulness of separation agreements, for, though separation is a breach of one of the
D primary obligations of marriage, separation agreements have been treated as lawful, unless they were merely contingent on a future state of separation. Such agreements negative the *consortium vitæ*, which is intended, not only to preserve the happiness of the spouses, but also to conserve and further the interests of the children, a very important
E consideration. They may also tend to prejudice the possibility of reconciliation, though it is true that, in some cases, they will provide the only possible hope of a reconciliation. This consideration makes clear, to my mind, with all respect to my noble and learned friends who hold a contrary view, that there is no general principle of public
F policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, or, to phrase it otherwise, with loyalty to the other spouse. I am, therefore, not surprised, on consideration of the cases of *Spiers* v. *Hunt* (6) and *Wilson* v. *Carnley* (7), to find that these decisions are mainly based on the general tendency
G of the contracts under consideration to immorality or crime. In both these cases, a spouse promised to marry a third party after the death of his wife, a future and uncertain point of time. The only other ground of these decisions rests upon the reference to the opinion of the Chief Justice in the American case of *Noice* v. *Brown* (13), which is based on
H protection of the married state. But, in my opinion, the law in this country as to separation agreements is inconsistent with the American law, as stated by the Chief Justice. There can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country.

My Lords, once the decree *nisi* has been pronounced, the petitioner, as I have already stated, has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute. The guilt of the respondent has been judicially determined. The waiting period is imposed in the public interest, in order to ensure that there has been full disclosure before the court. If intervention takes place, and is successful, the decree absolute will not be obtained, and the promise of marriage will be nugatory. If the intervention is unsuccessful, the position as at the date of the decree *nisi* will be ratified. It follows, from the view that I have expressed, that the question is not whether the present case is an exception to a general rule, but whether a contract of this kind has the same general tendency as those which were under consideration in the cases of *Spiers* v. *Hunt* (6) and *Wilson* v. *Carnley* (7). In my opinion, after careful consideration, I am unable to find the same general tendencies in the present case. Public policy is not concerned with tendencies that may exist in a very limited number of cases, and I am satisfied that the tendency to prejudice the possibility of a reconciliation is of such rare occurrence that the courts would not be justified in relying on that ground as a basis of their refusal to enforce a contract. There is no suggestion that such a contract involves any tendency to crime. There remains the question of immorality, and it is in this regard that I find a vital distinction between a promise to marry on the contingency of a *dies incertus* and a promise to marry on the decree *nisi*, already in existence, being made absolute. The general tendency of the latter, I should assume, will be to promote patience until the expiry of a period, which, in the vast number of cases, is practically mechanical in its operation. In the case of the petitioner, this seems obvious; in the case of the respondent's promise to a co-respondent, the existence of immorality is not likely to be affected. In the case of the respondent's promise to an innocent third party, I should conceive that, in general, such a promise would not create a tendency to immorality.

I am therefore of opinion that the respondent has not shown that there is any existing principle of public policy which involves the refusal of the courts to enforce the promise of marriage given by him, and that he is liable to answer to the appellant for his breach of that promise.

Lord Russell of Killowen: My Lords, the counsel for the appellant, in opening this appeal, said that the question for our decision was whether it was against public policy for a husband (whose wife had obtained a decree *nisi* for the dissolution of their marriage) to promise to marry the woman whom he had involved in the proceedings, if and when the decree *nisi* had been made absolute. That no doubt states accurately the question, in terms of the facts of this particular case, but the actual question which is raised is much more general, and of far wider application. It concerns equally a promise to marry made by an innocent petitioner, and a promise by the guilty respondent to marry someone in no way involved in the matrimonial suit. The question is fundamentally the same question which was decided nearly 30 years ago by the Court of Appeal in *Wilson* v. *Carnley* (7), viz., whether a contract made by a married person whose spouse is still living, to marry some third person when free to do so by the termination of the existing marriage, is a contract contrary to public policy, and therefore unenforceable. The facts of the present case differ from those in *Wilson* v. *Carnley* (7). There the contemplated termination of the existing marriage was by the death of the living spouse: in this case it is by the decree absolute. No one contended before your Lordships that *Wilson* v. *Carnley* (7) was wrongly decided and should be overruled. It was accepted as correct. It was conceded that the general rule of English law was that a married person cannot, during the life of his or her spouse, validly contract to marry another person, but it was said that this rule did not apply if the contract was made after decree *nisi* pronounced in a suit between the spouses. For this alleged exception to the general rule no authority exists. In this case it arises for decision for the first time. It is a question the answer to which must, I fear, depend to some extent upon the view taken as to the importance to a civilised community both of the maintenance of the married state, and (even if the ideal of permanence be excluded) the durability of the marriage tie.

My Lords, when England was a Catholic country, matrimony was a sacrament, conferred upon themselves by the spouses. This sacramental nature of marriage, the holy state of matrimony, was the basis of the civil law of Europe with regard to it. When, in the reign of Elizabeth, England abandoned the old faith, and became a Protestant country, matrimony ceased, according to the new dispensation, to be ranked among the sacraments of the Gospel. The 25th of the 39 Articles so provided. The status of marriage became the product or result of a contract between the parties. But the obligations resulting from the status, the solemnity of the status, the importance to a civilised community of its maintenance, remained almost unimpaired. Until the first Divorce Act, in 1857, the marriage tie was indissoluble except by legislation. The question now arises whether, as a result of that Act, and subsequent divorce legislation, there has come about such an alteration in the public view of the status of marriage, its obligations, and the importance of its maintenance, that, without any offence to public policy or public opinion, a spouse may validly contract to marry another, provided only that the jurisdiction of the divorce court has been invoked in relation to his or her existing marriage.

My Lords, I use those words advisedly, because, as it seems to me, every argument for the appellant which depends upon the existence of a decree *nisi* is applicable to a case where the suit has not yet proceeded beyond the presentation of the petition. The decree *nisi*, as I understand it, effects nothing. It does not dissolve the marriage. The parties are just as much man and wife as they were before. It is true that the right to *consortium* could not be enforced; that duty and obligation between spouses is no doubt in suspense. So it is once a petition for divorce has been presented. Other duties and obligations, however, remain. The duty and obligation to refrain from sexual intercourse with others, surely continues. To break it would be to commit adultery, just as much as to marry another would be to commit bigamy. I confess that I do not understand how the existence of a decree *nisi* is really relevant or essential to this case. The parties at the time of the contract are either married or not. If they are married, can either of them, while still married, enter into an enforceable contract to marry someone else?

Let me now examine *Wilson* v. *Carnley* (7), and see what were the grounds upon which that decision was based. Vaughan Williams, L.J., at p. 733, describes the question involved as:

> the abstract question whether a promise to marry a woman made by a married man in the lifetime of his wife can be enforced.

After citing a passage from the judgment of Phillimore, J., in *Spiers* v. *Hunt* (5), he says, at p. 734:

> I also am of opinion that such a contract is one which cannot be enforced: and, personally, I am of opinion that such a contract is one which *ab initio* cannot be enforced, and that it does not matter at what time or after the happening of what contingencies the action is brought, the contract being one which at no moment of time the court would enforce.

After a reference to an anticipatory breach of such a contract, he reiterates:

> In my opinion such a contract is against public morality, and is void *ab initio*, and never at any time can be enforced in the courts of this country.

He again refers to *Spiers* v. *Hunt* (6), and agrees with Phillimore, J., that such a contract is within the language of Sir George Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* (3), at p. 465, as a contract which will induce one of the parties to do something against the general rules of morality. Although the words here used are "will induce," Vaughan Williams, L.J., makes it clear that, in his opinion, a tendency to induce is sufficient, for after a reference to a contention by counsel based upon *Egerton* v. *Brownlow* (*Earl*) (2), he continues at p. 735:

> But, though the doctrine may have been carried too far, there is no case in which it has been suggested that a contract which has a tendency to induce one of the parties to it to do something contrary to the general rules of morality is not a contract which the court may refuse to enforce upon that ground. I have no doubt that this was a contract which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognised in this country as owing from a husband to his wife. It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife . . . it is a contract against public policy as tending to make the husband disregard the acknowledged rules of morality as to married life, and therefore cannot be enforced.

My Lords, I think that Vaughan Williams, L.J., in his judgment, with its references to public morality, to the general rules of morality and to disloyalty to a spouse, does not mean to base his decision solely on the tendency of the contract to produce adultery. He is taking a much broader view as to the conduct and loyalty which is required by public opinion to be displayed by each spouse during the continuance of the marriage tie. The bare idea of a spouse, becoming one of an engaged couple, and indulging, or at any rate likely to indulge, in the affectionate familiarity which is natural and usual between engaged couples, is an idea inconsistent with the existing marriage tie, and disloyal to the living spouse. Those elements are, I think, included in his view that the tendency of the contract was to make the spouse do something in contravention of the obligations owing from one spouse to the other.

Farwell, L.J., seems to base his decision more explicitly upon the view that the contract was calculated to act as a direct inducement to immorality (meaning, I think, on the context adultery), and might also lead to crime.

Kennedy, L.J., refers both to the contract as tending to immorality (meaning, I think, adultery), and as an incentive to crime, but he also refers, in more general terms, to its derogation from the sense of the obligations involved in the status of marriage. While the foundation of his decision is the tendency to adultery and crime, his judgment is not inconsistent with the broader view, which, I think, is the basis of the judgment of Vaugham Williams, L.J.

I must also refer to *Spiers* v. *Hunt* (6). In that case, I think that Phillimore, J., took the same broad view as that taken by Vaughan Williams, L.J., in *Wilson* v. *Carnley* (7). He describes the contract as against public policy and public morals. He agrees with the views which Lawrence, C.J., of the State of Illinois, expressed in *Paddock* v. *Robinson* (14) that to hold such a contract valid would be to introduce into social life a dangerous and immoral principle, and at p. 724 he cites with approval the following extract from the judgment in that case of Lawrence, C.J.:

> Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong —a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognised as valid in a court of justice.

Phillimore, J., goes on to point out that such a contract has a tendency to make the husband, in thought, if not in deed, unfaithful to his wife, that it might even lead to crime, and that its very probable result is sexual immorality. It is, however, clear in my opinion, from his approval of what was said by Laurence, C.J., that Phillimore, J., took the broader view, and considered the contract void as against public policy on general grounds (apart from any tendency to specific acts, such as adultery or crime) because it involved a moral breach of the existing marriage tie, and disloyalty to the living spouse.

If *Wilson* v. *Carnley* (7) was, as I think it was, rightly decided, I cannot see how the existence of a decree *nisi* can make any difference in law. The petitioner and respondent are still husband and wife. The marriage tie still binds them. They are still under marital duties and obligations, though some may be in suspense. It is said that the marriage status has been impaired by the decree *nisi*. This is language which I do not understand. If it means that the marriage tie has been weakened, or that the parties are less man and wife than they were before, it is simply untrue. If it means only that the petitioner, in obtaining a decree *nisi*, has indicated a then existing intention to have the marriage dissolved, it is true, but irrelevant to the point under discussion. The petitioner may change her or his mind. But, it is said, there has been brought about a vital change in the position of the parties ; the petitioner here, by obtaining her decree *nisi*, has thrown off her husband, and with the result that there can no longer exist any question of loyalty between the parties. My Lords, that is a proposition which I utterly deny, for, when examined, it can in law only mean that the petitioner, by obtaining a decree *nisi*, has displayed her intention to bring about that condition of affairs. But presenting her petition displayed just the same intention, and involved the suspension of some marital obligations, and is it to be said that, notwithstanding *Wilson* v. *Carnley* (7), she could then immediately enter into a binding contract to marry ? And, if the matter depends upon intention, as seems to be the case, could she do so, on discovering her husband's infidelity, and resolving to petition for the dissolution of her marriage ? The answer must in each case, in my opinion, be No, and for the same reason as in the present case, viz., that present intention to end a marriage is irrelevant, and that, until the marriage tie has in fact and in law ceased to exist, and until the person in question has ceased to be a spouse, a contract by him or her to marry is a contract against public policy and morals, to the enforcement of which the law will not lend itself.

In my opinion, the reasons given in *Wilson* v. *Carnley* (7) apply to the present contract, with the exception of one, viz., the tendency to induce the commission of a crime.

The tendency to the commission of adultery, it must be conceded, cannot be so strong as in a *Wilson* v. *Carnley* (7) case, owing to the interval of waiting being ordinarily of shorter and less uncertain duration. But the tendency is there, and we must remember that we are deciding a point of law which has relation to all classes and all cases, including those in which a period of time considerably longer than six months may elapse between the decree *nisi* and the dissolution of the marriage. Nor can it, I think, be denied that the mere fact that the person who promises marriage makes the promise notwithstanding that he or she is, at the time of the promise, the spouse of someone else, indicates a strong desire on the part of the person who makes the promise.

But, my Lords, there exists in the present case a reason, non-existent in *Wilson* v. *Carnley* (7), and, in my opinion, of the gravest import, why this contract should be held to be one against public policy. It A has, I think, never been doubted that public policy requires that the married status should, as far as possible, as long as possible, and whenever possible, be maintained. The policy of the law which forbids contracts which contemplate a future separation of spouses is founded, as TURNER, L.J., pointed out, in *Cartwright* v. *Cartwright* (15), at p. 990, on :

> B the importance to society of maintaining that relation between [husband and wife].

Again, we must bear in mind all classes of cases. It is in the interests of the state that family life should be maintained, and that homes should not be broken up by the dissolution of the marriage of parents. But, even in the absence of children, it is in the interest of the state that, if C possible, the marriage tie should remain stable and be maintained. As was well said by BEESLY, C.J., in the American case of *Noice* v. *Brown* (13) :

> The institution of marriage is the first act of civilisation, and the protection of the married state against all molestation or disturbance is a part of the policy of D every people possessed of morals and laws.

In my opinion, any contract the effect or tendency of which would be to create an obstacle or bar to the reconciliation of husband and wife must necessarily be a contract against public policy. In divorce proceedings, nothing is final until decree absolute. Up to that time, there E is always the possibility, I need put it no higher than that, of a reconciliation, and of that being maintained which it is in the interest of the state to maintain, viz., the marriage tie. A contract by a spouse, made in the course of divorce proceedings, to marry someone else must, from its very nature, create a serious obstacle or bar to any chance of F the existing marriage tie being maintained ; its tendency as regards the contracting spouse must be against reconciliation, and he or she could join in a reconciliation only subject to the risk of a claim for damages at the suit of the promisee. For this reason, apart from the others which I have indicated, and which are founded on *Wilson* v. G *Carnley* (7), I am of opinion that the contract sued upon in the present case is unenforceable.

I disagree entirely with the views expressed by GREER, L.J., to the effect that a decree *nisi* relieves both the petitioner and the respondent from all the duties and obligations arising out of the marriage, and that H it puts an end to the whole content of the marriage contract, leaving only the technical bond. I can only repeat, with what emphasis I can command, that, in my opinion, while some of the duties and obligations may be suspended from the presentation of the petition, the marriage bond remains unimpaired and unloosened until the decree absolute ; it is then, and only then, that, according to the municipal law of this country, the marriage is determined by dissolution, and the former husband and wife cease to be married persons.

I agree with the judgments of Slesser and Greene, L.JJ., in which they point out how and why such a promise as is here in question must necessarily tend to hinder reconciliation between the spouses; and I further agree with them in thinking that the rarity of reconciliation after the commencement of divorce proceedings, if it be a fact, is an irrelevant consideration in deciding this question of law.

My Lords, as I see this case, there is here no question of inventing a new rule of public policy. It is only an illustration of an old rule applied to new facts. In the cases which have hitherto arisen in this country, the existing marriage was to be determined by death. In this case, it is to be determined by divorce. The reasons, or some of them, which invalidated the contract in *Wilson* v. *Carnley* (7) apply, in my opinion, equally to a contract made during the pendency of divorce proceedings to marry after decree absolute, and are, in the case of such a contract, reinforced by the fact that the contract is an obstacle or bar to the reconciliation of the spouses. For the reasons which I have endeavoured to indicate, I would dismiss this appeal.

Counsel for the appellant contended that the solemnity of the institution of marriage was in no way involved in the appeal, and that the tendency of his argument was to uphold the marriage tie. With all respect to him and those who share his view, I cannot agree. The institution of marriage has long been on a slippery slope. What was once a holy estate, enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will. For myself, I am glad that the opinion which I have formed of the law which is applicable to this case is consistent with the view that the obligations of married people do not cease, in the eye of the law, until, in the eye of the same law, they cease to be married, and that the married state, so long as it lasts, is still a status of sufficient solemnity to justify the words of Farwell, L.J., when he said, in *Wilson* v. *Carnley* (7) at p. 740:

> Speaking for myself, I find it impossible to realise the position of a man who in the lifetime of his wife, deliberately affiances himself to another woman.

In conclusion, I would point out that the decision which I would wish this House to reach in this case will in no way hinder any persons who desire to marry after divorce from taking that step. It will only compel a person already married to await with decency until he or she is no longer a married man or woman before becoming the subject of a fresh betrothal.

Lord Wright: My Lords, from one aspect, the dispute in this case may be regarded as a small matter. Its importance is that it raises a serious and fundamental question of law.

The facts are simple. The appellant, a registered state nurse, became,

in about Jan., 1932, the mistress of the respondent, a baronet who was married but not living happily with his wife. In Sept., 1932, his wife presented a petition for divorce, on which, in Jan., 1933, the President pronounced a decree *nisi* for dissolution of the marriage. This was made absolute on July 31, 1933. Between these dates, on Feb. 21,
A 1933, and again in Apr., 1933, the respondent promised to marry the appellant immediately the decree *nisi* was made absolute. But on June 14, 1933, the respondent by his solicitor stated that the respondent would not marry the appellant. In May, 1934, he married another woman. In the action for breach of promise of marriage which the
B appellant brought, the promise was not denied, nor was the breach. The jury found that the appropriate sum of compensation was £2,000. The respondent has, however, succeeded in avoiding payment of that sum, on the contention that it is against public policy that he should have made the promise he did, and, therefore, that he was not bound
C in law to fulfil his promise to regularise the position of the appellant, who had been made intervener in the divorce proceedings, or make any reparation to her. Your Lordships are not concerned to consider whether the respondent's conduct is that of an honourable or of a generous man. The case must be decided simply on grounds of law. The primary duty
D of a court of law is to enforce promises which parties have made, and to uphold the sanctity of contract, which is the basis of society. But, in certain cases, the court dispenses parties from keeping their plighted word because of some rule of law founded on what is called public policy. It is said here that there is such a rule of law requiring the court to
E say the respondent's promise was not binding, though it is admitted that no precise precedent has established this rule. The rule, therefore, if applied, must be applied as a new rule, or at least as a substantive extension of a settled rule. So far as I have been able to understand what is advanced as the basis of this particular new rule, it is that it
F involves the public interest in upholding the marriage state. That there is, in general, such a public interest, I should be the last to deny. But the provisions of English law recognise civil marriage and divorce. Whatever views a judge may personally hold on the public policy of these provisions, he must proceed on the footing that such is the law.
G The question in the present case is whether, after decree *nisi*, there is any public interest in seeking to preserve, at the expense of the solid detriment of sanctioning a breach of contract, the transitory and unsubstantial form of a marriage which, by the decree of the court, is practically doomed to extinction in a brief period of months. In the
H language of the divorce court, there are innocent and guilty parties. It is said that public policy imposes on both equally a contractual disability of a particular kind after decree that the marriage is to be dissolved until it is finally dissolved. The reasons adduced for this proposition seem to me to be vague and problematical, and not sufficient to weigh against the solid fact that the parties may legitimately be anxious

to stabilise their position against the time when the decree absolute takes effect. The assumed promise is to marry when and if it becomes legally possible to marry, that is, after the decree absolute. The guilty party in such cases may properly be anxious to regularise, as the law permits him to do, his union with his partner in adultery. The innocent party may properly desire, now that the court has declared the practically certain dissolution of the marriage, to lay the foundation of another and happier union. The decree *nisi* has put an end to the common home, to the *consortium vitæ*, to what are crudely called the conjugal rights. These new relationships are not in their nature bad on the ground of immorality, or likely to lead to immorality, any more than the engagement of affectionate couples, who have not suffered the miseries of an ill-assorted union. On the footing that the marriage of divorced persons is legal in this country, it is true that such a promise may possibly place, at least in theory, a new obstacle to the parties being reconciled, and coming together again. But it is agreed that, in the vast number of divorces, there is no reconciliation. A mere possibility of that kind cannot, to my mind, counterbalance the solid and certain considerations which I have indicated. As Lord Truro said in *Egerton* v. *Brownlow* (*Earl*) (2), at p. 197, an authority to which I shall refer later, the judges must be presumed to take care not to apply the law (that is relating to public policy) to doubtful cases. If I thought this type of case was doubtful, that would be enough to justify me in deciding not to invalidate a contract like this. But I go further. There is, in my judgment, no rule of law such as the respondent claims there is. In any event, it is admittedly a new law, or, at lowest, a substantive extension of law. We have high authority for saying that the court is not to establish new heads of law founded on new public policies. The onus is always on those who assert that the court is not to enforce a contract which is *ex facie* good, save on grounds of law substantial enough to outweigh the paramount policy of the law that people should keep faith and fulfil their promises. *Pacta sunt servanda.* As I can find no such grounds in this case, I agree with the convincing judgment of Greer, L.J., in the Court of Appeal, and disagree, with all respect, with the judgment of Slesser and Greene, L.JJ., who formed the majority.

The case has been elaborately argued. Many authorities have been cited. Some at least of these authorities and arguments I shall now discuss.

I must first attempt to explain what I think to be the modern law in regard to the duty of the court concerning rules based on public policy. It is important to realise what is meant by public policy in this connection. In one sense, every rule of law, either common law or equity, which has been laid down by the courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy. In that sense, Sir George Jessel, M.R., referred to the paramount public policy that people should fulfil their contracts. But public policy in the narrower sense means that there are considerations of public interest which require the courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. Public policy in this sense is disabling. It is important to determine, first of all, on what principles a judge should exercise this peculiar and exceptional jurisdiction when a question of public policy is raised. What is, I think, now clear is that public policy is not a branch of law to be extended, as Lord Blanesburgh, then Younger, L.J., said in *Re Wallace, Champion* v. *Wallace* (5), at p. 303; to the same effect the Earl of Halsbury, L.C., in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), at p. 491, said: "I deny that any court can invent a new head of public policy." The Earl of Halsbury, L.C., further denied the right of a judge or a court to declare that such and such things are, in his or their view, contrary to public policy. The view of the law which has prevailed is that stated by Parke, B., in *Egerton* v. *Brownlow* (*Earl*) (2), at p. 123. His statement has several times been quoted with approval in this House, by the Earl of Halsbury, L.C., in *Janson's* case (1), and Lord Atkinson in *Rodriguez* v. *Speyer Brothers* (16), at p. 91; and in the Court of Appeal by Lord Reading, delivering the judgment of the full court in *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ltd.* (17). The statement runs thus:

> It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

Similarly, Lord Lindley said, in *Janson's* case (1), at p. 507:

> public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson, B., and Parke, B., in *Egerton* v. *Brownlow.*

No doubt Lord Lindley had in mind, *inter alia,* the words quoted from Alderson, B., by Lord Sumner, in *Speyer's* case (16), at p. 126: "My duty is as a judge to be governed by fixed rules and settled precedents." This, I think, explains what Lord Lindley means by "made safe by decision." Public policy, like any other branch of the common law, is governed by the judicial use of precedents. To the same effect in the *Mogul* case (18), at p. 45, Lord Bramwell quotes the words of Cave, J., in *Re Mirams* (4), at p. 595:

> Certain kinds of contracts have been held void at common law on [the ground of public policy]—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.

That this is a modern rule is, I think, clear from considering the method in which courts have considered such questions when they have arisen in modern times, as, for instance, in the *Mogul* case (18), the *Maxim Nordenfeldt* case (19), and *Rodriguez* v. *Speyer Brothers* (16). They have proceeded to apply some recognised principle to the new conditions, proceeding by way of analogy and according to logic and convenience, just as courts deal with any other rule of the common law. Thus, they have sometimes applied the principle to new conditions as the majority of this House did in *Speyer's* case (16), and sometimes refused to extend the principle as this House did in *Janson's* case (1), or the Court of Appeal did in *Wallace's* case (5), or, take a more famous instance, as was done in the *Thellusson* will case (20), when the rule against perpetuities was not extended or applied to dispositions of personalty. I may here refer to the brief but illuminating statement of LORD CRANWORTH in *Egerton* v. *Brownlow* (*Earl*) (2), at p. 253, on this matter. It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world: but that is true of the principles of common law generally. I find it difficult to conceive that, in these days, any new head of public policy could be discovered.

I have found it necessary to state my opinion on this matter because it has been at least suggested, if not overtly argued, that a judge has peculiar powers in a question of public policy in acting upon his individual views or predeliction, and can on these grounds refuse to enforce a contract or disposition of property *ex facie* valid. That was the view expressed, in sharp contrast to the views of PARKE, B., and ALDERSON, B., which I have quoted, by POLLOCK, C.B., in the same case of *Egerton* v. *Brownlow* (*Earl*) (2). He said, at p. 151:

> It may be that judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it.

While it is true that a judge is entitled to have, and even state, on proper occasions, his personal opinions, on questions of public interest, it is a different matter if he claims to base his judicial decisions on his personal opinions. Hence the modern acceptance of the contrasted view of PARKE, B., which I have explained. POLLOCK, C.B., it seems, approved of the reasoning adopted in *Gilbert* v. *Sykes* (21), and of the unfair and illogical rule, long abolished by Parliament, that seamen were not entitled to insure their wages. *Gilbert* v. *Sykes* (21) was one of the cases in which the court invented the most extraordinary views of public policy to avoid enforcing wagers. The curious who read it will find it a good specimen of a judicial practice in these matters current in the early decades of the nineteenth century but long since obsolete. PARKE, B., at p. 124 said of these cases that:

> courts have . . . been astute, even to an extent bordering on the ridiculous, to find reasons for refusing to enforce them.

He goes on to discuss the idea that the supposed tendency to evil constitutes a ground for avoiding transactions, and points out that what consequences would follow from its logical application, for instance, insurances on life or against fire might be declared void as tending to murder, suicide or arson. He adds, at p. 128:

> in short, there are few contracts in which a suspicious mind might not find a tendency A to produce evil; and to hold all such contracts to be void would, indeed, be an intolerable mischief.

It is true that the majority of the House in *Egerton* v. *Brownlow* (*Earl*) (2) came to the conclusion advised by POLLOCK, C.B., and not that advised by PARKE, B., and the eight judges who agreed with him, but there B was no need for such extreme reasoning to support their judgment, which, indeed, was a legitimate extension of *Kingston* (*Earl*) v. *Pierepont* (*Lady Elizabeth*) (22), and depended on the view that the condition in question was aimed at, and tended to exercise, a corrupt influence on the Government in regard to the appointment to high dignity in the C state, that is, a dukedom or marquisate. Later the Court of Appeal, in *Re Wallace, Champion* v. *Wallace* (5), refused to extend this doctrine to a baronetcy. The only place in which I have found the *dictum* of POLLOCK, C.B., quoted is in *Speyer's* case (16), at p. 79, by LORD HALDANE, but only with very qualified approval. It was not necessary D for the decision, and finds no reflection in the opinions of his colleagues, either the two who agreed with him or the two who dissented. In view of the passages I have quoted from later judges, it is, I think, clear that this *dictum* of POLLOCK, C.B., and certain observations in *Egerton* v. *Brownlow* (*Earl*) (2) to a similar effect, cannot be regarded as fixing the E modern law, which, in my opinion, is as stated by PARKE, B.

The necessarily brief analysis of the law, as I understand it, enables me to propose the question to be decided in this appeal, viz., is there any rule of law founded on public policy which could justify avoiding the promise sued upon? Or, to paraphrase the words of the EARL OF F HALSBURY, L.C., in *Janson's* case (1), on p. 490, what are the definite propositions as to what interest of the state, or what public inquiry, is supposed to be involved, or how or upon what principle of law the promise was unlawful. The matter must be decided on tangible grounds, not on mere generalisations.

G The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married, or to pay a sum of money, or give some other consideration, in return for immoral association. But nothing of the sort was suggested in this case. On the contrary, the promise, if carried out, would have regularised an H immoral association. English law recognises the right of divorced people to marry though their former consorts are alive. The law has furthermore sacrificed a rigid idea of morality to the idea of making reparation by enforcing obligations under seal by a man to pay money to a woman in respect of past immoral cohabitation, though it might have been said that to enforce such obligations tended to encourage immorality. The only public policy which can be involved in this case must be that of promoting and safeguarding, as far as may be, the relationship of marriage, the maintenance of which must always be regarded as of primary moment in any civilized state, and not least in a country like ours, which is essentially monogamous. The marriage relationship is certainly a matter of public interest; it involves a status of public character, indissoluble by the consent of the parties, though by English law dissoluble since the Reformation by the legal machinery provided by Parliament. As, unfortunately, there are unhappy and ill-adjusted marriages, the law has provided carefully guarded and restricted means of ending them, before 1857 by the divorce *a mensa et thoro* followed by a private Act of Parliament, since 1857 by the Matrimonial Causes Act, and its amending Acts. Apart altogether from questions of divorce, questions arose about the validity of separation agreements. It was held at first that an agreement for the separation of husband and wife and their living apart was illegal, as in *Mortimer* v. *Mortimer* (8). The agreement was held to involve a renunciation and dereliction of the mutual offices which the parties were not at liberty to desert. Lord Eldon was originally of that opinion, but later recognised the validity of separation agreements, and, in *Wilson* v. *Wilson* (11), this House finally decided that agreements for immediate separation, or made where there was actual present separation, were legal and valid, and that dispositions of property under them would be specifically enforced. Later, in *Hunt* v. *Hunt* (12), in 1861, the Lord Chancellor granted an injunction against a spouse suing another for restitution of conjugal rights where there was a separation agreement. Lord Westbury said that the law regarded a deed of separation as any other legal contract, and that voluntary separation was not an offence at common law, however it might be regarded from a religious point of view. He said that it was not contrary to any policy of the law, which he defined as a consideration of such general and universal public utility as should, as a matter of sound reason, regulate the proceedings of courts of justice. It was true, he said, that the ecclesiastical courts would not admit a separation agreement as a bar to a suit for restitution of conjugal rights, but, as he pointed out, the statute of Henry VIII provides that ecclesiastical law is only to prevail so far as not contrary to the common law, and, as this law does recognise separation agreements as legal, a court of equity would enforce them by injunction.

It is clear that to admit the legality of such agreements was to legalise the cessation by mutual agreement of the *consortium vitæ* of matrimony, to prejudice the chances of reconciliation, and, perhaps, to sacrifice the interests of the children. What, however, was not enforced was a contract before marriage, or before the spouses actually separated, or agreed to separate, which provided for the position if in future they did separate. It was held that an agreement for future separation was against the policy of the law. The distinction between that and the cases of actual separation is obvious. If a separation has actually occurred, or become inevitable, the law allows the matter to be dealt with according to realities, and not according to a fiction. But the law will not permit an agreement which contemplates the future possibility of so undesirable a state of affairs. But the law admitted a still further, though not inconsistent, refinement. Where parties had separated, but were coming together again, their agreement for resuming cohabitation may, it has been held, contain a provision for maintenance if they separate again: *MacMahon* v. *MacMahon* (23). I have referred to these cases as illustrating the modern development of a rule of public policy in relation to the marriage state, apart from the Matrimonial Causes Act. I think it very significant as supporting the distinction which I draw between the position before and after decree *nisi*.

The Act of 1857 provided for a single decree of dissolution, leaving the parties free to marry again, as soon as appeals were out of question. By the amending Acts of 1860 and 1866, the decree of dissolution was changed from being a single decree into a bipartite decree. The position was peculiar, because the decree *nisi* was an adjudication that the matrimonial offences justifying divorce were established, and that the marriage was to be dissolved, but the decree was to be absolute only if, within six months, sufficient cause were not shown why it should not be made absolute. It has been said that the decree *nisi* constitutes the inchoate, the decree absolute the final, dissolution. Between the decrees, the marriage, not being, but only to be, dissolved, still subsists. If one party dies before decree absolute, the survivor will be widow or widower, as the case may be. Adultery in that period will be a matrimonial offence, which, if committed by the petitioner, will be a ground for rescinding the decree, or, if committed by the respondent, would found, if need be, a new petition. In that period, the woman in former days was still under the contractual disabilities of a married woman (*Norman* v. *Villars* (24)), though a court of equity would treat the decree absolute, when pronounced, as relating back to the decree *nisi*, so as to relieve the woman against acts of the husband prejudicing her estate: *Prole* v. *Soady* (25), at p. 220. The order *nisi* in truth determines the status of the parties, though its final operation is suspended, and it is subject to a contingency. Sect. 7 of the Act of 1860, which introduced the bipartite decree, shows that the purpose of the interval was not the private interest or detriment of the parties, but to enable the King's Proctor or other member of the public to show cause, if need be, why the decree should not be made absolute, because the decree *nisi* had been obtained "by collusion or by reason of material facts not brought before the court."

One consequence, not perhaps contemplated, has been that, if a petitioner does not apply to have the decree made absolute, the respondent cannot apply, and hence the final decree can never be made. This unmeritorious course is rarely adopted. In the very few cases in which it is adopted, it is mostly for the purpose of exacting better terms. But in the vast majority of cases, the decree absolute follows the decree *nisi* in due course: indeed, the court has a discretion to make the decree absolute at any time within the stipulated six months.

The marriage, then, in the sense and respects which I have indicated, continues until decree absolute. But it is obvious that in truth and in substance there is no longer any marriage. There is no longer any matrimonial home, no *consortium vitæ*, no right on either side to conjugal rights. The court has, at the suit of the petitioner, publicly found the respondent guilty of matrimonial offences which in law go to the root of the relation, there is no common home for the children, if there are children, and the court has to provide for their position. The court has pronounced for dissolution to take place, subject to the qualification I have stated, at the end of a specific fixed and brief period. If realities are to be looked at, and not mere form, by the court, as the court did in regard to judicial separation, the marriage is at an end, and the parties are entitled to provide for their future, at the end of the period fixed for the decree absolute, when by English law they are entitled to marry again. How can the public interest in regard to marriage be prejudiced if the innocent petitioner then desires to enter into an engagement, conditional on the decree absolute, for a fresh marriage? The law permits such a marriage, and, indeed, in general, it would be regarded as in the public interest. Again, how can the public interest be prejudiced if the respondent seeks to make a conditional engagement to terminate or atone for an immoral association with the intervener or co-respondent? In this case, also, public policy would seem to favour such a course. Or the guilty party may not desire to renew the immoral association, and may desire to form a new engagement, and lay the foundation of a new life. Why should the law impose on these people a contractual disability, even though temporary, merely because they have contracted an unfortunate marriage, and availed themselves of, or become subject to, the divorce law? There is, in my judgment, no authority for any such rule of law, or any such new public policy. Public policy is, in my judgment, best subserved by the opposite view.

It is, however, contended that the case is governed by the decision in the Court of Appeal in *Wilson* v. *Carnley* (7), agreeing with a decision of Phillimore, J., in *Spiers* v. *Hunt* (6). These were cases in which the promise to marry was given while the marriage state in the full legal sense continued, and before decree *nisi* had been made, or even sought. But it was said that, as the marriage is not dissolved till decree absolute, the fact of decree *nisi* makes no difference. I cannot see how a question of public policy can be decided on what appears to me to be a technicality. Even if *Wilson* v. *Carnley* (7) be correctly decided, still I find in the decree *nisi* a ground of distinction as decisive as the distinction between the dukedom or marquisate and the baronetcy which distinguished *Re Wallace, Champion* v. *Wallace* (5), from *Egerton* v. *Brownlow* (*Earl*) (2), or between *Thellusson's* case (20), and those in which the rule of perpetuities was applied, or between *Janson's* case (1) and *Speyer's* case (16) and the earlier cases respectively, in which a contrary view was taken of the applicability or non-applicability of the public policy in regard to alien enemies. The approach to the question is the same, in my opnion, A in a question of law based on public policy, as in any other case in common law or equity, where a previous authority has to be either extended or distinguished. As LORD LYNDHURST said, in *Egerton* v. *Brownlow* (*Earl*) (2), at p. 161:

> Each case [meaning, as I think, each class of cases] must be determined according B to its own circumstances.

He instances a typical equity case, that of a trustee dealing with his *cestui que trust*. I must accordingly consider whether the *ratio decidendi* of *Wilson* v. *Carnley* (7) is appropriate to govern this case or whether it does not point to the opposite conclusion in this case.

C I shall assume, for purposes of this appeal (as has been assumed in argument), that *Wilson* v. *Carnley* (7) was rightly decided. That exact question has not been argued before your Lordships. When *Wilson* v. *Carnley* (7) came before CHANNELL, J., on the abstract question of law whether the promise given during marriage was void, that admirable D common lawyer said he could not decide it as an abstract question, instancing such cases as where the other consort was an incurable lunatic, or the promise was made at the instance of a dying consort. PHILLIMORE, J., at p. 725, said he did not decide such cases: the rule might be general but not universal. Again, in *Wild* v. *Harris* (26), and in E *Millward* v. *Littlewood* (27), the Court of Common Pleas and the Court of Exchequer respectively did not hold a promise to marry by a person already married as bad in law. It is curious that POLLOCK, C.B., and PARKE, B., appear to have taken different views on this question of public policy. Both these cases presented complications, and might, F it seems, have been decided on other grounds than the mere promise in favour of the plaintiffs. The Court of Appeal in *Wilson* v. *Carnley* (7) were prepared, if necessary, to overrule these authorities. In that case, the plaintiff and defendant both thought the wife was likely to die soon. So far as I can follow the precise reasons given why the contract was G void *ab initio* as being against public policy, they were primarily that the contract was likely to induce a breach of morality, and likely to conduce, either to the crime of murdering the spouse, or perhaps to the attempt to procure a dissolution of the marriage by conduct, on the part of the husband, which would compel the wife to seek divorce. It was also H said that such a promise was inconsistent with that affection which should subsist between married persons. I agree that it is difficult to imagine, from the standpoint of an affectionate and happy marriage, or, indeed, from that of any marriage where the parties are living together, how a man or a woman could, in the consort's lifetime, enter into an engagement to marry another. As I have said, I am prepared to assume, without finally deciding, that *Wilson* v. *Carnley* (7) is rightly decided, but I do not see why it should be said that such a promise as that in question would conduce to immorality, or have such a tendency to conduce to immorality that the court would hold it void on that ground. On a matter of this nature, there neither is nor can be evidence on which the judge can act. The question is a question of law, and the judge must, if necessary, act upon general considerations of human nature. Some judges may feel that undue suspicions of pruriency are to be avoided. I am not sure how considerations of that sort apply in such a case, unless it is conceived that an act of such disloyalty shows such a wicked mind that anything may be expected. But I have not considered it necessary to form any final opinion on *Wilson* v. *Carnley* (7) (which may well be correctly decided on the ground of disloyalty), because I think that quite different considerations apply in a case where the marriage has been contingently dissolved by a decree *nisi* on petition. The marriage bond is then for all practical purposes severed, indeed the marriage is in truth dissolved. Loyalty is in fact at an end. Of course if the promise is given in consideration of future immoral relations, it is illegal and void on that ground, but I cannot see any implied general tendency to immorality in such a promise. If the guilty parties are living together in immoral relations, the promise points to moral relations being established by marriage in the near future, when the decree is made absolute. If the parties are acting morally, I cannot see why the promise after decree *nisi* should lead them into immorality. There is the further reason which distinguishes from a case like *Wilson* v. *Carnley* (7) the case of an engagement entered into after decree *nisi*: in that latter case, the period of delay is fixed by law with what is practical certainty (because I disregard the very exceptional, and practically negligible, cases where the petitioner refuses to apply for decree absolute, or where the decree *nisi* is rescinded) and there is no real temptation to anticipate the consummation of the union, or to accelerate the period when it will be possible legally, and there is no need to adopt improper means to procure the dissolution of the tie, because the marriage is already dissolved in truth by adjudication of the court. All that can be done in that respect is already accomplished. Again, there can be no motive of affection or loyalty after decree *nisi* which would be outraged by either the innocent or guilty party entering into the new engagement, conditional on decree absolute. Kennedy, L.J., at p. 743, says that the cases:

> in which separation deeds have been held good are really cases in which, circumstances having brought the parties to the point at which separation was inevitable, it was merely a question of making provision for the terms of such a separation.

I cannot conceive any such case in which separation is as inevitable as where there has been a petition and a decree *nisi*, and I do not see why either party, or both parties independently, should be debarred from making provision for the future when the final and inevitable separation has taken place.

Certain cases in the courts of the United States have been referred to, but the reasoning of these cases seems equally inappropriate to such a case as the present, and, indeed, to support the view I have formed. In *Paddock* v. *Robinson* (14), the promise was given while both parties were married. It was said that the promise involved a moral unfaith-
A fulness to the marriage tie, and was incapable of performance except on a contingency so remote as not to be expected, and a sin to anticipate. In *Noice* v. *Brown* (13), a married man, living apart from his wife, who was prosecuting a suit for divorce, promised to marry the plaintiff within a reasonable time of divorce. There again there had been no adjudica-
B tion by the court, and no inchoate decree like the decree *nisi* for dissolution.

But I have not found, in any of these cases, reference to a matter which seemed to me most worthy of consideration when I was deliberating on this case, I mean the point that such a promise as that in question
C may tend to present an obstacle to reconciliation. The law would undoubtedly favour reconciliation if there were any prospect of it, especially where there are children of the marriage. In a sense, the interests of children are sacrificed in divorce, though it may be that, in the unfortunate circumstances, the separation of the parents is best even for them.
D But it is clear that the validity of a separation agreement is an obstacle to reconciliation, and reduces the prospect of it, yet that has not been held to make such agreements contrary to public policy. I think the real answer to the difficulty is that the prospect of reconciliation is too remote. It is admitted on both sides that, in the vast number of cases,
E the decree *nisi* is followed by the decree absolute, and I think the chance of reconciliation is too slight to furnish a sufficient reason to hold the promise of marriage void. It is true that a tendency to a certain result may constitute a matter contrary to public policy but, as I pointed out above, it must be a substantial or serious tendency sufficient to
F justify so grave a conclusion. A promise such as the present, made after decree absolute, would be an obstacle to reconciliation, but no one would treat that as a ground for saying promises after decree absolute are against public policy. A mere remote possibility cannot be weighed against the solid fact of a contract *ex facie* legal and binding.

G In all the cases, many hundreds in number, in which, sitting as a judge of assizes, I made orders *nisi*, I never heard of one in which the decree *nisi* was not made absolute. I cannot recall a single case in which there appeared to me to be the slightest prospect of reconciliation. It seemed clear that a chapter was being closed and a new chapter being opened.
H In most cases it seemed obvious that the petitioner was looking forward to commencing a new life.

I have here chosen the decree *nisi* as marking the line of division and demarcation. Many of the above arguments would apply to a mere separation, and even more to the presentment of a petition. But I think a decisive point is reached by the decree *nisi*. The petition is merely the first step in proceedings. The result is uncertain. There is no public hearing. It is true the parties are, when the petition is lodged, almost certainly living apart, and must live apart while the petition is pending. But there is nothing final such as there is in the adjudication and the decree *nisi*, given in public court and in the eyes of the world. Before that the charges may fail, the petition may be compromised, the A parties may be reconciled. The whole position, in my opinion, becomes changed and fixed by the decree *nisi*.

On the whole case, I think the appeal should be allowed.

LORD ROCHE: My Lords, it is a settled rule of the law of England B that certain classes of contracts, which by reason of their nature and tendency are contrary to public policy, will not be enforced in our courts: *Egerton* v. *Brownlow* (*Earl*) (2). Amongst these classes of contracts are contracts of marriage brokerage, contracts in restraint of trade, contracts tending to assist the King's enemies: see *per* LORD HALSBURY, L.C., in C *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), at p. 491.

In my opinion, it may also be regarded as a settled rule of our law that, in general, promises of marriage, made where one of the parties, to the knowledge of the other party, is married at the time of the promise, fall into and constitute a class of contract which is unenforceable as D contrary to public policy. This, in my opinion, is the effect of the decision of the Court of Appeal in *Wilson* v. *Carnley* (7), approving *Spiers* v. *Hunt* (5), and, although the matter has not been previously considered in this House, it has come before the Judicial Committee of the Privy Council in *Skipp* v. *Kelly* (28). The law was thus stated, E at p. 259, in the judgment of the Board delivered by LORD DUNEDIN:

> It was undoubtedly the case that the defendant first proposed marriage when Mrs. Kelly [the plaintiff] was a married woman. It was understood between them that a divorce was pending and the divorce afterwards took place; but it had been quite settled in law that a promise made in these circumstances was a void promise.

F

The same settled rule of law prevails in the courts of the United States of America, and is thus stated by WILLISTON ON CONTRACT, 1926 Edn., s. 1743:

> An agreement by a married man to marry another woman after a divorce not yet granted from his present wife is illegal.

G

In the reported cases, English and American, various illustrations of the evil tendencies of such agreements are given, but the essence is that "they are in themselves a violation of marital duty"—LAWRENCE, C.J., in *Paddock* v. *Robinson* (14). I confess it seems to me manifest that it is incompatible with the status of marriage that a spouse should also be H the betrothed of another. There are cases in the books where a promisee has recovered damages where a promise has been made by a spouse, concealing from, or not disclosing to, the promisee the fact of a subsisting marriage. Such decisions may be supportable on the grounds of a collateral warranty or of fraud, and do not affect the validity of the

rule. It was conceded at the bar by the appellant's counsel that the general rule subsisted, and it was not sought to question it in argument before your Lordships. The argument for the appellant was shortly and solely this, that, although certain promises of marriage which were made in the present case before the decree *nisi* (dated Jan. 16, 1933)
A were not enforceable, and were not relied upon, promises made after decree *nisi* and before decree absolute were not within the rule, and were enforceable. It was said that the basis of the rule was the preservation of loyalty between spouses, and that, upon the decree *nisi*, loyalty was so impaired or destroyed that the rule could not and did not
B operate.

I find myself quite unable, with the greatest respect to those of your Lordships who think otherwise, to assent to this reasoning. The decree *nisi* operates only in the future, and when the court sees fit to make it absolute, and I need not repeat what has been truly said by my noble
C and learned friend LORD RUSSELL OF KILLOWEN as to the continued subsistence of the married status of the parties to the marriage after a decree *nisi*, and as to the bearing of that fact upon questions of adultery and of reconciliation. The plain fact, as it presents itself to my mind, is that, after decree *nisi*, the respondent was a married man as he was
D before, and was in no material respect in a situation different from that he was in after he committed matrimonial offences by entering on an adulterous intercourse with the appellant, who knew he was married, or from that he was in after his wife petitioned for divorce, and cited the appellant as a party to the suit. It seems to me to be inadmissible, and
E contrary to the established rule of law, to deal in degrees of marriage, and to draw a line either at the filing of a petition or at the pronouncement of a decree *nisi*, and to say that, at either of those dates, a party is so little married that the rule as to promises of future marriage does not apply. I also regard it as inadmissible in law to enter upon an
F examination of particular circumstances in this manner. The opinions expressed in this House in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1) are much in point. In that case, the defendant Janson, a British underwriter, contended that the seizure of gold, the property of the plaintiff company, a foreign subject, by his own government in the
G Transvaal Republic before the outbreak of the Boer War, and, as it was said, in preparation for such war, fell within the rule by which no recovery could be had for such a seizure, if made by an enemy. This House would not so extend the rule. The EARL OF HALSBURY, L.C., having stated, in the terms I have already mentioned, the rule of law as to contracts
H contrary to public policy, said, at p. 491, that the rule " does not leave at large to each tribunal to find that a particular contract is against public policy." Then he said that, the rule being a rule as to existing war, " imminent war is not the same as war " and " expected wars do not make a contract illegal." LORD MACNAGHTEN, at p. 497, said that " the law knows nothing of an intermediate state which is neither the

one thing nor the other—neither peace nor war." Lord Lindley said, at p. 507 :

> A contract or other transaction which is against public policy, i.e., the general interest of this country, is illegal ; but public policy is a very unstable and dangerous foundation on which to build *until made safe by decision.*

I have ventured to emphasise the last words of the sentence by italics, because they are omitted in the headnote to the case, which is therefore apt to mislead. The decision is plainly not in derogation of the rule as to public policy. It is an affirmation of its existence and force, accompanied by a refusal to innovate, in that case, by adding something to a rule sanctioned by decision. Here, in my opinion, this House is again asked to allow an innovation by taking something away from a rule sanctioned by decision. It is also asked, in my opinion, to act as this House refused to act in *Janson's* case (1), to know some intermediate state which is neither one thing nor the other, neither marriage nor divorce, and to treat expected or imminent divorce as the same as divorce. I find myself unable to regard such a derogation from the rule as permissible in law. Now, to evolve new heads of public policy, or to subtract from existing and recognised heads of public policy, if permissible to the courts at all, which is debatable, would, in my judgment, certainly be permissible only upon some occasion as to which the legislature was, for some reason, unable to speak, and where there was substantial agreement within the judiciary, and where circumstances had fundamentally changed. None of those conditions seems to me to exist here. As to the last matter, change of conditions, it was suggested, in argument for the appellant, that such a change had taken place in the accepted views as to marriage and divorce. I confess I find no change relevant to the matter now in question. Merely in order that I may not be misunderstood, it may be permissible to say that I am not venturing on any disapproval of the Act of 1857, nor of subsequent modifications of it, nor of proposals for its further modification, which, in my judgment, deserve full and sympathetic consideration. But, as to the essentials of the status of marriage, whilst it subsists, and as to the importance of it as an institution, I think that the language of Kennedy, L.J., is as true to-day as when it was used in 1908. In the course of his judgment in *Wilson* v. *Carnley* (7), he said at p. 743 :

> I do not think that in post-Reformation times any change of view material for the present purpose has taken place with regard to the moral obligations involved by marriage. Apart from the especial sanctity which from an ecclesiastical point of view was formerly attached to marriage, and although the idea of its sacramental character, which once formed the basis of the civil law of Europe with regard to it, no longer prevails among the majority of persons in this country, I think that nothing has really ever been allowed to derogate from the sense of the obligations involved in the status of marriage.

I have but few other observations to make upon the particular case under discussion. It was said, in argument for the appellant, that little of the substance of marriage was left after a decree *nisi* ; but of what remains whilst the marriage is undissolved not an insignificant part is the duty the spouses, the parties to the suit, owe to the court in charge of the divorce proceedings, including the supreme duty of candour and good faith. I cannot myself regard it as tending to the performance of such duty that, whilst the court is still suspending its final decree, and may not pronounce it at all, another and powerful motive for securing A its pronouncement should be interposed by the act of one of the parties. There would indeed, as it seems to me, be some inconsistency in another court holding to be enforceable a promise of another marriage, on an event which the court in charge of the divorce suit relating to the subsisting marriage has yet to determine.

B It was also argued that the matter must not be considered or decided on the facts of this case, and that it should be supposed that the promise of marriage was made by an innocent petitioner. I confess for myself that, taking, I hope, a not unduly unfavourable view of human nature, I could not but think that innocent petitioners would be averse to either C making or disclosing to the court binding promises to contract a new marriage pending a final decree dissolving the subsisting marriage. Whilst, therefore, the facts of this somewhat sordid case are not conclusive of the tendency of promises such as these, I think, with GREENE, L.J., that they afford an illustration of the real and general tendency of D such promises.

I would also desire to adopt without reiteration that which was said by GREENE, L.J., as to the essential difference between the functions of a divorce judge in the exercise of his discretion where he is charged with the examination of particular cases and the functions of a court E charged with the application of a general and established rule of law such as is now in question. Public policy, it is true, has been said to be an unruly horse, but no one denies that it is given to the courts to manage. Metaphors and analogies are often misleading, but this one can serve a useful purpose if it is a reminder that the management that is most useful F is one that is most consistent and uncapricious. It is because I feel satisfied that to make the exception contended for by the appellant would not be a compliance with the rule, or with these conditions for its administration, that I am in favour of the dismissal of this appeal.

Appeal allowed, and judgment entered for plaintiff for the amount found G *by the jury.*

Solicitors: *Percy Haseldine & Co.* (for the appellant); *Sutton, Ommanney & Oliver* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

RONALD BAMPTON & PARTNERS *v.* D. GARNER & SONS, LTD.

[King's Bench Division (Hilbery, J.), **May 27, 1937.]**

Agency—Sale of property—Vendor withdrawing from contract—Bargain too favourable to purchaser—Bargain previously agreed to by vendor—Vendor's mortgagee refusing to agree to bargain—Remuneration of agent—Damages—Assessment of damages.

An agent for the sale of 3 shops in course of erection by builders secured an agreement for the purchase of the same upon certain terms agreed to by the builders who were in fact the vendors. When the agreement was mentioned to the solicitor for the persons financing the builders, he refused to allow the sale to go on, upon the ground that it was completely one-sided and too advantageous to the buyer. The builders then refused to go on with the sale and the agent sued for his commission :—

Held : the fact that upon further consideration the bargain is far too favourable for the purchaser is not a just excuse for refusing to proceed with the sale, and the agents were entitled to damages for the loss of the opportunity of earning their commission, and such damages ought to be assessed at half the amount of the commission.

[EDITORIAL NOTE. In *Trollope* v. *Caplan* (5) it was said that there might be "just excuse" for the withdrawal from a contract of sale, but the term "just excuse" was not further defined. The present case decides that the fact that the bargain is found to be altogether one-sided is not a "just excuse" nor would it appear to be a just excuse that the person financing a builder refuses to recognise the sale on account of the inadequacy of the price. It will be noted that the price was agreed to by the vendor and not one fixed by the agent. The case also considers the assessment of damages in such a case and in this respect may be a useful guide to the liability of the vendor to the agent.

As to Right to Remuneration, see HALSBURY, Hailsham Edn., Vol. 1, pp. 258, 259, para. 433 ; and for Cases, see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to :

(1) *Green* v. *Lucas* (1875), 33 L.T. 584 ; 1 Digest 511, *1761*.

(2) *James* v. *Smith* (1921), [1931] 2 K.B. 317, *n* ; Digest Supp. ; 100 L.J.K.B. 585, *n* ; 145 L.T. 457, *n*.

(3) *Martin* v. *Perry & Daw*, [1931] 2 K.B. 310 ; Digest Supp. ; 100 L.J.K.B. 582 ; 145 L.T. 455.

(4) *Trollope* (*George*) *& Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436 ; Digest Supp. ; 103 L.J.K.B. 634 ; 152 L.T. 88.

(5) *Trollope* (*George*) *& Sons* v. *Caplan*, [1936] 2 K.B. 382 ; [1936] 2 All E.R. 842 ; Digest Supp. ; 155 L.T. 365.

Action by a firm of house agents for commission for the introduction of a purchaser of shop property. The facts are fully set out in the judgment.

H. H. Maddocks for the plaintiffs.

Donald McIntyre for the defendant company.

Hilbery, J. : The facts in this case are as follows : The defendant company was developing the Wells Estate, Epsom. The company had erected houses and shops ; Mr. William Garner, a practical builder,

was the director in charge of the developing of this estate, and had the conduct of the arrangements which were come to with the plaintiffs. He first got into touch with the plaintiffs with a view to effecting through them the sale of some houses, and, on Aug. 11, the plaintiffs' representative, one Miller, called with a prospective purchaser to view the
A house property. The houses were of no interest to the plaintiff's client, but there was a row of four empty shops which was also shown to the plaintiffs' representative and the gentleman he had taken with him, and eventually Mr. Garner instructed the plaintiffs to sell these, at £1,260 for each of the three inside shops, and £1,350 for the end shop,
B Mr. Garner guaranteeing to have the shops let, if a sale was arranged, on 7, 14, and 21 years' full repairing and insuring leases, at rentals of £125 per annum exclusive for each shop, before completion. On Aug. 12, 1936, by a letter of that date, the plaintiffs put forward a definite cash offer of £3,600 for the four freehold shops, subject to this guarantee
C by the defendant company. That offer was refused. Mr. Garner did not, however, repudiate the guarantee as to letting upon the basis of which the plaintiffs said in their letter they were instructed to sell the property. In Sept., Mr. Garner informed the plaintiffs that he had sold the end shop, but that the three inside ones were available at
D £1,200, and that he could guarantee lettings of these at £125, as he had previously stated. The plaintiffs thereupon got into touch with another firm of agents, Messrs. Shepherds, and put before them particulars of the shops, with a view to collaborating with them to find a purchaser. On Oct. 12, Mr. Miller telephoned to Mr. Garner an offer of £3,300,
E which he had received through Shepherds. Mr. Garner was not willing to accept this, and said he would write. On Oct. 12, Mr. Garner wrote a letter, giving his selling price as £3,450, at which price he said he would put in three shop fronts at a cost of £150, and the buyer would have to pay the agents' fees. He added that he had several clients waiting to
F take the shops at £125 a year. Again, when the plaintiffs answered this, they confirmed that at this figure Mr. Garner was agreeable to:

> let each of the shops on 7, 14, 21 years' full repairing and insurance leases at rentals of £125 per annum exclusive.

On receipt of that letter, Mr. Garner again did not demur to this
G statement.

On Oct. 20, Shepherds' representative, one Devos, took down to the site a prospective buyer of this property, one Thomas, and met Mr. Garner on the site. After a discussion, Thomas offered to buy the three shops for a total sum of £3,550, to include £150 for shop fronts and
H £100 for agents' fee, the defendant company guaranteeing, as before, to have the shops let before completion on 7, 14, and 21 years' full repairing and insurance leases, at rentals of £125 per annum exclusive, and to be responsible for the fitting of the shop fronts. The defendant company, through Mr. Garner, accepted this offer, and Mr. Devos thereupon gave to Mr. Garner Mr. Thomas's name, and that of the

solicitors who would be acting for him. Mr. Devos added that Mr. Garner would receive confirmation from the plaintiffs that night, because Mr. Devos would call on the plaintiffs and advise them that the sale had been arranged. Mr. Devos did call on Mr. Miller, and, in consequence, Mr. Miller wrote the letter, dated Oct. 20, confirming that the sale had been arranged, upon the terms above mentioned. I am satisfied A that the plaintiffs' letter of Oct. 20 accurately represents the mandate given to the plaintiffs, and the terms upon which a purchaser, at a figure of £3,550, was acceptable to the defendant company. What happened subsequently was that the plaintiffs informed the defendant company's solicitors of the terms upon which they had arranged the sale of these B shops. Mr. Jones, of the defendant company's firm of solicitors, was providing finance for the development of this particular estate, and, on Oct. 22, on behalf of the defendant company, refused to accept the figure quoted conditionally on the defendant company's letting the premises on full repairing and insurance leases at £125 per annum. C A further interview took place, when Mr. Garner said, in effect, that he wished to go on with the matter, but his solicitors would not let him. Mr. Thomas offered a further £100, subject to the same conditions, but this was refused. Mr. Jones in the witness-box explained that the reason for insisting upon refusing to go on with the sale to Mr. Thomas D was that he formed the view that the transaction was completely one-sided, in other words, that it was too advantageous to the buyer. The defendant company's refusal to go on with the matter being complete, the plaintiffs brought this action.

In the circumstances, I think that what the plaintiffs had to do, E under their mandate, was to introduce a person ready and willing to buy, at the price, and subject to those conditions, which the defendant company, through Mr. Garner, had said were acceptable: *Green* v. *Lucas* (1), *James* v. *Smith* (2), *Martin* v. *Perry & Daw* (3). This they did, and they proved before me, by the evidence of Mr. Thomas, the F buyer introduced, that he was ready, willing, and able to complete the purchase, on the conditions arranged on Oct. 20, and confirmed by the plaintiffs in the letter of that date. Since the decision of the Court of Appeal, which is binding on me, whatever my own view may be, in *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (4), that, in such an employ- G ment, in the words of MAUGHAM, L.J., at p. 456:

> There is a necessary implication that the employer will not do anything to prevent the earning of the remuneration, unless at any rate he has some just excuse for his interference with the course of events obviously contemplated by both parties when they entered into the contract of employment—

it is unnecessary to consider the questions of law which arise on the H plaintiffs' alleged causes of action, other than the claim for damages for breach of contract. On the facts as I have stated them, the plaintiffs did what they were employed to do. The defendant company refused to go on with the matter after the plaintiffs had thus done what they were employed to do, and thereby put an end to the employment of the plaintiffs and to any opportunity of a sale to Mr. Thomas being completed.

It was argued that there was a just excuse for the course they took. There are great difficulties in interpreting the expression "just excuse," but it cannot, in my view, be "just excuse" for refusing to perform A a contract that, on further consideration, it is far too much to the advantage of the other party, or even that it is entirely to the advantage of the other party. The plaintiffs have, therefore, established contract and breach. There remains the question of damages. In *Trollope (George) & Sons* v. *Caplan* (5), the Court of Appeal laid it down that, in B such a case, before there can be made an award of damages equal to the commission the plaintiffs would have earned if the transaction had gone through, it must be found as a fact that, but for the defendant company's act, a binding contract with the purchaser would have been entered into, and that, if this is not established, then the court must C ascertain what damage the plaintiffs have actually suffered by being deprived of the chance of earning their commission.

In the same case, GREER, L.J., indicates that, in considering the amount of the damages in such circumstances, the court must take into account the risk that the vendor and purchaser might never have come D to an agreement with regard to the several matters that would have to be settled before there could be a concluded contract, including, especially, the date of completion. In this case, the date for completion was not fixed; there were many matters which might have occasioned a breakdown before all the contract terms were settled. E What the plaintiffs' chance of earning their commission was it is difficult to say, and it is difficult, therefore, to say what damages they suffered through losing their chance. On the whole, I think there cannot have been more than an even chance of this purchase and sale going through finally. I therefore award the plaintiffs £50, and there will be judgment F for the plaintiffs for £50 and costs.

Judgment for the plaintiffs for £50, and costs.

Solicitors: *Lionel Lazarus & Leighton* (for the plaintiffs); *Warmingtons* (for the defendant company).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

G

BETTY & TOM, LTD. *v.* SOUTHERN ESSEX ASSESSMENT COMMITTEE.

H [COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **June 22, 1937.**]

Their Lordships dismissed an appeal from the judgment of the Divisional Court reported in [1937] 1 All E.R. 461, merely saying that they fully agreed with that judgment.

ROACH *v.* YATES

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **June 22, 23, 1937.**]

Negligence—Damages—Assessment—Shortened expectation of life—Loss of wages—Nursing expenses necessarily incurred for remainder of plaintiff's life.

As a result of severe injuries to the brain sustained through negligence for which the defendant admitted liability, a bricklayer, aged 32, who had formerly led a vigorous, happy and healthy life, became very nearly a hopeless lunatic, who, for the rest of his life, would require nursing attendance day and night. His wife and sister-in-law gave up their respective employments in order to nurse him. In an action for damages the judge awarded him £2,750, which included £542 special damages. He appealed on the ground that the damages were inadequate:—

Held: (i) in assessing damages for shortened expectation of life, it is not a material fact to be taken into consideration that, as a result of an accident, a plaintiff's health is so affected that he no longer desires to live, or that he is unable to appreciate that his expectation of life has been shortened.

(ii) in assessing damages for loss of wages, regard must be had to the plaintiff's normal expectation of life, and not to his expectation of life after the accident.

(iii) in the present case a sum ought to be included for expenses of nursing based upon the wages, amounting to £3 a week, formerly earned by the wife and sister-in-law.

(iv) the damages in the present case ought to be increased to £6,542.

Flint v. *Lovell*, [1935] 1 K.B. 354, *and Rose* v. *Ford*, [1937] 3 All E.R. 359, *applied.*

[EDITORIAL NOTE. It may be that this decision does not carry the legal position as to damages for shortened expectation of life any further than the cases of *Flint* v. *Lovell* (1) and *Rose* v. *Ford* (2). In *Flint* v. *Lovell* (1), it was held that such damages were not part of the damages for pain and suffering, and here it is held that it is immaterial whether the injured party realises at all that his expectation of life has been shortened; or, indeed, if he did, might well have been content that it was. The question of damages is referable wholly to his condition before the accident. The point, in substance, arose upon the facts in *Rose* v. *Ford* (2), since there the injured party was practically unconscious from the time of the accident. The judgments in the present case, however, will be particularly helpful as a practical application of the principles which have been canvassed in the previous decisions.

As to Damages for Personal Injuries, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and for Cases, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

(2) *Rose* v. *Ford*, [1937] 3 All E.R. 359; Digest Supp.

(3) *Rowley* v. *London & North Western Ry. Co.* (1873), L.R. 8 Exch. 221; 36 Digest 140, *942*; 42 L.J.Ex. 153; 29 L.T. 180.

(4) *Phillips* v. *London & South Western Ry. Co.* (1879), 5 Q.B.D. 78; 17 Digest 176, *784*; 41 L.T. 121.

Appeal from a decision of Hilbery, J., dated Jan. 19, 1937, awarding the appellant £2,750 damages, including £542 special damages, in respect of injuries suffered by him as a result of a collision with the defendant's motor car. At the time of the accident, the appellant was a bricklayer, aged 32, in good employment earning £3 10*s.* a week. On Nov. 22, 1935, he was cycling on the road when he was run into from behind by the respondent's motor car. He was thrown on his head and sustained serious injuries to the brain from which, according to the doctors, he would never recover. It was common ground that for the rest of his A life the appellant would have to have two people to look after him constantly. His wife had given up her employment, at which she earned £1 15*s.* a week, in order to look after him, and a sister-in-law had also given up work at £1 5*s.* a week to help in looking after him. The appellant appealed on the ground that the damages awarded were B inadequate.

Gilbert Beyfus, K.C., and *Humfrey Edmunds* for the appellant.

F. J. Tucker, K.C., and *N. R. Fox-Andrews* for the respondent.

GREER, L.J.: This is an unfortunate and a difficult case, and I C think it is the first case in which this court has taken upon itself the extremely difficult task of estimating the damages that should be given to a man whose life has been shortened and whose life has been ruined by turning him into a useless member of society, who cannot earn any wages at all. Where the trial is a trial before a judge alone, and this D court is re-hearing the case, it is not only entitled, but is, I think, bound to assess the damages which it thinks are proper to be awarded.

I do not think it necessary to go all through the evidence as to the results to this unfortunate bricklayer of the accident, which admittedly happened to him through the negligence of the defendant, or negligence E for which the defendant is responsible. I accept *in toto* what HILBERY, J., says has been established by the medical evidence as to the kind of life into which this healthy, athletic and enjoyable life has been converted by reason of negligence for which the defendant was responsible. It is not easy to put a finger on what the plaintiff (the appellant) in this case F has lost by reason of having been converted from a healthy athletic man, who enjoyed his life as a bricklayer, into what is very nearly a hopeless lunatic by reason of the injury to his brain, a man who for the rest of his life will be bound to have nursing attendance day and night, who cannot be left, and whose physical faculties have been so G interfered with that he is put into the awful position of not having control over his own interior economy.

I think HILBERY, J., made one unfortunate mistake in his judgment when he said:

> It is right, with regard to the decision of the Court of Appeal to which I have H been referred [*Flint* v. *Lovell* (1), as interpreted by *Rose* v. *Ford* (2)] that I should take into account, too, that his expectation of life has been seriously diminished; but I myself in this case think that his mental condition is such that it is very doubtful whether he appreciates very much, if at all, the fact that his expectation of life is diminished. I think his condition is such that if he truly spoke upon the topic at all he might truthfully enough say that he was glad to think that his expectation of life had been diminished as much as possible.

It seems to me that HILBERY, J., unfortunately, went completely wrong with regard to that, because what he had to consider was not whether the expectation of life he had after the accident had become diminished so that he was glad to be dead, but whether the length of life he was entitled to anticipate he would have had, if the accident had not happened to him, had been diminished by reason of the accident happening to him through the negligence of the defendant. If that had happened during the course of the summing-up to a jury, it would appear to me that we would have had to order a new trial, having regard to a misdirection. I think the judge misdirected himself upon that point, and we have to decide the real question which falls to be decided, having regard to the decision in *Flint* v. *Lovell* (1), namely, whether we ought not to take into consideration the reduction of his expectation of life by reason of the serious injuries from which he suffered. The injuries which this man suffered were injuries to the brain which made it necessary that he should have day and night the services of some nurse or friend to look after him ; he can get those services, and perhaps get them better, only from the attendance being given to him by his wife and his sister-in-law, but, quite naturally, he would feel that he ought to compensate them for what they have lost by giving up the work at which they were earning the sum of £3. I think that Mr. Beyfus was right in saying that we must take into account, at any rate, for the period during which he may now be expected to live, the sum of £3 a week as the minimum expense which this unfortunate man would have to incur in retaining the services of his wife and his sister-in-law. That is the minimum sum, because it might well be that these two devoted attendants would not be able to continue to attend him, and then he would have either to employ day and night nurses or to go into some institution, where he would have to pay the costs of his attendance day and night by the nurses in that institution. I do not think we are entitled to take into account that he might be thrown upon the mercy of charitable institutions, because no such suggestion was made in the course of the case. What will that come to ? It is difficult to estimate, but I am inclined to take the view that the cost to him of having to compensate his wife and sister-in-law for the loss they have sustained by reason of this accident cannot be under-estimated at a sum approaching, at any rate, the figure of £2,000 for the expenditure that he will be put to for nursing attendants. The judge has given, in addition to his special damage up to date, the sum of £2,200 ; that seems to me quite inadequate in order to compensate him for his pain and suffering, for his loss of expectation of life, for the terrible injuries he has sustained, for the mental suffering that he will inevitably undergo, and for the physical disabilities, which I think the judge found would at any rate last for the period of his shortened life. Taking that into account, one has to estimate also what his loss of wages would be. The judge took that into account, but I do not think he gave a figure which could be adequate to cover either the loss the appellant sustained by having to pay for nursing attendance in the way I have mentioned, or the loss he sustained by not being able to earn any wages whatever, which, in the net result, was the final opinion of all the doctors who were called before the judge. In those circumstances, it is impossible to say that the judge has given sufficient compensation for the injuries which were A sustained by this unfortunate man.

In *Flint* v. *Lovell* (1) I ventured to say this in the course of my judgment, on p. 358:

> I think we ought to accept the judge's finding that by reason of the accident the plaintiff's future was reduced to pain and suffering for a year with a certainty of additional medical and nursing expenses, and the high probability that by reason B of the injuries caused by the defendant's negligence he would be dead within a year. If it was open to the judge to take into account the probability of early death, though this is a border line case, I do not think it can be said that the damages which he awarded, though somewhat on the generous side, are such that the Court of Appeal ought to interfere with his decision and reduce the damages.

Then, on p. 359, I say, referring to the rule about no action being based C on the death of another person:

> Having regard to the peculiar origin of the rule, I have come to the conclusion that it has no application to a case in which a plaintiff still living at the date of the trial is asking for damages on the ground that he has not only suffered severe pains of body and mental disquietude through the prospect of an early death, but also claims that what might have been an eight to ten years pleasant life in which he could have carried on his normal activities has been converted into a precarious tenure D not likely to exceed twelve months, during which he will continue to suffer severely as the result of the wrong of which he complains.

The rules which have been laid down with regard to the decision of juries are these: A new trial will be ordered if it is clear that the jury have not taken into consideration some matters that they were bound E to take into consideration, or have taken into consideration some matters which they were not entitled to take into consideration, or where, on the whole, they have taken an erroneous view of the damages which ought to be awarded. I have said—I think it was in *Rose* v. *Ford* (2)—that those rules ought, as a general principle, to guide this court in F dealing with the question of an appeal on damages, although, of course, an appeal on damages to this court is just as much a re-trial on that question as on any other question. I am quite satisfied by the facts proved in this case, and by the argument to which we have listened, that the judge did come to an erroneous conclusion as to what the G damages ought to be. It is very difficult to assess the damages in this case, because it is not possible, by any amount of damages, to compensate a man who has been subjected to the injuries and sufferings that this man has suffered. If you gave him £10,000 or £20,000—which, I think, was given in one case by a judge—you would not be giving him H something that he would rather have than the continuance of his healthy life. In my judgment, you cannot estimate the damages on that basis; you must take a reasonable view of all the matters which have to be considered, and come to a conclusion upon that basis.

It is said that *Rowley* v. *London & North Western Ry. Co.* (3) ought not to be treated as a guide in determining what ought to be given by way of damages in a case of this sort, because in *Rowley's* case (3) the judge had to consider only the value of a lost annuity, and the court said that the value of a lost annuity is necessarily the cost of replacing it by another annuity of the same value. In the course of his judgment, at p. 231, Brett, J., said this:

> They must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.

It may well be that, in an annuity case, if one were to rely upon *Rowley's* case (3), it would not be right to diminish the damages by reason of the guide laid down by Brett, J.; but, in *Phillips* v. *London & South Western Ry. Co.* (4), that view was accepted as a view which was applicable to a case of damages at large, and not of the loss of an annuity. There, in the course of the argument, James, L.J., said this at p. 84:

> The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

I come to the conclusion that the effect of that observation, which was accepted and was repeated in effect in the judgment of James, L.J., is that we have not to give what will be an absolute and perfect compensation for all the injuries which this unfortunate plaintiff in this case has suffered; we are not to give him as damages the price that he would have accepted in exchange for the life which he preferred to go on living, but, taking all these matters in consideration, I am quite satisfied that the judge did take an erroneous view of the compensation to which this unfortunate man was entitled. There is no question about what should be the damages which are attributable to the loss of wages up to the date when the trial took place; they were assessed by the judge at £542, and, in addition to that, there are the other matters which have been discussed. My brothers and I have come to a conclusion as to the damages that should be awarded; we have to decide what shall be awarded in this case as damages to this unfortunate man, and we have come to the figure of £6,542; that is the figure that, independently, each member of this court thinks is a proper figure to award in this case. For these reasons, the appeal will be allowed, the judgment of the judge reversed, and judgment entered for £6,542.

Slesser, L.J.: I agree. In so far as, in this case, we are differing from the judge in his estimation of the damages, and in so far as we have to take upon ourselves the burden of assessing the damages, I think it is right that I should add my reasons. As Greer, L.J., has said, it is necessary that we should satisfy ourselves, if we are to disturb the estimation of the damages of the judge, that he has proceeded upon an erroneous basis. In my view, his estimation of the damages here, upon the facts as found and stated by himself, must be of so erroneous a nature that it becomes necessary for this court, dealing with the matter by way of re-hearing, to reconsider the basis upon which he proceeds to assess the damages. The sum which he has awarded, apart from the special damage, is in the neighbourhood of £2,200; but when the facts of the case, as found by the judge, are considered, it is evident that the A damage which of necessity flows from those facts, taking into account every reasonable contingency and not making any unreasonable assumptions in respect of the injured man, must come to a very much larger figure.

Apart from the actual loss and expenditure of £542, the damages in B this case fall into two principal groups: the pecuniary damage, the actual sum in money which it may reasonably be held the plaintiff is bound to incur, and will have to incur, by reason of the accident, on the one hand, and, on the other hand, the more uncertain loss, the pain and suffering and shock, and the misery, and the loss of the expectation C of what has been found by the judge to have been a vigorous, happy and healthy life. With regard to the pecuniary loss, that again falls into two groups: the loss of wages and the expenses to which, in his present condition, he must inevitably be put in order that he should be maintained alive. As to his wages, criticism has been made of the D suggestion that one method of estimating his loss under that head is to consider what he would have earned during his normal life, if he had lived. Speaking for myself, I see no justification for approaching that problem by starting with the assumption that he would have lived only so long as the accident has now allowed him to live. I think the proper E way of approaching the problem—as I understand the case of *Phillips* v. *London & South Western Ry. Co.* (4), which is the leading case on this matter—is first to consider what would have been the sum which he would have been likely to have made during his normal life if he had not met with the accident. This was a man of 33 years of age, and the F actuarial expectation of life—which is, at any rate, something to start with—would be that he would have lived, if he had not met with this accident, although he would have met with all the other risks of life, for probably another 30 years. On that hypothesis, it is said that it is wrong, nevertheless, in trying to find out what capital sum would bring G in the wages he would have earned but for the accident, to have any recourse at all to the consideration of annuity tables and the like. I do not for a moment understand Mr. Beyfus to say that, when one has arrived at an estimation of a figure based on annuity tables, one is not to make the proper discounts and deductions for contingencies of every H kind; but he says that that is, at any rate, a method by which one can capitalise the sum he is now to receive at once, rather than by weekly instalments for the rest of his life, as a basis for consideration. It is not the only method which is open to the court, but that it is permissible appears to be evident from the case of *Phillips* v. *London & South Western*

Ry. Co. (4), to which I have referred. James, L.J., says, at p. 84:

> The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

In his judgment, James, L.J., uses language which shows that he has accepted that principle in coming to the conclusion, as the court did in that case, that the damages which had been awarded by the jury were too small, and the rest of the court concurred. That does not mean that you must not have regard to all the contingencies, the reasonable contingencies, of life; you are not to assume that this man would have necessarily gone on earning this money for the rest of his life, and I think that, in this present case, it is right to assume that he would never have earned any more, having regard to the fact that there is no evidence that he would, although in many cases the question of his prospects in life improving would be a proper subject matter for consideration. However the matter be looked at, and whatever discount may be made, it seems to me that, in one way and another, it would not be right to say that this man might not reasonably expect, had he not met with this accident, to have earned during the next 30 years in all less than something in the nature of £2,000.

That is the first element in the case. Then, secondly, comes the question of his maintenance. The judge has accepted as a fact that this man will need night and day attendance during the 16 years which the doctors think he may be expected to live. Whether they be his wife and his wife's sister, or whether those unfortunate women may break down under the strain of this matter, or die, and other nurses have to be employed, are all matters to be considered. I think the sum of £3 a week, which has been suggested as a reasonable and very moderate remuneration for attendance on this unfortunate man by two attendants day and night, is a reasonable one. Taking it on that basis for 16 years, we arrive, adding the wages which he has lost, at a sum which alone is considerably larger than that which the judge has allowed for the total damages in this case. That fact alone seems to me to show that the damages as awarded by the judge cannot possibly stand.

Then Mr. Beyfus points out that there are other matters which the judge is bound to take into consideration; he must make an award of compensation for pain and suffering and the like. Consonantly with the case of *Flint* v. *Lovell* (1), if he has found that this man was living a happy and religious life, he is bound to give him something for the shortening of that life by reason of the accident. I agree with, and wish to associate myself with, what has been said by Greer, L.J., that the approach of the judge to this matter of the expectation of life is one which cannot be defended. In his judgment, he says that he will take into account that his expectation of life has been seriously diminished, as he has been told to do by this court, and he then says:

> I myself in this case think that his mental condition is such that it is very doubtful

> whether he appreciates very much, if at all, the fact that his expectation of life is diminished. I think his condition is such that if he truly spoke upon the topic at all he might truthfully enough say that he was glad to think that his expectation of life had been diminished as much as possible.

That is to say, as I understand the judge, that, if, by reason of the accident, you reduce the man into such a state of misery that he does A not wish his life to continue, it is no longer open to him—although the evidence was that, but for the accident, he would have wished his life to continue, and would have enjoyed it—to rely upon a situation which has been destroyed as regards its attractive qualities by the very act of the defendant of which he complains. I have always taken the view B that *Flint* v. *Lovell* (1) was a case based upon the facts of that particular case. In that case, the judge found in terms that the injured man had the prospect of an enjoyable and vigorous and happy old age, and GREER, L.J., in his judgment similarly points out that the judge said:

> C There is no doubt that he has lost the prospect of an enjoyable, vigorous and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred.

We are not to speculate as to what would be the result in a case where the evidence was that the person injured was either of an atrabilious temperament, or a follower of Professor Schopenhauer, or of suicidal D tendencies. *Flint* v. *Lovell* (1) was a case of a man who wished to live a happy life, as was the finding in this case, and who would have lived a happy life but for the accident. If the evidence is that the loss of the desire to live is due to the accident itself, that is not a ground upon which the defendant can say: "I have reduced this man to a nervous E wreck and he does not want to live, and therefore I need not pay him compensation because he would have wanted to live if I had not so reduced him."

Therefore, I agree with GREER, L.J., that on that point there has been a misdirection. However the matter may be put, I think the F plaintiff is entitled, in the circumstances, to damages on that head. I agree with Mr. Tucker that care must be taken that he is not compensated twice over, once on the basis of the wages which he would receive in the future, if his life had extended to its normal period, and again for the loss of the expectation of life. Taking all these matters into considera- G tion, I come to the conclusion that the award of the judge in this case is approximately only a third of that to which this man, on any view, is entitled; it cannot be supported, and I agree that the damages should be as stated by GREER, L.J.

H MACKINNON, L.J.: I agree.

Appeal allowed, with costs.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellant); *Ponsford & Devenish* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

MITCHAM GOLF COURSE TRUSTEES *v.* EREAUT (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence, J.), **May 6, 7, 10, 11, 1937.**]

Income Tax—Profits arising from occupation of land—Occupation—Trustees of golf course on common—Any member of public entitled to play upon payment of fee—Income Tax Act, 1918 (*c.* 40), *Sched. B.*

The appellants carried on, under a licence granted by the conservators of a common, a golf course upon part of the common. The appellants had exclusive right to construct and maintain the golf course, to dig gravel and soil, and to cut turf and gorse for the purpose of maintaining the course, and to turn out sheep for the purpose of keeping down the grass and making the turf suitable for playing golf. Any member of the public was entitled to play golf on the course upon payment of 1*s.* 6*d.* per round. The profits derived from the carrying on of the course were to be applied either to the improvement of the course for the benefit of the public or to paying an annual sum to the conservators for the upkeep of the common:—

Held: the appellants were not in occupation of the golf course within Sched. B.

[**EDITORIAL NOTE.** It is here held that lands held for the use of the public cannot be occupied in the sense which would make those invested with the management of them liable to income tax under Sched. B. This case applies the doctrine of *extra commercium* to assessments under Sched. B.

As to Occupation with Reference to Sched. B, see HALSBURY, Hailsham Edn., Vol. 17, p. 65, para. 125; and for Cases, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to:

(1) *Lambeth Overseers* v. *London County Council,* [1897] A.C. 625; 36 Digest 247, *12*; 66 L.J.Q.B. 806; 76 L.T. 795.

(2) *Mersey Docks & Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891; 28 Digest 21, *104*; 53 L.J.Q.B. 4; 49 L.T. 781; 2 Tax Cas. 25.

(3) *Mitcham Common Conservators* v. *Cox, Mitcham Common Conservators* v. *Cole,* [1911] 2 K.B. 854; 11 Digest 88, *1078*; 80 L.J.K.B. 1188; 104 L.T. 824.

(4) *R.* v. *London School Board* (1885), 55 L.J.M.C. 33; 38 Digest 529, *754*; *affd. sub nom. R.* v. *London School Board* (1886), 17 Q.B.D. 738.

(5) *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) *& Dartford Union Assessment Committee,* [1893] A.C. 562; 38 Digest 429, *42*; 63 L.J.M.C. 9; 69 L.T. 725.

(6) *Ystradyfodwg & Pontypridd Main Sewerage Board* v. *Bensted,* [1907] A.C. 264; 28 Digest 7, *15*; 76 L.J.K.B. 876; 97 L.T. 141; 5 Tax Cas. 230.

Appeal by way of case stated from a decision of the Commissioners for General Purposes of the Income Tax for the division of Wallington in the county of Surrey, confirming assessments on £66 for the year 1933/34, and £100 for the year 1934/35 made upon the appellants under Sched. B as occupiers of Mitcham Golf Course.

The lands the subject of the assessments were at material times laid out as a golf course and formed part of Mitcham Common, which was one of the metropolitan commons and subject to the provisions of the Metropolitan Commons Acts, 1866 and 1869. The common at material times was administered under a scheme confirmed by the Metropolitan

Commons (Mitcham) Supplemental Act, 1891. By cl. 1 of that scheme the administration of the common was vested in a body known as the conservators. By cl. 18 of the scheme the conservators were to set apart such portions of the common as they might consider expedient for games. By certain bye-laws made by the conservators under powers given to them by the scheme it was provided that no unauthorised person should turn out on the common any sheep, or cut or dig turf or gravel on the common. A part of the common had for many years been set aside for the playing of golf, and in 1932 a licence to carry on the golf course was granted to the appellants. That licence provided, *inter alia*, that the appellants might use or permit to be used for the playing of golf by all members of the public certain portions of the common, that the public should be entitled to play the game of golf on the course in accordance with the bye-laws of the conservators and the rules of the appellants, and that the appellants should pay to the conservators an annual sum of £300 if in the opinion of the appellants the funds in their hands would permit. The general charge made by the trustees for the use of the golf course under rules prescribed by them was 1*s.* 6*d.* per round.

On behalf of the appellants it was contended that (i) there was no occupation by them of the land in question, (ii) the golf course was laid out upon common land which was open to the general public, (iii) the common (including that part of it upon which the golf course was laid out) was unenclosed land at all times and was not assessable under Sched. B, (iv) the right to play golf upon those parts of the common set apart for that purpose was not vested exclusively in the appellants and such persons as they might permit to play thereon, and (v) no assessments could lawfully be made upon the appellants under Sched. B.

On behalf of the Crown it was contended that (i) the appellants had the exclusive right (*a*) to construct and maintain a golf course or golf courses on the land in question, (*b*) to dig gravel and soil and to cut turf and gorse for the purpose of maintaining the said golf courses, (*c*) to turn out sheep for the purpose of keeping down the grass on the said golf courses and making the turf suitable for playing golf, (*d*) to use or permit members of the public on payment of fees to use the said golf courses for the purpose of playing golf; (ii) the appellants had the use of the said land and were deemed to be the occupiers thereof; and (iii) the appellants were chargeable under Sched. B in respect of the occupation of the said land.

Cyril King, K.C., and *F. N. Bucher* for the appellants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: The trustees of Mitcham golf course appeal against an assessment under the Income Tax Act, 1918, Sched. B, in respect of their occupation of Mitcham golf course. It is contended on their behalf that they are not in occupation of the course, but that the public are in so far as the public can occupy, and that, therefore, the course is not capable of occupation within the meaning of Sched. B, No. 1, and they rely upon the decision of the House of Lords in *Lambeth Overseers* v. *London County Council* (1). For the Crown it is contended that the trustees are in occupation, and in beneficial occupation, by reason of the fact that they charge 1*s*. 6*d*. a round for the privilege of playing golf on the course, and that the public are not, because only those members of the public who are willing to pay 1*s*. 6*d*. for the privilege are allowed to play: that *Lambeth Overseers* v. *London County Council* (1) is distinguishable, because there the public were not, and, as they contend, could not be, charged for the privilege of using Brockwell Park, and, in so far as any income was derived from the park, it was assumed that it was, and must be, a burden, and not a profit, to the London County Council; and that the fact that the profits derived from the privilege of playing golf at Mitcham must, in accordance with the appellants' trust deed, be applied either to the improvement of the course for the benefit of the public or to paying £300 per annum to the conservators, who, in their turn, must apply it to the upkeep of the common for the benefit of the public, does not differentiate the case from such cases as *Mersey Docks & Harbour Board* v. *Lucas* (2), where the proceeds of charges made by public bodies are applied for the ultimate benefit of the public. The decisions as to occupation in the law of rating have been treated as applicable, for the present purpose, to income tax, and are, in my opinion, applicable for the present purpose.

In my opinion, the *ratio decidendi* of *Lambeth Overseers* v. *London County Council* (1) was that land which, by statute, is designated to be held for the use of the public is incapable of occupation, because the public cannot occupy it. It is true that the profits derived from grazing and refreshment-stalls were insufficient to pay the expenses of the park, but, in my opinion, even if the London County Council, which was designated to manage the park, had been empowered to charge for its use, the proceeds of such charges being applied to the maintenance and improvement of the park for the benefit of the public, it would not thereby have become the occupier of the land, nor have had any beneficial occupation of it, since the public, *qua* public, would not have been excluded, neither would the London County Council, nor any other hypothetical tenant, pay a rent for land destined by statute to be held for the public.

The appellants in the present case are, in my opinion, in no better and no worse position, for income tax purposes, than the conservators appointed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891, except in so far as they may be assignees of the club house, which is not on the common, or of the manorial and commons rights, which were not vested in the conservators by the statute; but, as the present appeal is against an assessment in respect of the golf course, the question of the club house and the manorial and other rights does not arise. The conservators had express statutory power to set apart (para. 16 of the schedule to the Act) part of the common for the playing of games, and it was held, in *Mitcham Common Conservators* v. *Cox* (3), that they might impose, as a condition of play, that players should employ caddies at 1*s.* a round. I see no distinction between such a condition imposed for the proper regulation of the game and a charge of 1*s.* 6*d.* to be used in the upkeep of the course. If managers for the public have not such powers, just as they have power to keep horsemen off the greens, it is impossible for the public to enjoy the game, which it was the object of the statute that they, and not the conservators or the trustees or any one else, should enjoy. The same question arises in connection with every space which is to be used for the public, whether it be a bowling-green, bandstand, side-walk or chair; its use must be regulated, and, where the managers have no other means of raising money to preserve the desired use, they must get it from the public, or the use will not be preserved. It is true that school boards are held to be in occupation of their schools (*R.* v. *London School Board* (4)), and municipal authorities in occupation of their sewers (*London County Council* v. *Erith Parish and Dartford Union* (5), and *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (6)), although the public are ultimately benefited by their occupation, but in those cases those bodies exclude the public as such from the space occupied, and the space is not designated by Act of Parliament to be held for the public, and therefore hypothetical tenants, including the public authority, are deemed to be in competition for the space. Here, in my opinion, there is no exclusion of the public by the conservators or the appellants, by the charge that is made, and therefore neither the trustees nor the conservators can be regarded as occupiers, and the common is designated by the Act of Parliament to be managed by the conservators for the public by setting apart such parts as they think right for whatever games they choose.

I therefore hold that the appellants are not in occupation of Mitcham golf course within the meaning of Sched. B, nor is such occupation as they may be deemed to have beneficial occupation, since no hypothetical tenant would pay rent for a golf course which, by statute, has to be managed solely in the interests of the public. For these reasons, I allow the appeal, with costs.

Appeal allowed with costs.

Solicitors: *F. R. Allen* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

ELLIS v. FULHAM BOROUGH COUNCIL.

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **June 24, 25, 1937.**]

Negligence—Invitee or licensee—Child—Paddling-pool maintained by local authority—Plaintiff a child of a ratepayer. A

A borough council maintained a public paddling-pool for children. A quantity of sand had been placed at one side of the pool, some of which had silted, or been pushed under the water. A boy, the son of a ratepayer of the borough, while paddling, stepped upon a piece of glass hidden in the sand, and cut his toe. This accident happened almost immediately after the pool had been raked out by an official of the council:— B

Held: (i) the defendant council knew of the possibility of danger, and was under a duty to see that it was provided against, which duty it failed to perform. It was, therefore, liable, whether the child were a licensee or an invitee.

(ii) *Per* Slesser and MacKinnon, L.JJ.: the child was a licensee and not an invitee, since he was not invited for some purpose of business or material interest. In this respect a ratepayer or his son is in no C different position from any other visitor to the park.

Decision of Greaves-Lord, J., [1937] 1 All E.R. 698, *affirmed on other grounds.*

[EDITORIAL NOTE. Though the decision here is not dependent upon whether the child was an invitee or a licensee, their Lordships' remarks on this point are the real point of interest in the case. The suggestion in the court below that a rate- D payer, or the child of a ratepayer, is in a better position than any other visitor to the park receives little support from the Court of Appeal. The well known definition of invitees as persons who are invited upon the premises for some purpose of business or material interest is referred to and the child is held not to be within this definition.

As to Invitees, see HALSBURY, Hailsham Edn., Vol. 23, pp. 602-604, para. 852; and for Cases, see DIGEST, Vol. 36, pp. 35-41, Nos. 208-246.] E

Cases referred to:

(1) *Addie, R. & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

(2) *Purkis* v. *Walthamstow Borough Council* (1934), 151 L.T. 30; Digest Supp.

(3) *Hastie* v. *Edinburgh Magistrates,* [1907] S.C. 1102; 36 Digest 70, *450 v.* F

(4) *Glasgow Corpn.* v. *Taylor,* [1922] 1 A.C. 44; 36 Digest 70, *453;* 91 L.J.P.C. 49; 126 L.T. 262.

(5) *Cooke* v. *Midland Great Western Ry. of Ireland,* [1909] A.C. 229; 36 Digest 70, *450;* 78 L.J.P.C. 76; 100 L.T. 626.

(6) *Devlin* v. *Jeffray's Trustees* (1902), 40 Sc. L.R. 92; 7 Digest 287, *157 v.*

(7) *Latham* v. *Johnson (R.) & Nephew, Ltd.,* [1913] 1 K.B. 398; 36 Digest 38, *223;* 82 L.J.K.B. 258; 108 L.T. 4. G

(8) *Stevenson* v. *Glasgow Corpn.,* [1908] S.C. 1034; 36 Digest 52, case *g.*

(9) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208;* 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(10 *Gautret* v. *Egerton, Jones* v. *Egerton* (1867), L.R. 2 C.P. 371; 36 Digest 36, *209*; 36 L.J.C.P. 191; 16 L.T. 17. H

(11) *Sutcliffe* v. *Clients Investment Co.,* [1924] 2 K.B. 746; 36 Digest 41, *246;* 94 L.J.K.B. 113; 132 L.T. 83.

(12) *Hillen & Pettigrew* v. *I.C.I. (Alkali), Ltd.,* [1936] A.C. 65; Digest Supp.; 104 L.J.K.B. 473; 153 L.T. 403.

(13) *Gow* v. *Glasgow Education Authority,* [1922] S.C. 260; 36 Digest 21, case *e.*

(14) *Cahill* v. *West Ham Corpn., Times Newsp.,* June 25, 1937.

APPEAL from a judgment of GREAVES-LORD, J., dated Feb. 4, 1937, and reported in [1937] 1 All E.R. 698.

N. L. C. Macaskie, K.C., *Granville Sharp*, and *Willard Sexton* for the appellant council.

R. F. Levy, K.C., *I. H. Jacob* and *R. Gold* for the respondents.

Macaskie, K.C.: The plaintiff has failed to prove that the accident was caused by the defendant council's neglect. The relationship of invitor and invitee exists only where there is a business interest with the invitor. The plaintiff here was a licensee. Liability is restricted to such dangers as were known, not to those that might, or ought to, have been known: *Indermaur* v. *Dames* (9), *Latham* v. *Johnson (R.) & Nephew, Ltd.* (7). The plaintiff was in the position of a person present for his own pleasure, and so was a licensee. The fact that his father was a ratepayer is immaterial. [Counsel referred to *Addie (R.) & Sons (Collieries)* v. *Dumbreck* (1).] The only duty to a licensee is to warn him of known dangers: *Gautret* v. *Egerton*, *Jones* v. *Egerton* (10), *Sutcliffe* v. *Clients Investment Co.* (11), and *Hillen & Pettigrew* v. *I.C.I. (Alkali), Ltd.* (12). Otherwise there is no difference between the duty owed to a licensee and that owed to an invitee. If the distinction is to be continued, then the relationship of invitor and invitee must be restricted to cases where there is a common interest. [Counsel also referred to *Glasgow Corpn.* v. *Taylor* (4), *Gow* v. *Glasgow Education Authority* (13), *Cahill* v. *West Ham Corporation* (14), and *Purkis* v. *Walthamstow Borough Council* (2).]

Levy, K.C.: Even if the plaintiff was only a licensee, he was entitled to succeed. He was not there by permission, but as of right. His father is a ratepayer; the pond was provided out of the rates. [Counsel referred to *Hastie* v. *Edinburgh Magistrates* (3).] In *Purkis's* case (2), the child was over the age of children invited, and so was a licensee. The duty towards a child licensee is much higher than that due to an ordinary licensee, and approaches that due to an invitee: *Cooke* v. *Midland Great Western Ry. of Ireland* (5). The defendant council knew of the danger; it knew the pond was a dangerous place.

Macaskie, K.C., in reply.

GREER, L.J.: On Aug. 19, 1936, the infant plaintiff went to a park or recreation ground owned by the defendant council. He went there in the morning, when the representative of the council, who usually raked out the pond for the purpose of making it safe for children to paddle in, had just finished such raking out as he did. Almost immediately after that, the child stepped into the pond, with a friend, in the part of the pond adjoining that where the sand was, and his foot came into contact with a piece of broken glass, obviously something very dangerous to a child stepping upon it. He was almost immediately taken from where he had met with his accident, and attended to. He brought an action against the council for damages for negligence, and GREAVES-LORD, J., upon the particular facts of this case, held that the child was in the position of an invitee, that he was invited by the council to use this pond for the purpose of paddling in it, that it was a matter of interest to the council that children should have the opportunity of getting away from the streets, especially the children of ratepayers, and should have the more healthy occupation of paddling in a pool, which had been constructed in such a way as to indicate that it was there for the purpose of children paddling in it. There was upon the premises a notice board in this form: "Owing to the risk of cut feet, persons must not take into the paddling-pool any bottles, tins or other sharp materials." This indicated, to my mind, that those who represented the council and those who were responsible for the notice were treating this pool as a paddling-pool for the children, and, in addition to that, they recognised that there was a real danger to the children who paddled there if bottles, tins, or other sharp materials had been put there. There was another fact which seemed to me to indicate that it might well be thought that the relationship of the child and the council was a relationship of invitor and invitee. For many years the council officials well knew that the pool was regularly used for the very purpose which is mentioned in the notice, namely, for the purpose of the children paddling there, and, recognising that, they had taken precautions, which the judge found to be inadequate precautions, to see that there were no dangerous pieces of glass in any part of the pond where the children were likely to be paddling.

If this question were free from authority, I should be very much inclined to agree with Greaves-Lord, J., that the position was one as between invitor and invitee, but it is not necessary to decide that point, and I am rather puzzled by the various decisions that have been given on the question as to when the relationship between two persons is to be regarded as that of invitor and invitee. I am not deciding that, but am reserving it for future decision, if it ever becomes necessary. Without deciding that the relationship in this case was that of invitor and invitee, I assume that I am, in accordance with the authorities, bound to treat this case as a case of licensor and licensee.

In *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (1), Lord Hailsham, L.C., directly laid down the proposition that, in considering cases of this kind, there are only three categories, and there is no no-man's land, which may be regarded as a position which creates a liability, albeit the case is not within any one of the three categories. Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee, and I do not regard the decision of the other members of the court as agreeing with that part of the finding of Lord Hailsham, L.C. I treat his finding as if the words "or ought to be known" were eliminated from it, because that is in accordance with the authorities when we are dealing with a case of licensor and licensee. There are many authorities dealing with the question, but, at the risk of being thought to be too fond of my own opinion, I cannot help thinking that the correct position is that stated by me in *Purkis* v. *Walthamstow Borough Council* (2). In that case, all three judges agreed in the ground of the decision, which was that, assuming there was some duty, the accident did not arise because of any breach of any duty by the representatives of the defendant council, but was a result of the plaintiff, the injured boy, having done something himself which he ought not to have done. There was no causal connection between the alleged negligence and the unfortunate result that happened to the plaintiff. That was, and is correctly stated in the headnote to be, the ground of the decision in the case, but certain observations were made, which indeed were *obiter*, by Scrutton, L.J., and myself, and they are mentioned in the headnote :

> *Per* Scrutton, L.J. : The authority would be liable for defective or dangerous premises or implements for play.

In saying that, I think he is assuming the relationship of licensor and licensee.

> But in his opinion the authority which had provided unobjectionable structures or implements for play was under no duty to supervise their employment, still less to ascertain that each child using them was physically fit to stand a swinging or revolving motion.

An accident could happen to a boy who fell off a swing through his being sick, and, when he was on the ground, through his being knocked by the swing continuing to revolve, and being hurt in consequence. Scrutton, L.J., goes on :

> He was aware that many authorities did not attempt to supervise the proper swings they provided and he was not aware of any authority or principle that required them to do so.

Then the headnote continues :

> *Per* Greer, L.J. : The plaintiff was merely a licensee, and any liability of the council could only arise if there was a danger known to them and not known to the plaintiff which he could not be expected to avoid. The evidence did not establish any breach of duty on the part of the defendants towards the plaintiff.

In my judgment, I say that, whatever might be the position of the children who were under age, that is to say, were of the age of those who were invited to use the playground, the plaintiff, at any rate, was not included in that category, but was a mere licensee. Having dealt with that, I went on to say this :

> On the other hand, I think, on the admitted facts of the case, he was a licensee, and the only duty on the defendants was their duty to him as such licensee ; that is to say, they would be liable if there were a danger which was known to them and was not known to the boy, and which the boy could not be expected to avoid.

Treating myself with the respect that I am entitled to, I think that that correctly represents the law as it has been decided with regard to licensors and licensees. There have been several cases in Scotland which have raised similar points, one of them being the case of *Hastie* v. *Edinburgh Magistrates* (3), which received the approval of the House of Lords when it was mentioned in a later case. In that case, the boy fell into a lake, which had been constructed not for the purpose of boys going into it at all, but for the purpose of being a part of the amenities of the park, in the sense of being something beautiful to look at. The boy fell into the water and was drowned. It was there held that the boy was a mere licensee, and the corporation was under no liability to him; but that case does not seem to me to have any bearing upon the present case. There is another Scots case that went to the House of Lords, *Glasgow Corpn.* v. *Taylor* (4). In that case, there was in the park a shrub which developed poisonous berries. The corporation had done nothing either to remove the poisonous berries or to warn children, who they knew were in the habit of frequenting the park, that they ought not to consume any of these poisonous berries. It was held, in those circumstances, that the corporation was liable, even though it was right to say that the infant plaintiff was merely a licensee.

Now, what is the position here? Assuming, as I do assume, for the purposes of this case, without finally determining it, that the infant plaintiff was a mere licensee, what is the position of the defendant council towards the licensee? The position, I think, is that to which I referred in *Purkis* v. *Walthamstow Borough Council* (2): if it knew of the danger to which the children would be exposed by using this paddling-pool (a description which is taken from the notice that it put up at the side of the pool), what was its obligation? Its obligation was surely to see that the danger, which it recognised existed, should be provided against, either by sufficiently removing all risk to which the children were likely to be subjected when they paddled in the pool, or by seeing that the children did not paddle in the pool at all. All that it did was that it had a rake, which adequately raked the deeper part of the pool—it was not really deep anywhere—but which had little or no effect upon that part of the pool into which this unfortunate plaintiff stepped, because it was a rake that would not do anything more than remove a very little thing from the surface. On the occasion on which the plaintiff was in fact injured, there was undoubtedly a dangerous piece of glass in the sand adjoining the patch of sand on which the children played, and it was a removable piece, because, when the plaintiff's brother came with him in the afternoon, he removed it with a piece of stick. It is impossible to suppose that it was not a removable piece of glass, and that the defendant council had taken any sufficient measures to do away with the risk to which children were exposed if they used this paddling-pool for the purpose for which it was intended, namely, to paddle. I have very little doubt that the possibility of procuring an instrument which would in fact adequately deal, not only with the centre of the pool, but also with that portion of the pool where the sand was, was within the reach of the council officials, if they had directed their attention to the question at all. That the council recognised that it was a danger is obvious from the fact that its officials took precautions as they did, day after day, to remove articles which might endanger the safety of the children; but they in fact left there a danger which they could have removed if they had taken adequate measures to remove it. In consequence of that, I think the council is liable to a licensee who was, with its assent and its permission, using the pool for the purposes for which it was intended. Unfortunately, this boy had, almost immediately after the raking had been done, stepped on to the piece of sand that was just adjoining the place where the sand was provided, for children who desired to enjoy themselves in making sand castles or otherwise, and he stepped on this piece of glass. He stepped on the piece of glass when there was there a removable danger which the council had taken no reasonable care to have removed. It does not seem to me to matter that the council officials did not know that the actual piece of glass was there; the question is, did not the council know that there was a danger to children that it ought to provide against? Having made a wholly inadequate provision for the removal of the dangerous object at the place where the plaintiff stepped, it seems to me that it is liable to the plaintiff upon that ground, and it seems to me quite unnecessary to enter into the other grounds which were put forward by GREAVES-LORD, J., as reasons in support of his judgment. The respondents are entitled to rely upon any ground which is sufficient to support the decision, and the ground which I think is sufficient is that the council recognised the danger to the infants when they stepped into this pond at the place adjoining the sand patch, but that it took inadequate measures to remove that danger, and exposed these children to a danger which it could have prevented if it had taken adequate measures to prevent it.

For these reasons, I think the judge's judgment can be supported. I do not think it necessary to refer in detail to the various cases which have been mentioned in the course of the case; they are all collected in SALMOND ON TORTS, and I think they establish, or do nothing to prevent, the inference which I have come to the conclusion is the proper inference from the facts proved in this case.

There is one other case to which I want to refer, the Irish case, *Cooke* v. *Midland Great Western Ry. of Ireland* (5). In that case, the facts were that a child received an injury from playing on a piece of ground where there was a danger through the risk of a turntable being started while children were playing. The children were certainly not invitees; they were not even licensees, or possibly they were not licensees; they were treated as trespassers. But, inasmuch as the company by its servants knew that it was a regular habit of these children to come on to this ground and play upon it, and it did nothing to stop them, and it did nothing to prevent the danger which in fact arose, the Irish court decided that the railway company was liable for the accident which happened, and this decision was upheld by the House of Lords. LORD ATKINSON treated the case as one of licensor and licensee, but I am not sure that the other members of the court did. Lord Atkinson said, at p. 240:

> For the omission to make the turntable fast the defendants are responsible. If the plaintiff entered upon these premises and played on this turntable with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be. Young Monahan and his playmate no doubt intervened and made the turntable revolve [they are not the plaintiffs], but the omission of the defendant company to discharge the duty which, on the above-mentioned assumption, I think they owed to the plaintiff, namely, to cause the machine to be made immovable by boys and children, and therefore a safe thing for them to play with, was not only the *causa sine qua non* but also the *causa causans* of the accident. It was, of course, for the jury to determine whether leave and licence had in fact been given. There was, I think, as I have already stated, evidence proper for their consideration on that question.

The jury seem to have found that the boy was there with the leave and licence of the railway company, and Lord Atkinson obviously took the view that there was evidence upon which the jury could so decide. I think there was evidence here on which the judge could decide, and he did decide, that this unfortunate plaintiff was there with the leave and licence of the defendant council or of those whom it put there to look after the pond.

I have already indicated that I am not giving any binding decision as to whether the judge was right in finding that this was a case of invitor and invitee; I am treating it as a case of licensor and licensee; but still there is some liability, and the liability is to protect from dangers which are known to the council, to the licensor, and which are not likely to be known to the licensee, that is to say, to a child, who is not likely either to have read notices or performed the mental operation of considering whether or not there are likely to be dangers in the pond. For these reasons, though I do not agree with everything that Greaves-Lord, J., said in the course of his judgment, I have come to the conclusion that liability was established, and that, therefore, this appeal must be dismissed with costs.

Slesser, L.J.: Although I have come to the same opinion, that this appeal fails, I feel it right to say that I come to that conclusion for reasons different from those which I understand were relied upon by Greaves-Lord, J., in this case, who, having stated that the borough council had argued that this child was a mere licensee, and that, therefore, the duty which devolves upon those who invite does not devolve on it, goes on to say that he does not think there is anything in the authorities which impels him to limit this child to the class of bare licensee, and he says ([1937] 1 All E.R. at p. 700):

> In my view, taking the description of an invitee which is used by Viscount Dunedin in *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (1), I am quite certain that this little child was an invitee.

Now, when I look at the observations of Viscount Dunedin in *Addie*

(R.) & Sons (Collieries) v. *Dumbreck* (1), referred to by the judge, I find this statement, at p. 371:

> The best test of who is an invitee is, I think, given by LORD KINNEAR in *Devlin's* case (6). He must be on the land for some purpose in which he and the proprietor have a joint interest.

A With every respect to the judge, I find it difficult in this case, either for the reasons which he has stated, which I will mention, or for any other reason, to see what interest the borough council had in this child being on this land, that is, an interest cognisable in law so as to make it an invitor. If one thing is certain in this difficult question more than B another, it is that an invitor is not everybody who invites somebody on to his land. As was pointed out by HAMILTON, L.J., in *Latham* v. *Johnson (R.) & Nephew, Ltd.* (7)—a case which has since received on more than one occasion the authority and approval of the House of Lords—at p. 410:

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> The latter term [invitee] is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view.

D I dismiss, first, the consideration which is urged by the judge, that there was an interest on the part of the council in providing this pool, because it had promised to provide to the inhabitants of the district a pool out of the rates. The judge goes on:

> There is no doubt that that is one of the promises undertaken to the ratepayers. At any rate, it would be very curious if it is not.

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I will content myself with saying that there is no evidence whatever that the ratepayers at any time ever were promised by the council the provision of a paddling pool, and, even if there were such a promise, I do not think it would constitute in itself any such material interest: F first, because this paddling-pool has been there for a considerable time, and it may or may not be the case that the present councillors feel themselves bound by a promise which was made by their predecessors, if it ever was made, of which there is no evidence; and, secondly, because, in any event, there is not a material, but, I suppose, only a spiritual, G interest in keeping promises.

So that I think one may dismiss that question altogether from one's consideration, and, indeed, it would be an extraordinary circumstance if, as MACKINNON, L.J., pointed out to counsel during the argument, a person who was a ratepayer, in such circumstances—or even more so, H I suppose, if a ratepayer's infant son, who was injured—could say: "Because I am a ratepayer, or, my father is a ratepayer, I am an invitee"—while somebody else who was not in that fortunate or unfortunate position would be only a licensee. It might give rise to many difficulties which scarcely bear consideration, such as this, that there is no evidence that this paddling-pool is provided out of the rates at all;

it may have been a gift from some benevolent person; it may have been in part supported out of the funds of the Exchequer; and it may well be, for ought I know, that this paddling-pool is open to all on equal terms, whether they are ratepayers or not. At any rate, there is no evidence to the contrary. The only evidence on the matter is contained in the bye-laws, which were before the judge, of the Bishops Park of the metropolitan borough of Fulham, which have the authority of the Secretary of State under the Act, and are therefore binding, which make no distinction at all between ratepayers, or the children of ratepayers, and other persons. There are many things which one is prohibited from doing in this park. Indeed, I should think it would be difficult to remain in this park for any length of time without committing some offence against one of the bye-laws. Certainly the least raising of the voice in secular or sacred song appears to be a crime. Whatever the prohibitions are, they are applied equally to ratepayers and to persons who are not ratepayers.

The second ground mentioned by the judge is that this pool is provided for the purpose of children bathing in the way in which this child did. Now, I find it difficult to understand why, in principle, there is any difference between a paddling-pool, provided for children to bathe in, and any public park provided for citizens for their recreation. In this connection, there is an important observation made in *Glasgow Corpn.* v. *Taylor* (4), to which Greer, L.J., referred. That was the case where, there being a public park kept by the corporation of Glasgow, on certain ground it permitted to grow a shrub bearing poisonous berries, which presented a tempting appearance to children. This piece of ground was open to the public, and was in a part of the grounds much frequented by children. On the question of the liability of the corporation, arising owing to a child unfortunately having tasted one of these berries, Lord Shaw of Dunfermline points out, at pp. 60 and 61:

> In grounds open to the public as of right, the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited. The two Scotch cases of *Hastie* (3) and *Stevenson* (8) clearly illustrate the distinction.

I read that to mean that, in grounds open to the public as of right, the public are there not as invitees, in which case the greater obligation laid down in *Indermaur* v. *Dames* (9), the responsibility for unusual dangers which were known or ought to have been known, would apply to the invitor, but as licensees. Lord Atkinson appears to me to speak to the same effect, because, having said that the unfortunate child was not merely there as a licensee, but as of right, he goes on to say, at p. 53:

> The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger

of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

Now, that observation makes it clear, to my mind, that Lord Atkinson similarly was treating the child in that park as being in the position of a licensee, and, for myself, I think the distinction which Maugham, L.J., appears to have drawn in *Purkis* v. *Walthamstow Borough Council* (2)—making a kind of intermediate state between the invitee on the one hand and the licensee on the other, when a person is invited into a public park where he has a right to be—is one which cannot be supported, more particularly in view of the observations in the House of Lords to the effect that there is no intermediate state between that of an invitee and that of a licensee.

For all these reasons, I think that the judge was wrong when he founded his judgment, as I think he primarily did, on the finding that this child was an invitee. I think that this child was a licensee. In those circumstances, one has to apply the test to which Greer, L.J., has referred. Applying that test, it seems to me clear, on the evidence in this case, that the council did those things, or failed to do those things, which constitute it responsible, as licensor, for the injury which the child has suffered. [His Lordship referred to the precautions taken by the council to guard against the danger of glass being thrown into the paddling pool.] It follows, therefore, upon those two facts being found—first, that this danger was known by the authority, and, secondly, that it took no reasonable, nor indeed, I think, any, precaution to prevent this glass falling on to this critical area where the child was injured—that the council is responsible as a licensor. Therefore this appeal fails.

MacKinnon, L.J.: I agree in regard to the proposed result. I desire to add only a very few words about the law. As the result of a great number of cases, there is now no doubt whatever that the great army of those who suffer physical injuries upon the premises of other people has to be divided into three regiments, as is laid down by Lord Hailsham, L.C., in *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (1). Personally, I think that the names, or nicknames, that have been customarily applied to describe those three regiments are a little unfortunate. We all know what trespassers are, and that one is clear; but the names of the other two, "invitees" and "licensees," are, I think, unfortunate, if only for this reason, that the most obvious use of the word "invitation," in common language, is that connoting a request by a host to another person to attend a social function. A person who accepts that request, and goes to his host's house, none the less ought to go into the regiment of licensees, and not into that of invitees.

Now, the question has been raised in this case as to whether this child ought to be regarded as an invitee or as a licensee. The difference between the two may be in some cases difficult of definition. The best definition, as it seems to me, to be derived from the cases is that very neatly stated in Salmond on Torts, 9th Edn., at p. 514:

> an invitee . . . is a person who receives permission from the occupier as a matter of business and not as a matter of grace. An invitation is a request to enter for the purposes of the occupier; a licence is a permission to enter for the purposes of the entrant himself. The invitor says: "I ask you to enter upon my business." The licensor says: "I permit you to enter on your own business."

Inasmuch as public parks of this nature are provided all over the country, I think it would be desirable that we should not leave in doubt the question, to be raised in another case, whether one who enters such a park by the invitation or permission of a public authority providing the park is to be classed as an invitee or as a licensee. Upon all the cases, it seems to me quite clear that such a person is only a licensee, and that the child in this case was only a licensee. In that respect, I differ from the grounds on which the judge decided this case, though, for the reasons which have been stated by my brothers, I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *W. Townend*, Town Clerk, Fulham (for the appellant council); *Tobin & Co.* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

BRITISH SALMSON AERO ENGINES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Finlay, J.), **June 22, 1937.**]

Income Tax—Royalties—Licence to construct and use—Consideration—Lump sum payable in instalments and further sum payable each year during continuance of licence—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 21.

Under an agreement whereby the appellant company was granted the exclusive right for 10 years to construct, use and sell in the United Kingdom and the Dominions certain engines, the appellant company was to pay as consideration for the licence so granted £25,000, payable as to £15,000 on the signing of the agreement, as to £5,000 six months after the signing of the agreement, and as to £5,000 twelve months after the signing of the agreement. The agreement further provided: "There shall be paid in addition to the foregoing payments and as royalty £2,500 twelve months after the signing of this agreement, and a like sum each twelve months during the following nine years":—

Held: (i) the sums of £15,000, £5,000 and £5,000 represented instalments of a capital sum of £25,000, and the appellant company was not assessable in respect thereof under All Schedules Rules, r. 21.

(ii) the payments of £2,500 were royalties or other sums paid in respect of the user of a patent, and the appellant company was assessable in respect thereof under r. 21.

Desoutter Bros., Ltd. v. *Hanger & Co., Ltd.*, [1936] 1 All E.R. 535, *followed.*

[**EDITORIAL NOTE.** In this decision the judge follows the decision of MacKinnon, J., in *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd.* (7). In that case MacKinnon, J., placed much reliance upon a passage in the judgment of Rowlatt, J., in the *Constantinesco* case (5). As pointed out in the judgment in the present case, this passage is perhaps in conflict with a remark of GREER, L.J., in the course of his judgment in *Mills* v. *Jones* (8); but his Lordship has preferred to follow the decision of MACKINNON, J.

AS TO ROYALTIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 236, 237, para. 476; and FOR CASES, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-98.]

A Cases referred to:

(1) *Inland Revenue Comrs.* v. *Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.

(2) *Dott* v. *Brown*, [1936] 1 All E.R. 543; Digest Supp.; 154 L.T. 484.

(3) *Inland Revenue Comrs.* v. *Ledgard*, [1937] 2 All E.R. 492; Digest Supp.

(4) *Chadwick* v. *Pearl Life Insurance Co.*, [1905] 2 K.B. 507; 28 Digest 66, *347*; B 74 L.J.K.B. 671; 93 L.T. 25.

(5) *Constantinesco* v. *R.* (1927), 43 T.L.R. 727; 28 Digest 19, *97*; 11 Tax Cas. 730.

(6) *Butterworth* v. *Page* (1935), 153 L.T. 34; Digest Supp.; 19 Tax Cas. 328.

(7) *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd. & Artificial Limb Makers, Ltd.*, [1936] 1 All E.R. 535; Digest Supp.

(8) *Mills* v. *Jones* (1929), 142 L.T. 337; Digest Supp.; 14 Tax Cas. 769.

C

APPEAL and cross-appeal against a decision of the Commissioners for the Special Purposes of the Income Tax Acts, holding that the sums of £15,000, £5,000 and £5,000 payable under an agreement referred to in the judgment represented instalments of a capital sum of £25,000, D and that the appellant company was not assessable in respect thereof under All Schedules Rules, r. 21, and holding that the ten further payments of £2,500 under the agreement were royalties or other sums paid in respect of the user of a patent, and that the appellant company was assessable in respect thereof under r. 21.

E *Raymond Needham, K.C.*, and *F. A. Martineau* for British Salmson Aero Engines, Ltd.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the Crown.

F FINLAY, J.: I do not propose to attempt any review of the cases on the subject, and for this reason, amongst others, that there have been three quite recent cases in which the matter has been discussed: *Inland Revenue Comrs.* v. *Ramsay* (1), *Dott* v. *Brown* (2), and *Inland Revenue Comrs.* v. *Ledgard* (3). In those three cases, two of them in G the Court of Appeal, the matter has been fully considered, and I do not think that, if those cases are read, one gets very much beyond this, that the question of capital or income is a question to be decided upon a survey of the particular facts in each particular case. There are certain "sign-posts," as I think SCOTT, L.J., called them, but there is H no real governing indication. A useful indication is that laid down long ago by WALTON, J., in *Chadwick* v. *Pearl Life Insurance Co.* (4), but, as SCOTT, L.J., has pointed out, not even that can be regarded as decisive.

One has, therefore, to look at the facts of the case, and to decide upon which side of the line the case falls. Now, this particular matter has reference to royalties, and turns upon an agreement whereby there was granted to the licensees :

> the exclusive right for the period of 10 years from Oct. 25, 1929, until Oct. 24, 1939, to construct use and sell in the United Kingdom of Great Britain and Ireland and its Dominions the Salmson Aero engines [and then certain engines are described].
>
> II. As consideration for the licence thus granted to them the licensees shall A
> pay to the constructors the sum of £25,000 payable as follows : £15,000 on the signing of this agreement. £5,000 six months after the signing of this agreement. £5,000 twelve months after the signing of this agreement. There shall be paid in addition to the foregoing payments and as royalty £2,500 twelve months after the signing of this agreement, and a like sum each twelve months during the following nine years.
>
> V. The licensees shall have the right to grant to any persons, firms or companies, B
> within the above-mentioned territories such sub-licence as they may think advisable and nothing herein contained shall permit any sub-licensee to break the provisions regarding the territory for which the licence is granted.

Now, on that, the special commissioners, having considered the matter, arrived at this conclusion. They point out :

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> the appellants were granted the exclusive right for the period of ten years to construct, use and sell in the United Kingdom of Great Britain and Ireland and its Dominions Salmson Aero engines.

They refer to the consideration and say :

> We hold that the sums of £15,000, £5,000 and £5,000 represent instalments of a capital sum of £25,000—

D

and they hold that the appellant company, therefore, was not assessable in respect of those payments. But, as regards the ten further payments of £2,500, they hold that they were payments of royalties or other sums, and that the appellant company is assessable in respect thereof. Mr. Needham has contended that the decision of the special commissioners E
as regards these sums of royalties was wrong. He rightly said that the circumstance that they were called "royalties" in the agreement is not decisive. But, while one is of course entitled, and indeed bound, to look at the thing to ascertain the real substance of the matter, the fact that people who, after all, know all about it, choose in their agreement F
to refer to these annual sums as "royalties," is a matter not to be entirely neglected. Mr. Needham says that, whatever they are called, they are simply the purchase price of a thing sold. Now, if I rightly follow that argument, it depends upon the fact that here there was granted to the licensees an exclusive right. I am unable to adopt G
the view which Mr. Needham urged upon me as to that. If I rightly follow his argument, supposing there had simply been granted a right not exclusive to construct and use, then in that event there would not have been a sale of property, and royalty, if royalty they were, would have been appropriately taxed. I cannot regard the fact that this is H
an exclusive right as turning a licence into a sale of property ; it seems to me to be not the reality of the thing. If, contrary to my view, it could be regarded, as, in my opinion, it cannot, not as a licence to use, but as a sale of the whole substratum, so to speak, of the whole property, that would not conclude the question, because it is quite clear that there

may be a sale of property in consideration of an annual payment. The question would therefore remain. But, in my opinion, when one looks at it, this is really the grant of a licence to construct and use.

I agree with Mr. Needham—and indeed the Attorney-General conceded it—that there is a distinction to be drawn between this case and A such cases as the *Constantinesco* case (5), where there was not any grant at all, but simply a user, by virtue of overriding powers, by the Crown of the thing, and then a sum paid in respect of that user. I agree that such cases as the *Constantinesco* case (5) and the *Handley Page* case (6), and so on, are distinguishable, but, looking—and that is my primary B duty here—at this agreement, I cannot doubt that this was the grant of a licence to use, and it follows from that that the decision of the special commissioners as to this annual sum, for annual it was, expressed to be a royalty which was part of the consideration, was correct.

Now, I turn to what is a different matter, and that is this sum of C £25,000, payable in sums of £15,000, £5,000 and £5,000. It is perfectly obvious that it is quite possible that a licence may be granted, or, for the matter of that, property may be sold, partly in respect of a lump sum and partly in respect of an annuity or annual payment or royalty, or anything of that sort; and, in that event, of course, income tax is D attracted by that part of the payment which is an annuity or royalty, and is not attracted by the lump sum, which is in the nature of capital. There is no difficulty about that, and that is what the special commissioners have held. With regard to that, my attention was drawn to a decision of MACKINNON, J., in *Desoutter Bros., Ltd.* v. *Hanger &* E *Co., Ltd., and Artificial Limb Makers, Ltd.* (7). Rightly, it was pointed out to me that the Crown was not represented in that case, but I have looked with great care at the case, and indeed the Attorney-General called my attention to it carefully and fully, and I have arrived at the conclusion that that case is in point here. If it were not for that decision, F I should have thought that there was considerable force—I say no more than that—in the argument which the Attorney-General urged, and I did not fail to notice that a passage in the judgment of ROWLATT, J., in the *Constantinesco* case (5), on which MACKINNON, J., placed much reliance there, has been apparently, to some extent, doubted in a passage G in the judgment of GREER, L.J., in *Mills* v. *Jones* (8). But I think that the decision of MACKINNON, J., is really in point, and that no proper distinction can be drawn between the facts which he had there to consider and the facts which I have here to consider. His judgment supports the conclusion at which the special commissioners arrived H in the matter of the three payments outside the royalties.

For these reasons the appeals both of the Crown and of the taxpayer must be dismissed.

Solicitors: *A. J. Adams & Adams* (for British Salmson Aero Engines Ltd.); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

GRAY (INSPECTOR OF TAXES) v. PENRHYN (LORD).

[King's Bench Division (Finlay, J.), **June 17, 18, 1937.**]

Income Tax—Trade receipts—Overpayments for wages due to fraud of servants—Misappropriation by fraudulent servants—Reimbursement by auditors.

By the fraud of two quarry officials at the respondent's quarries larger amounts were entered in the wages sheets than were due for wages. These larger amounts were received, the wages were properly paid, and the officials took the balance for themselves. After a number of years the frauds were discovered, and the auditors, without admitting liability, admitted that a clerk was negligent in not making inquiries, and by arrangement they paid to the respondent the whole amount of the defalcations:—

Held: the sums paid by the accountants were trading receipts properly assessable to tax and should be brought into account in the year in which they were received.

Semble: instead of treating the whole amount as a receipt in the year in which the whole was received, it was open to the Crown to reopen the previous assessments and correct the accounts of those years in respect of the repayment in respect of the defalcations.

[EDITORIAL NOTE. The amount received to replace the defalcations of employees is treated as similar to a sum received under a policy of insurance and therefore a trade receipt, and not damages. The judgment leaves the question open whether the accounts over a number of years should be re-opened or whether the whole amount should be brought in as a trade receipt in the year in which it is received; but the latter course is adopted.

As to Damages and Compensation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 125-128, paras. 235-240; and for Cases, see DIGEST, Vol. 28, **pp. 62-64, Nos. 316-328.**]

Cases referred to:

(1) *Dodworth* v. *Dale*, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290.

(2) *British Mexican Petroleum Co., Ltd.* v. *Jackson, British Mexican Petroleum Co., Ltd.* v. *Inland Revenue Comrs.* (1932), 16 Tax Cas. 570; Digest Supp.

(3) *Gliksten (J.) & Son, Ltd.* v. *Green*, [1929] A.C. 381; Digest Supp.; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are set out in the judgment.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

F. H. Talbot for the respondent.

Finlay, J.: The matter arises on rather peculiar facts. Lord Penrhyn, the respondent, is the owner of well known quarries in North Wales. He employs a large number of workmen at these quarries, and it appears that two of the quarry officials over a series of years misappropriated sums of money. What apparently was done was this: There was entered in the wages sheets as being due for wages a greater amount than was in fact due. That amount was received; the proper amounts were paid to the various employees for wages, and the balance, the difference between the sum received for wages and the sum really required for wages, was shared between the two conspirators. For this fraud, the two quarry officials were charged, and, on their own confession, they were convicted at assizes and sentenced, but no part of the sum misappropriated was recovered from them. The defalcations amounted, in the years 1930 to 1933, to £5,201, and there were defalcations to the amount of £750 in the year 1934. Nothing particular turns upon the details, but it is a fact that the fraud was not discovered by the firm of chartered accountants who were responsible for auditing the accounts. No express admission of liability was made by the firm of chartered accountants, but it was admitted—we have looked at the correspondence—that a clerk, or clerks, of the firm of chartered accountants was, or were, negligent in not making inquiries which, if they had been made, would, in all probability, have revealed the fraud which was going on. Negotiations took place. There was, I should think, a probable—it is not necessary to say more than that—legal liability on the chartered accountants. Apart from that, it is perfectly apparent, for reasons which I need not go into, that the chartered accountants would not be anxious to have a case of this sort tried. Thereupon, an arrangement was made—it was not really a compromise—whereby the whole amount of the defalcations after the first audits—that is, the whole amount of the defalcations during the period for which the chartered accountants could be considered to be responsible—was repaid by the chartered accountants to Lord Penrhyn. In fact—I imagine it is a common system—the chartered accountants were insured against things of this sort. Nothing, I think, turns upon it, really, but it is proper to mention that they were insured, the terms being, apparently, that the chartered accountants should themselves bear the first £1,000 of any loss of this character, and the insurers were to bear the rest. Nothing really turns upon the accounts, but, if the profit and loss account is looked at, it does become apparent that this sum was in fact brought in as being a sum received in the nature of income. It is entered as: "Recovery in respect of wages. Defalcations to Dec. 31, 1933."

The question which arises is whether that sum thus recovered by Lord Penrhyn is or is not the subject of income tax. The view which was taken by the special commissioners is expressed in their findings:

> (1) In our opinion on the evidence before us the sum of £5,951, which was paid by the auditors to Lord Penrhyn in Nov., 1934, in substance represents damages for negligence, the amount being measured by the amount of the defalcation, for the occurrence of which the auditors assumed responsibility. We do not think that it was open to the Crown to make additional assessments for 1930/31 to 1934/35 under the Income Tax Act, 1918, s. 125, by reference to the fact that the amount of the defalcation was made good to Lord Penrhyn in Nov., 1934. (2) Although in view of subsequent knowledge the deductions allowed in the original assessments under the description "wages" would have been more accurately described as for wages and peculation by employees, the amounts of the deductions were correct and there is no justification for re-opening the accounts: see *Dodworth* v. *Dale* (1)

and *British Mexican Petroleum Co., Ltd.* v. *Jackson* (2). (3) As regards the assessment for 1935/36 the position is different. By the time the accounts for year to Dec., 1934, were prepared, the correct amount paid for wages was known and the amount of the defalcations £750 had been made good. For 1935/36 we hold that the correct deduction for wages on production is £207,598 and no more. (4) We further hold that the sum of £5,201 cannot be brought into the computation for the 1935/36 assessment as a trading receipt.

That view of the special commissioners really depends upon this. The special commissioners say: "In a particular year we observe that there were defalcations to the extent of £750, but we also observe that in that year those defalcations were made good, and therefore there was no going out, so to speak, of the £750 in the year; the thing balanced itself." Now, it is necessary, I think, to appreciate the view which I take at all events a little to understand what that means. In the year, £750 was expended by Lord Penrhyn, ostensibly for wages, but really because a fraudulent claim was made, and it went to those two fraudulent employees. In that same year, the thing having been discovered, the money was repaid by the chartered accountants. I think the Attorney-General was right when he pointed out that there was truly in the year an out-going, and, equally truly, in the year, a receipt. If the accounts were accurately kept, there would on one side appear £750, which would be, I suppose, expressed as for wages, because that is what it is supposed to be, and, on the other side, there would appear £750 as an incoming. If that is right, the view which the special commissioners have taken as to the rest of the case seems to be a little startling, because what they have said is this: "In the particular year, we hold that while there was an outgoing, there was also an incoming, and therefore the incoming must be brought in and the thing cancels out." It is extraordinarily difficult, of course, to think that that can apply to that year but not apply to a matter which arose in the previous year. If one supposes that in the year "1" there is an outgoing, by reason of peculation on the part of employees, or for any other reason, and that that is made good in the year "1," it follows in the view of the special commissioners that, in that event, the receipt must be brought in, and cancels the outgoing. But now, if by reason of some delay in discovery, or something of that sort, the outgoing is in the year "1," but the incoming does not take place till the year "2," it is startling to suppose that, in that event, a curious advantage is obtained by the taxpayer, namely, that the outgoing stands, but the incoming is not to be brought in. It is difficult to suppose that that view could be correct.

Two points were taken by the Attorney-General. One point was that the previous years could be re-opened, and the other point was that the sum of £5,000 odd, when it was received, was an incoming, a trade receipt, which had to be brought into account in the year in which it was in fact received. I prefer the latter of these two views, but, in my opinion, the Crown would be entitled to succeed on either of them. With regard to the view upon which I do not propose to rest my decision, it is not necessary that I should say very much, and I say only this, that, in my opinion, *British Mexican Petroleum Co., Ltd.* v. *Jackson* (2) does not contain anything which would prevent a re-opening of the previous year's assessment. In fact, I think, although there are some difficulties about that case, that, if the criterion laid down by LORD MACMILLAN is looked at, this case would fall within it, and there would be nothing to prevent a re-opening; but, for myself, while I should be prepared, if it were necessary, to decide the case on that ground, I prefer the other ground which was put by the Attorney-General.

There is one authority upon which a good deal of reliance was placed, *Gliksten (J.) & Son, Ltd.* v. *Green* (3), a case where there was a fire of timber and a large sum was paid by way of insurance. It was held by the courts up to the House of Lords that the insurance money received was properly brought in as a trade receipt. Several illustrations may be put here. One may suppose that the fraudulent employees, on the thing being discovered, had made restitution. In that event, could it be doubted that the sum which they would pay would have to be brought in? It seems to me it would be almost absurd to say that, while the sums which they had fraudulently appropriated were to be regarded as an outgoing, and therefore as a deduction from profits, the recoupment which they themselves made was not to be brought in. That cannot be right. Then one may suppose another illustration, that Lord Penrhyn had insured against a thing of this sort. In that event, following the case of *Gliksten* (3), the sum paid by the insurance company would have to be brought in.

The substance of the view which I take here is that this was simply a business payment and a business receipt. I put to Mr. Talbot, who so skilfully argued the case for Lord Penrhyn, the question whether the £5,000 odd paid by the chartered accountants would form—except so far as it was covered by insurance—a good deduction from their profits, and he frankly said, as I anticipated indeed that he would, that certainly it would form a good deduction, simply because it was an outgoing of the business. It seems to me that, looking at it from the point of view of the recipient, it is equally a business receipt, something which comes in in the course of the business. The substance of my view can be quite concisely put by saying that I think that there is a strong presumption that the two things, so to speak, balance; that is to say, looking at it first from the point of view of Lord Penrhyn, that, since, as an outgoing to these fraudulent people, it was allowed, so, when that outgoing is made good, the thing ought to be cancelled out, and that ought to be done, if not by the re-opening of previous years, then, as I prefer, because it is simpler, by the bringing in of the receipt, when it comes in. Looked at from the point of view of the chartered accountants and that of Lord Penrhyn, it seems to me that, as the sum is an outgoing of the chartered accountants, so, looking at it from the other side, it is a receipt on the part of Lord Penrhyn.

On the whole case, I arrive at the conclusion that the Crown is right here. I think it probably does not make very much difference that the more correct way of looking at it is that the total sum received was a trade receipt. I am unable, as I indicated earlier in my judgment, to appreciate the distinction which has been drawn between the £750 and the rest. I think that the whole amount ought to be regarded as a trade receipt. If I felt any difficulty about that, which I do not, I should be prepared to say that there is nothing in the authorities which prevents that re-opening which manifestly ought to be made if necessary, and that, if necessary, the previous years ought to be re-opened. But I prefer to rest my decision in favour of the Crown on the first ground, leaving the second ground, of course, open to the Crown. Therefore, the result will be that the appeal will be allowed, with costs.

Appeal allowed, with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Whitfield, Byrne & Dean* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

Re SMITH, BILHAM *v.* SMITH.

[CHANCERY DIVISION (Luxmoore, J.), **July 2, 1937.**]

Husband and Wife—Policy taken out by husband for benefit of wife—Death of wife—Husband continuing to pay premiums—Lien on policy money—Married Women's Property Act, 1882 (c. 75), *s.* 11.

Insurance—Life insurance—Lien on policy money—Policy taken out by husband for benefit of wife—Death of wife—Husband continuing to pay premiums—Married Women's Property Act, 1882 (*c.* 75), *s.* 11.

A husband took out a policy of insurance on his own life for the benefit of his wife under the Married Women's Property Act, 1882. The wife died at a time when the policy had no surrender value, and the husband, who was one of the administrators of his wife's estate, continued to pay the premiums in respect of the policy until the policy matured. The husband's personal representative claimed a lien on the policy money for the premiums paid by the husband since the wife's death:—

HELD: the payments were made by the husband as a trustee of the policy, and he was, therefore, entitled to an indemnity out of the trust property for the money expended by him in its preservation. His personal representative was, accordingly, entitled to the lien claimed.

Re Leslie, Leslie v. *French* (1883), 23 Ch.D. 552, *applied.*

[EDITORIAL NOTE. FRY, L.J., in *Re Leslie, Leslie* v. *French* (2) set out four cases in which a person has a lien upon policy moneys by reason of the fact that he, not being beneficially interested in those moneys, has paid premiums that have accrued due. One of them is the case of a trustee paying money to preserve the trust fund. That part of the judgment of FRY, L.J., is here applied. The circumstances of the trust are peculiar though not now unusual. The trust was that arising under the Married Women's Property Act, 1882, s. 11, in the case of the policy taken out by the husband on his own life for the benefit of his wife, and the lien is in respect of premiums paid after the death of the wife. The relationship of husband and wife ceased upon the death of the wife and, therefore, no question of advancement arose.

AS TO POLICIES EFFECTED UNDER THE MARRIED WOMEN'S PROPERTY ACT, 1882, see HALSBURY, Hailsham Edn., Vol. 16, pp. 671-673, paras. 1069-1071; and FOR CASES, see DIGEST, Vol. 27, pp. 149-152, Nos. 1209-1228.]

Cases referred to:

(1) *Cousins* v. *Sun Life Assurance Society*, [1933] Ch. 126; Digest Supp.; 102 L.J. Ch. 114; 148 L.T. 101.

A (2) *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; 29 Digest 383, *3066*; 52 L.J. Ch. 762; 48 L.T. 564.

(3) *Royal Exchange Assurance* v. *Hope*, [1928] Ch. 179; Digest Supp.; 97 L.J. Ch. 153; 138 L.T. 446.

SUMMONS taken out by the surviving administrator of the estate of B Winifred Lily Smith to determine the question whether the defendant Gladys Madeleine Smith, as personal representative of Percy Joseph Smith, deceased, was entitled to repayment out of the proceeds of a policy of assurance effected by him on Nov. 28, 1924, with the Pearl Assurance Co. in the sum of £1,000 with profits for the benefit of his first C wife the above-named Winifred Lily Smith under the Married Women's Property Act, 1882, of all or any part of the premiums paid by him for the maintenance of such policy.

Meyrick Beebee for the plaintiff.

Wilfrid M. Hunt for the first defendant, the second wife of Percy D Joseph Smith, and his personal representative.

B. L. Bathurst for the second, third, and fourth defendants, children of the first marriage of Percy Joseph Smith.

Hunt: The policy was vested in the husband for the benefit of the wife. Any trustee holding a policy and paying the premiums out of his E own money could exercise a lien on the policy moneys. While the wife was alive there might be a presumption of advancement to the wife, but, if the husband pays the premiums after his wife's death, there is no presumption of advancement to the estate of the dead wife. The claim that is being made is solely in respect of premiums paid after the wife's F death. The husband was under no obligation to pay them. He was a trustee who spent his own money in preserving the trust property. The whole value of the policy was created after the wife's death. The inference that the husband did this for the benefit of the wife's estate should not be drawn. [Counsel referred to *Cousins* v. *Sun Life Assurance Society* G (1) and *Re Leslie, Leslie* v. *French* (2)].

Bathurst: *Cousins'* case (1) covers the present case. So far as *Leslie's* case (2) is concerned, the right to an indemnity out of trust moneys would apply to premiums whether paid before or after the death of the wife, and it is necessary to go further than that to distinguish the two H cases. The husband has not paid these premiums as trustee for his wife at all. He paid them for the benefit of his wife, and, on the authority of *Cousins'* case (1), it was for the benefit of his wife's estate, too. The trust is a trust of moneys payable under the policy. The payments the husband made were voluntary payments. The Act created a trust of the policy moneys for the wife, and the position of the wife and her estate after death were the same. [Counsel also referred to *Royal Exchange Assurance* v. *Hope* (3).]

Luxmoore, J.: The question involved in this case is whether the estate of a gentleman who took out a policy of insurance on his own life for the benefit of his wife, under the Married Women's Property Act, 1882, is entitled to a lien for premiums paid by him in respect of that policy after the death of his wife, for whose benefit the policy was taken out. The material dates are these. The policy was taken out on Nov. 28, 1924, by Percy Joseph Smith with the Pearl Assurance Co., Ltd., and the contract is between that company and Mr. Smith. The policy contains this statement:

> To whom payable. The proposer and his executors administrators and assigns for the benefit of Winifred Lily Smith under the Married Women's Property Act, 1882.

The policy was for a term of 10 years, and the policy money was payable on Nov. 28, 1934, or on the earlier death of the assured, Mr. Smith. The Married Women's Property Act, 1882, s. 11, provides:

> A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife . . . shall create a trust in favour of the objects therein named [in this case the wife] and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.

The Act provides for the appointment of trustees, and states that, in default of appointment of a trustee, the policy shall vest in the insured or his or her legal personal representatives in trust for the parties stated.

Mrs. Smith died on Mar. 10, 1926. At that time the policy had no surrender value. It was not included as part of her estate, and the husband continued to pay the premiums down to the time the policy matured, on Nov. 28, 1934. The money was paid to the administrators of the wife's estate, one of whom was Mr. Percy Joseph Smith, and it was placed on deposit in the joint names of the administrators, pending an application which they proposed to make to the court to determine whether Mr. Percy Joseph Smith was entitled to a lien on the moneys paid in respect of the policy for the premiums which he had paid since the death of his wife on Mar. 10, 1926. There is no question to consider such as was considered in *Cousins* v. *Sun Life Assurance Society* (1), where it was held that the policy was still held in trust for the benefit of the wife's estate. Mr. Smith died before the summons was taken out, and this summons has been taken out to determine the question between the administrator of the wife's estate and the legal personal representative of the husband. The point is really quite a short one. After the death of his wife, the husband was under no liability to pay the premiums, though he was in fact a trustee of the policy in question. He paid the premiums while he was a trustee. It is well settled that, where a person who is not a beneficial owner of a policy pays the premiums to keep up the policy, he is entitled to a lien in certain cases: see *Re Leslie, Leslie* v. *French* (2), *per* Fry, J., at p. 560:

> In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases: First, by contract with a beneficial owner of the policy. Secondly. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. Thirdly.
> A By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property. Fourthly. By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property.

But in no other case can there be a lien on the policy money for
B premiums. In the present case, the payments made by Mr. Percy Joseph Smith seem to me to fall clearly within the second head. They were payments made by him as a trustee, and he is, therefore, entitled to an indemnity out of the trust property for money expended by him in its preservation, unless there is some other consideration which prevents
C that principle from applying. It is quite true that there was the relationship of husband and wife at the time the policy was taken out and until the wife's death, but, after the death of the wife, any considerations which might arise from that relationship do not appear to me to have any further application, and I can see no answer to the claim made by Mr.
D Smith's personal representative in respect of a lien for the premiums paid by him. Whatever the amount is, I declare that the personal representative of Percy Joseph Smith is entitled to be repaid that sum out of the proceeds of the policy of insurance. Costs will be allowed out of the policy money.

E Solicitors: *Henry P. Spottiswoode & Co.* (for all parties).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

KAHN v. AIRCRAFT INDUSTRIES CORPORATION, LTD.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **June 30, July 1, 2, 1937.**]

Agency—Commission—Agent prevented from earning—Wilful default of principal—Damages—Assessment. A

An agent procured an agreement for the sale of shares for the sum of £200,000, upon which he was entitled to £16,000 commission. The condition of his agreement with the defendant company was: "in the event of our making the purchase." The negotiations were continued up to the day for completion, when the purchase was not completed by reason of the purchasers requiring certain further arrangements which the vendor was held entitled to refuse to consider:— B

Held: (i) there was an implied term in the agreement with the agent that the purchasers would not by their wilful default prevent him from earning the commission, and the purchasers had made such wilful default.

(ii) the measure of damages was the full amount of the commission, as the agreement to purchase was complete in every respect, and was not the subject of any further negotiation or inquiry into title. C

Decision of Singleton, J., [1937] 1 All E.R. 757, *affirmed.*

Trollope (George) & Sons v. *Martyn Bros.*, [1934] 2 K.B. 436, *considered.*

[**EDITORIAL NOTE.** Although this appeal was dismissed without respondent's counsel being called upon, leave to appeal to the House of Lords was granted to the appellant on the ground that there is sufficient conflict between the commission D cases to justify the matter being brought before the House of Lords. Whether the House of Lords has the opportunity of considering those cases in an appeal from the present decision or not, the present case is of importance since the leading judgment is given by one of the Lords Justices who were parties to the decision in *Trollope (George) & Sons* v. *Martyn Bros.* (1), the decision which is thought to be the principal source of such doubt and confusion as exists. In the present case reliance E was placed upon a passage in the opinion of Lord Dunedin in *French (L.) & Co. v. Leeston Shipping Co.* (5) upon the definition of wilful default, but it is held that that definition must be confined to the facts of that particular case and that there is no real confusion between that case and *Trollope (George) & Sons* v. *Martyn Bros.* (1).

As to Preventing Agent Earning Remuneration, see HALSBURY, Hailsham F Edn., Vol. 1, pp. 261, 262, para. 435; and for Cases, see DIGEST, Vol. 1, pp. 509-512, Nos. 1754-1769.]

Cases referred to:

(1) *Trollope (George) & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88. G

(2) *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296; 1 Digest 509, *1754*; 26 L.J.C.P. 33.

(3) *Inchbald* v. *Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 1 Digest 542, *1952*; 34 L.J.C.P. 15; 11 L.T. 345.

(4) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; 1 Digest 540, *1944*; 47 L.J.Q.B. 396; 34 L.T. 890.

(5) *French (L.) & Co.* v. *Leeston Shipping Co.*, [1922] 1 A.C. 451; 41 Digest 351, *2006*; 91 L.J.K.B. 655; 127 L.T. 169. H

(6) *White* v. *Turnbull, Martin & Co.* (1898), 78 L.T. 726; 1 Digest 516, *1785*.

(7) *Chillingworth* v. *Esche*, [1924] 1 Ch. 97; Digest Supp.; 93 L.J. Ch. 129; 129 L.T. 808.

(8) *Emanuel* v. *Compagnie Fermière de L'Établissement Thermal de Vichy*, [1889] W.N. 150; 12 Digest 609, *5039*.

Appeal from a decision of Singleton, J., dated Feb. 5, 1937, and reported in [1937] 1 All E.R. 757.

Patrick A. Devlin for the appellant company.

A. T. Miller, K.C., J. Millard Tucker, K.C., Valentine Holmes and *T. G. Roche* for the respondent.

Greer, L.J.: The plaintiff, Kahn, was not in the ordinary way of business a commission agent, but he was, for the purposes of this case, it seems to me, an agent for the defendant company, on a promise that a commission would be paid to him if his efforts resulted in the purchase of Messrs. Beardmore's shares in Alley & MacLellan. The plaintiff put forward a proposition that he would obtain the purchase of the Beardmore shares for the defendant company if it would promise him a commission of £16,000. After some negotiation, it was agreed to pay him the £16,000 which he said he would be willing to accept as remuneration for his services if the sale actually took place. Messrs. Beardmore were prepared, if a deal satisfactory to them could be brought about, to dispose of the shares which they held in Alley & MacLellan. On July 10, the plaintiff wrote to the managing director and chairman of Beardmore & Co., Mr. Reincke, in these terms:

> I want to thank you for the visit you paid me a few days back. I should like to say that, in the event of our being able to do business in connection with the company we discussed, I and my associates would be prepared to purchase for cash both the preference and the ordinary shares which you may be in a position to sell on behalf of the parent company [Messrs. Beardmores]. I am leaving London for an extended tour at the end of this month, and I shall be extremely obliged if you can let me know at the very earliest possible moment if a deal can be arranged.

The plaintiff was in a favourable position to approach the defendant company in order to induce it to buy at a price which Messrs. Beardmore would be willing to accept, and, on July 14, in consequence of an oral request, the defendant company, which had agreed the commission at £16,000, wrote as follows:

> With reference to the above business, in the event of our making the purchase of the whole of the ordinary and preference shares of the company now issued, we agree to cover you to the extent of £16,000.

Now, at first I was inclined to think that that might be regarded, not as a commission agreement at all, but only as an agreement to pay £16,000 when an event in the future in fact happened. I have revised that view, and I think, having regard to the surrounding circumstances, that the words " we agree to cover you to the extent of £16,000 " mean " we agree to pay you the commission which we have been discussing, and we agree to the amount being £16,000." No point was made of the fact that this letter refers to the whole of the ordinary and preference shares, because admittedly what was being contracted about was what Messrs. Beardmores had to sell, namely, the shares which they had in Alley & MacLellan. That letter records the agreement for commission at £16,000. Of course, the matter did not end there. The £16,000 was payable only when the purchase was made, and the purchase could be made only when there was a final assignment of the shares held by Beardmores in Alley & MacLellan, an event which never in fact happened. Therefore, when the case came on for trial, the action by the plaintiff for commission, he necessarily failed to recover his commission, but he claimed alternatively that he was entitled to damages, because the defendant company had improperly, and without any reasonable excuse, prevented him from earning his commission. Negotiations took place over a certain time between those who represented Messrs. Beardmore, the sellers, and those who represented the buyers, the defendant company. All questions were settled on July 30 as to the terms of the agreement of sale, with the exception of the three the judge mentions, and I agree with the judge's finding that, after July 30, those three matters were settled to the satisfaction of the defendant company. Thereupon the defendant company sought to introduce a new term, entirely outside what had been agreed to on July 30, which had to do with the approval of a prospectus for a public issue of the shares by the defendant company. Mr. Reincke refused to have anything whatever to do with any such contention. Mr. Reincke said that it was not his business to have anything whatever to do with the terms on which the defendant company should offer to issue the shares to the members of the public who might feel inclined to subscribe. The matter did not result in an actual sale, because the defendant company withdrew from the position that it had accepted on July 30, and refused to complete the transaction. The judge had to determine whether that gave the company the right to say that it was not liable for damages for having prevented the commission from being earned. That depends on whether the law as decided in *Trollope (George) & Sons* v. *Martyn Bros.* (1), which we have to accept as binding on us, and as decided in *Prickett* v. *Badger* (2) a long time ago by a court of high authority, is good law or not.

Now, the statement of the law upon which I founded my judgment in *Trollope (George) & Sons* v. *Martyn Bros.* (1) was that which was stated by a judge of the highest authority in *Inchbald* v. *Western Neilgherry Coffee, Tea & Cinchona Plantation Co., Ltd.* (3). WILLES, J., in that case, said, at p. 741 :

> One who enters into a contract is bound to perform his engagement in substance. This is illustrated by the case in Bulstrode, where the defendant contracted to deliver to the plaintiff a horse, but poisoned him before delivery. That was held not to be a substantial performance of the contract [I gather he had delivered a horse, but it was a poisoned horse] because one of the contracting parties had done an act which prevented the other from having the benefit of it. I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

As a general proposition, I think that that accurately represents the law, but it has been subjected by other authorities to certain exceptions. One cannot imply a term in a contract that, in order that an agent may earn his commission, the defendant who has employed him shall continue to carry on his business in order that the future commission may be earned which would have been earned if he had still carried on his business. In addition to that, that law was applied in *Rhodes* v. *Forwood* (4), and a number of cases where it was necessary to establish that A there was an implied term which would amount to an undertaking to continue to carry on the business in order that commission might be earned. There is a number of cases in which it has been held that a shipowner is not bound to continue a charterparty in order to enable the commission to be earned which would be earned if the business of the B charterparty were continued. That was the sort of case which arose for decision in *French (L.) & Co.* v. *Leeston Shipping Co.* (5). In the course of his opinion, at p. 455, LORD DUNEDIN uses these words, which are very properly and very naturally relied upon by Mr. Devlin :

> I would only like to add one observation as to the reservation which was made C in *White's* case (6), and which seems to have rather troubled BANKES, L.J., in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done, and which should have had as its sequel the non-earning of further commission, had been done by the doer of it, not *prima facie* for a purpose of his own, but simply and solely to avoid payment of the commission.

D Those observations must, of course, be treated as relating to the particular facts with which the House of Lords was dealing, namely, that the commission had been paid up to a point, but the defendant then put an end to the charterparty so as to prevent further commissions from being earned, and the case is really on the same line as are cases E like *Rhodes* v. *Forwood* (4). A case which, to my mind, is decisive (if it is correct) of the present case is *Trollope (George) & Sons* v. *Martyn Bros.* (1). In the present case, on the facts found by the judge, there were agreed all the terms that ought to be put into the final agreement between the parties with reference to the sale. They were all agreed, F and agreed by persons having authority, express or by estoppel, to make an agreement as to what should be the terms on which the sale should take place. Having once given expression to the view to which I did give expression in *Trollope (George) & Sons* v. *Martyn Bros.* (1), I think I am entitled to assume, for the purposes of this case, that it was a G correct statement of the position as to what the implied term is. In that case I used these words, at p. 447 :

> It is undoubtedly the law that as between vendor and purchaser, the matter must be deemed to remain in negotiation until a form of contract is settled, and contracts are exchanged. But it does not follow from this that the plaintiffs would necessarily be without remedy if the purchaser they introduced was ready and willing H to sign the contract in the form in which he was asked by the vendor to sign it, and the vendor thereafter withdrew from the negotiations.

That seems to me to be exactly this case, that, when the vendor and purchaser made an agreement on July 30, there were three outstanding points which were settled at a later time. It seems to me that the facts of the present case are identical with the facts in *Trollope (George) & Sons*

v. *Martyn Bros.* (1), because in that case the reasons why damages were given to the commission agent were these: Before the contract was signed, it had been sent by the vendors' solicitor, who had been entrusted with the drawing up of the contract, to the purchasers' solicitor, and the purchasers' solicitor had assented to the terms to which he was asked to assent by the vendors' solicitor. Those facts seem to be parallel to the facts of the present case, because what happened was that there had been an agreement as to what the terms of the sale should be, but there had not been a final conclusion of the matter by a sale.

That appears to me to be practically all that it is necessary to say to justify this court in affirming the judge's findings in the present case. I agree with his findings of fact, and, in so far as his findings of fact depended upon the weight to be attached to the evidence of the witnesses on the part of the vendors and on the part of the proposed purchasers, we are bound not to interfere in any way with a decision which is based upon a question as to whether he attached credit to the witnesses on one side or to the witnesses on the other side, and it seems to me that, after all the outstanding points had been settled, the defendant company, according to the decision in *Trollope (George) & Sons* v. *Martyn Bros.* (1), not merely according to the words used in my judgment, but according to what is implied in the decision, could not, by withdrawing without any good reason from the agreement that had been made with its authority and approved by its managing director on Aug. 5, recede from that agreement without being in breach of its contract to pay commission. I think the judge was right in saying that, if the defendant company had not receded from the agreement that it had made by Aug. 5, the plaintiff would, in the ordinary course, as the managing director himself said, even if it had to be put before its directors, have been in a position to earn his commission, and that, therefore, by wrongfully and without just cause having receded from the agreement it had made, it deprived the plaintiff, in breach of the implied term of his contract, of the opportunity of earning his commission, and it must pay damages for that. The right amount of damages is the amount which the judge found, because there can be no doubt that, if it had not receded from the position to which it had agreed, the plaintiff would in fact, in respect of his having brought the two parties together on an agreement for sale for a sum of £200,000, have been entitled to the commission which he would then have earned. Accordingly, we do not think—indeed, I do not think we are asked so to find—that, if the view I have been expressing be right, the damages should not be the full amount of the commission. For those reasons, I think the appeal should be dismissed with costs.

SLESSER, L.J.: In this case, I am inclined to the view, on the finding of the judge, that there was a completely concluded agreement between Beardmores and the defendant company to purchase the shares in the company of Alley & MacLellan, subject to three conditions, all of which were satisfied, and that this is not a case of the nature of that considered in *Chillingworth* v. *Esche* (7), where negotiations were subject to some contract to be entered into, but were in themselves in the nature of final negotiations for the purchase of shares. That certainly was the opinion of Mr. Reincke, who was unable to see why it was necessary to have any further agreement at all. Now, if that be the case, it would follow, if it had been necessary to consider the matter, that, had Messrs. Beardmore thought fit to bring proceedings against the defendant company for breach of contract in refusing to purchase these shares, they would have succeeded either in damages or in an action for specific performance, according to which they were advised to take, for wrongful default on the part of the defendant company. If that view is right, then the right of the plaintiff here, to recover his damages on breach of the implied contract that the defendant company would do nothing to prevent him earning that which he was entitled to, namely, would not prevent the purchase of the shares by refusing to buy them, would be covered not only by the opinion of the majority of their Lordships in *Trollope (George) & Sons* v. *Martyn Bros.* (1), but would also, as I understand the judgments, have been recovered upon the basis of the judgment of SCRUTTON, L.J., because SCRUTTON, L.J., points out very clearly that the fault or default of the defendants, who were being sued by the agent, must be in the nature of a breach of contract, and, in my opinion, there was, on the finding of the judge, such a breach of contract here. But I will assume alternatively that that view of the position is a mistaken one, and that there was no more than this, that there were final negotiations on all the matters to be approved, to be embodied in a subsequent contract, and that the defendant company, as between itself and Beardmores, might have said that it was not yet bound. Now, however that may be, it seems to me that, bound as I am by the decision of the majority in *Trollope (George) & Sons* v. *Martyn Bros.* (1), this case is indistinguishable. I agree with the opinion of GREER, L.J., in that case, at p. 447, that where there is:

> an implied undertaking that if the purchaser introduced by the plaintiffs was ready to complete the contract on the terms put forward by the vendor, they would not by refusing to complete prevent the event from happening which would entitle the plaintiffs to their commission.

I think here it is proper to say that, on any view, whether there was a contract or whether there were only negotiations, there had been such an arbitrary and unreasonable refusal on the part of the defendant company to purchase that it cannot be heard to say that, by that fact that there was no purchase, the plaintiff was not entitled to his commission. The judge has found as a fact that, having concluded the whole matter, the reason it refused to purchase was because Beardmores declined to enter into an arrangement (which he has represented as an improper one, and about which, for my purpose, it is not necessary to add anything to his opinion), among other things, that the capital of the company to be purchased, Alley & MacLellan, Ltd., would be considerably increased without any real consideration of the needs of that company, and that with the increased capital it would be put upon the market, producing, if the company did not need the capital, a condition of over-capitalisation, and making it even more difficult for it to carry on its work successfully, and that the report—for it was not a valuation—which it subsequently A procured upon the Glasgow works, and which it says was unfavourable, was nothing but an afterthought, and had no relation to anything in the negotiations, which had been limited, so far as reporting on the works was concerned, to the case of Worcester, upon which, as I have said, it was satisfied, and that its principal reason for breaking off the B negotiations was because it could not at that last minute induce Beardmores to add some entirely new and extraneous matter which had never been agreed or considered between the parties.

Now, I cannot in principle distinguish this case and this refusal from the case of *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1), where the party C employing the agent simply refused to go on with the contract, and refused finally to agree the matter, though all the questions of purchase were settled. I want, however, to say one word, because I think a misconception may arise upon the matter, with regard to the observation of LORD DUNEDIN, which has been referred to by GREER, L.J., in the D case of *French* (*L.*) *& Co.* v. *Leeston Shipping Co.* (5), at p. 455. In my opinion, those observations by LORD DUNEDIN must be considered in relation to the subject matter of that case. That was a case raising a problem as to the right of the agent to claim commission where it was necessary, in order that he should earn it, that the principal should con- E tinue to carry on a business or continue a charterparty when there was no direct obligation upon him so to do. It is a case which follows a long line of authority from *Rhodes* v. *Forwood* (4), *Emanuel* v. *Compagnie Fermière de l'Établissement Thermal de Vichy* (8), and a number of other cases. What LORD DUNEDIN, to my mind, is saying is this, that there F is no obligation on a person to go on conducting his business in order to enable the agent to earn his commission, as decided in *Rhodes* v. *Forwood* (4), subject to this qualification, that, where he does stop carrying on his business simply and solely to avoid payment of commission, and it is in relation to that obligation to carry on the business that the agent G may in future earn commission, LORD DUNEDIN is making that remark and making that qualification. It obviously would in such a case be very material, when the authorities have decided that there was no obligation, in the absence of express contract, to carry on further business to enable the agent to earn commission, to consider a case where he had refused H it solely to avoid payment of commission. That is the matter about which LORD DUNEDIN is speaking. To my mind, there is nothing whatever which is inconsistent in that opinion with anything which is said in the case of *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1). I mention this because Mr. Devlin has suggested that *per incuriam* the judges in the case of *Trollope (George) & Sons* v. *Martyn Bros.* (1) had not their attention drawn to the observations of Lord Dunedin in that case. If they had, I think their answer would have been that which I have humbly ventured to make, namely, that it had nothing whatever to do with the point which they had there to consider. At any rate, I can see for myself no inconsistency and no doubt thrown upon the decision of the majority in the case of *Trollope (George) & Sons* v. *Martyn Bros.* (1) caused by anything which was said and had before been said by Lord Dunedin in the case of *French (L.) & Co.* v. *Leeston Shipping Co.* (5).

I agree with Greer, L.J., as to the result of this case.

Scott, L.J.: I agree with the two judgments which have been delivered, and am content, subject to one observation, to accept the judgment of Singleton, J., as expressing my own views upon the whole case. The only addition I would like to make to that judgment with which I so completely concur is that, in my view, the plaintiff here did the work for which he was employed on the terms of the remuneration stated, namely, to bring about the willingness of Beardmores to sell the shares in question to the defendant company on the terms which the defendant company instructed the plaintiff to obtain for it. In my view, therefore, he was entitled to his commission in accordance with the contract, subject only to this, that, after he had obtained the willingness of Beardmores to sell on those terms, the defendant company refused, for its own reasons, to go on with the proposed purchase. Whether, in those circumstances, the plaintiff's right is to receive his commission or to receive damages in lieu of his commission is, in my view, academic, because the measure of damages must, in my view, be the whole commission. Therefore, the case, in my view, upon the findings of fact by the judge, is one upon which there is no doubt at all as to the law applicable, and, so far as I am concerned, it does not, therefore, seem to me necessary to consider the cases which were carefully considered by the judge in his judgment and by my colleagues to a certain extent in their judgments. I agree that the appeal should be dismissed.

Appeal dismissed, with costs. Leave to appeal to the House of Lords.

Solicitors: *Clifford-Turner & Co.* (for the appellant company); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

ARMSTRONG *v.* ESTATE DUTY COMMISSIONER.

[Privy Council (Lord Maugham, Sir Lancelot Sanderson, Sir Sidney Rowlatt), **April 29, 30, May 27, 1937.]**

Privy Council—Hong Kong—Estate duty—Exemption—Settled property—Annuity to widow of testator—Power for trustees to appropriate investments to pay annuity—No appropriation—Estate Duty Ordinance, 1932, *ss.* 5 (1), 25 (1), (2).

A testator by his will bequeathed an annuity of £10,000 to his wife, clear of all death duties and income tax, and directed that his trustees should be at liberty, if they thought fit, to set apart out of the residuary estate investments representing such a capital fund as should, at the time of appropriation, be sufficient to produce annual sums to pay the annuity. After appropriation, these annual sums were to be wholly charged on the investments so appropriated in exoneration of the rest of the estate. Estate duty was paid on the whole of the estate of the testator when probate was granted. No fund was set aside by the trustees to meet the annuity to the widow, which was in fact paid out of general income of the estate, as and when the annuity became due :—

Held : as the whole of the income of the estate was not applied in making the annual payments to the widow, and a hypothetical slice of the property passing by the will could not be treated as an interest in that property, there was no property, estate or interest in property which stood limited to or in trust for any persons by way of succession within the Hong Kong Estate Duty Ordinance, 1932, s. 25 (2), and the exemption from estate duty in sect. 25 (1) did not apply.

[EDITORIAL NOTE. The judgment in this case is strictly only in point upon the Hong Kong Ordinance, but the provisions of that statute are very similar to, if not quite the same as, the relevant English statutes—Finance Act, 1894, s. 5 (2), and Finance Act, 1914, s. 14 (*a*). The relevant English decisions under these Acts are also fully considered, and it would appear that this decision must be taken into account in advising upon a similar English case.

As to Exemption where Estate Duty already Paid, see HALSBURY, Hailsham Edn., Vol. 13, pp. 252-254, para. 246 ; and for Cases, see DIGEST, Vol. 21, pp. 20, 21, Nos. 111-121.]

Cases referred to :

(1) *A.-G.* v. *Owen, A.-G.* v. *Coulson,* [1899] 2 Q.B. 253 ; 21 Digest 45, *290* ; 68 L.J.Q.B. 779 ; 81 L.T. 121.

(2) *Re Mundy & Roper's Contract,* [1899] 1 Ch. 275 ; 40 Digest 787, *3171* ; 68 L.J. Ch. 135 ; 79 L.T. 583.

(3) *Re Campbell,* [1902] 1 K.B. 113 ; 21 Digest 45, *292* ; 71 L.J.K.B. 160 ; 85 L.T. 708.

(4) *Re Waller, Margarison* v. *Waller,* [1916] 1 Ch. 153 ; 21 Digest 46, *293* ; 85 L.J. Ch. 188 ; 114 L.T. 42.

(5) *A.-G.* v. *Watson,* [1917] 2 K.B. 427 ; 21 Digest 10, *37* ; 86 L.J.K.B. 1034 ; 117 L.T. 187.

(6) *Re Alington (Lord) & London County Council's Contract,* [1927] 2 Ch. 253 ; 40 Digest 728, *2596* ; 96 L.J. Ch. 465 ; 138 L.T. 131.

(7) *Bruce (Lord Henry)* v. *Ailesbury (Marquess),* [1892] A.C. 356 ; 40 Digest 747, *2772* ; 62 L.J. Ch. 95 ; 67 L.T. 490.

(8) *A.-G. for Ontario* v. *Perry,* [1934] A.C. 477 ; Digest Supp. ; 153 L.J.P.C. 145 ; 151 L.T. 405.

(9) *A.-G.* v. *Coole,* [1921] 3 K.B. 607 ; 21 Digest 25, *137* ; 91 L.J.K.B. 250 ; 126 L.T. 24.

(10) *Cowley (Earl)* v. *Inland Revenue Comrs.,* [1899] A.C. 198 ; 21 Digest 7, *27* ; 68 L.J.Q.B. 435 ; 80 L.T. 361.

(11) *Re Booth, Pleace* v. *Booth,* [1916] 1 Ch. 349; 21 Digest 21, *120*; 85 L.J. Ch. 249; 114 L.T. 498.

(12) *Re Grinlinton, Public Trustee* v. *Grinlinton,* [1933] Ch. 344; Digest Supp.; 102 L.J. Ch. 4; 148 L.T. 191.

(13) *Berry* v. *Gaukroger,* [1903] 2 Ch. 116; 21 Digest 27, *155*; 72 L.J. Ch. 435; 88 L.T. 521.

A (14) *Re Carnarvon's (Earl) Chesterfield Settled Estates, Re Carnarvon's (Earl Highclere Settled Estates,* [1927] 1 Ch. 138; Digest Supp.; 96 L.J. Ch. 49; 136 L.T. 241.

(15) *Re Monckton's Settlement, Monckton* v. *Calder,* [1917] 1 Ch. 224; 40 Digest 727, *2584*; 86 L.J. Ch. 187; 115 L.T. 899.

(16) *Re Evans & Bettell's Contract,* [1910] 2 Ch. 438; 40 Digest 270, *2363*; B 79 L.J. Ch. 669; 103 L.T. 181.

(17) *Gleaner Co., Ltd.* v. *Assessment Committee,* [1922] 2 A.C. 169; 28 Digest 49, case *n.*

(18) *A.-G.* v. *Hammond* (1904), unreported.

(19) *A.-G.* v. *De Trafford,* [1934] 1 K.B. 1; Digest Supp.; 103 L.J.K.B. 401; 150 L.T. 24.

C

APPEAL from a judgment of the Full Court of the Supreme Court of Hong Kong. The facts are set out in the judgment of their Lordships delivered by LORD MAUGHAM.

Fergus D. Morton, K.C., and *Wilfrid M. Hunt,* for the appellants, D referred to *A.-G.* v. *Watson* (5); *A.-G.* v. *Coole* (9); *Cowley (Earl)* v. *Inland Revenue Comrs.* (10); *Re Waller, Margarison* v. *Waller* (4); *Re Booth, Pleace* v. *Booth* (11); *Re Grinlinton, Public Trustee* v. *Grinlinton* (12); *Berry* v. *Gaukroger* (13); *Re Carnarvon's (Earl) Chesterfield Settled Estates* (14); *Re Alington (Lord) & London County Council's* E *Contract* (6); *Re Monckton's Settlement, Monckton* v. *Calder* (15); *Re Evans & Bettell's Contract* (16).

A. M. Latter, K.C., and *Reginald P. Hills,* for the respondent, referred to *Gleaner Co., Ltd.* v. *Assessment Committee* (17); *A.-G.* v. *Hammond* (18); *Re Mundy & Roper's Contract* (2); *A.-G. for Ontario* v. *Perry* (8); F *A.-G.* v. *De Trafford* (19); *A.-G.* v. *Owen, A.-G.* v. *Coulson* (1); *Re Campbell* (3); *Re Waller, Margarison* v. *Waller* (4); *Re Carnarvon's (Earl) Chesterfield Settled Estates* (14); *Re Alington (Lord) & London County Council's Contract* (6).

G LORD MAUGHAM: This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong (LINDSELL, C.J., and HAYDEN, J.), delivered on Feb. 17, 1936, affirming a judgment delivered on June 27, 1935, by MACGREGOR, J., the then chief justice. The last-mentioned judgment dismissed a petition of the trustees of the will H and codicils of Sir Catchick Paul Chater (called below "the testator") appealing against a certificate of the respondent deciding that estate duty was payable upon the death of Lady Maria Christine Chater in respect of an annuity bequeathed to her by the testator. Lady Maria Christine Chater was the widow of the testator, and will be called "Lady Chater."

The testator died on May 27, 1926, and his will dated Apr. 17, 1925, with two codicils thereto were proved in Hong Kong on Sept. 9, 1926, by Sir William Edward Leonard Shenton Reginald Frederick Mattingly and Lady Chater, who were the executors and trustees under the said will and codicils. The appellants are now the present trustees of the will and the codicils. The will provided, so far as is material, as follows:

> (5) I bequeath the following annuities all clear of death duties and income tax payable to the respective parties hereinafter enumerated commencing from my death by equal quarterly payments the first payment in each case to be made at the expiration of three months from my death: (*a*) to my wife during her life the annual sum of £10,000 sterling [and other annuities as therein mentioned].
>
> (8) Subject to the payment of my funeral and testamentary expenses and debts and any legacies bequeathed by this my will or by any codicil hereto and the duty (if any) upon legacies and annuities bequeathed free of duty and subject to making provision for the payment of any annuities bequeathed by this my will or by any codicil hereto my trustees shall invest [in manner therein authorised].
>
> (13) I declare that my trustees shall be at liberty if they so think fit to appropriate and set apart out of my residuary estate investments representing such a capital fund as shall at the time of appropriation be sufficient to produce annual sums directed to be paid by cl. (5) of this my will with such a liberal margin for contingencies as in the opinion of my trustees shall be sufficient, and I declare that when such appropriation has been made the said annual sums shall be wholly charged on the investments so appropriated in exoneration of the rest of my estate but that the capital of such appropriated investments may be resorted to in case at any time the income thereof is insufficient to pay any such annual sum or sums.

Estate duty was paid on the whole of the estate of the testator when probate was granted in 1926. No fund was set aside by the trustees to meet the annuity to Lady Chater, the widow of the deceased, and the annuity was in fact paid out of general income of the estate as and when the annuity became due. Lady Chater died on Mar. 11, 1935, and thereupon her annuity ceased.

Estate duty is charged in the colony of Hong Kong according to the Estate Duty Ordinance, 1932. The Ordinance provides, so far as is material, as follows:

> 4. In the case of every deceased person there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property passing on the death of such person, a stamp duty called estate duty at the graduated rates mentioned in the applicable schedule . . .
>
> 5. (1) Property passing on the death of the deceased shall be deemed to include the property following: (*a*) property of which the deceased was at the time of his death competent to dispose; (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . .
>
> 9. (6) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, (*a*) if the interest extended to the whole income of the property, be the principal value of that property; and (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended.
>
> 25. (1) If estate duty has already been paid in respect of any settled property since the date of the settlement, upon the death of one of the parties to a marriage, no estate duty shall be payable on the death of the other party to the marriage unless such person was at the time of his or her death or had been at any time during the continuance of the settlement competent to dispose of such property.
>
> (2) For the purposes of this section, the term settlement means any deed, will, agreement for a settlement, or other instrument, or any number of instruments, whether made before or after or partly before and partly after the commencement of this Ordinance, under or by virtue of which instrument or instruments any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession, and the term settled property means the property comprised in a settlement.

The respondent claimed that, upon the death of Lady Chater, estate duty became payable under sect. 5 (1) of the Ordinance to the extent to which a benefit accrued by the cesser of the annuity, and he made an assessment for estate duty and interest on May 20, 1935, at $153,511. This assessment was disputed by the appellant trustees. They presented a petition to the Supreme Court of Hong Kong appealing from the adverse decision and assessment of the respondent. The petition of appeal was dismissed by MacGregor, J., on June 27, 1935, and an appeal from his decision was dismissed on Feb. 17, 1936, by Lindsell, C.J., and Hayden, J.

The short and apparently simple point which falls for decision is whether, on the facts of the case, there is or is not "a settlement," to use the language of sect. 25 (2), under or by virtue of which instrument any property or any estate or interest in any property stood, during the lifetime of Lady Chater, limited to or in trust for any persons by way of succession. Lady Chater was not at any time competent to dispose of the property out of the income of which her annuity was payable, and, since estate duty was paid in respect of the property passing under the will upon the death of the testator, the exemption given by sect. 25 (1) would apply on the death of Lady Chater, provided there could be shown to be "settled" property within the meaning of sect. 25. The appellants contended that the testator's will constituted such a settlement, inasmuch as a "slice," as it is called, of the testator's estate must be treated as within the words "any property or estate or interest in any property," and that such slice or portion of the estate stood, for the time being, limited to or in trust for the residuary legatees by way of succession. Several English cases dealing with succession duty payable under the Finance Act, 1894, and the amending Acts were relied on. The first of these cases was that of *A.-G.* v. *Owen* (1). In that case, a testatrix had bequeathed an annuity to a certain person, and directed that a portion of her estate should be set aside to provide for the payment of the annuity, and it was held that the property so set apart was property standing limited to or in trust for persons by way of succession within the meaning of the Settled Land Act, 1882, s. 2 (1). Settlement estate duty was accordingly payable in respect of it. It will be remembered that by the Finance Act, 1894, s. 22, the expression "settlement" was defined by reference to the Settled Land Act, 1882, s. 2. The judges placed much reliance on the then recent decision of Chitty, L.J., in *Re Mundy & Roper's Contract* (2), as to the meaning of the word "settlement" in the Settled Land Act; and they accordingly held that the phrase "by way of succession" was one which might be treated as equivalent to successively upon death, and that there was a succession in a popular sense in the enjoyment of the portion of the estate of the testatrix which had been set aside to provide the annuity. In *Re Campbell* (3), an almost identical question came before the Court of Appeal. In that case also the trustees, in pursuance of directions given by a testator, had set aside out of the residuary estate a sum which was invested so as to produce an income sufficient to pay a number of annuities. Collins, M.R., following the decision in *A.-G.* v. *Owen* (1), and relying on the decision in *Re Mundy & Roper's Contract* (2) as to the true construction of the Settled Land Act, 1882, came to the conclusion that the specific fund upon which was imposed a direct trust A in favour of the annuitants, being a fund which after their death passed to the residuary legatees, was property which stood limited in trust for persons by way of succession. Stirling, L.J., came to the same conclusion, but he added this, at p. 123:

> I only wish to add that it was admitted in argument that this decision does not B conclude the case of the simple gift of an annuity in general terms, where there is no such trust for payment of the annuity out of a particular fund as in the present case. I desire in giving judgment in this case to leave that case entirely untouched.

In *Re Waller, Margarison* v. *Waller* (4), Sargant, J., had incidentally to deal with a similar matter; and again the trustees had appropriated an annuity fund. Sargant, J., in the course of his judgment, at p. C 158, observes as follows:

> The gift of the annuity *simpliciter* would not, in my opinion—at any rate I am not aware of any decision to that effect—have rendered any part of the testator's estate a settled fund or have subjected the annuity to the payment of settlement estate duty—that is to say, the principal gift of the annuity would not have rendered it liable to settlement estate duty at all. The liability to settlement estate duty D according to the cases to which I have been referred—*A.-G.* v. *Owen* (1) and *Re Campbell* (3)—would seem to arise from the direction to set aside a portion of the testator's estate for the purpose of paying the annuity.

It is said that this statement was of the nature of a *dictum*, and it may be that it was not strictly necessary for the decision of the case, but, in the opinion of their Lordships, the observation of so learned a judge E calls for great respect.

A.-G. v. *Watson* (5) was also relied on, but it merely decided that an annuitant whose annuity was to be paid out of a residuary estate, as in the present case, without any provision for setting aside a fund to meet the payments, had an interest in the residuary estate within the F meaning of the relevant sections of the Finance Act. In other words, applying the case to the present circumstances, it decided that duty was *prima facie* payable to the extent of the interest ceasing on the death of the annuitant within the meaning or within the provisions of sect. 5 (1). G

In *Re Alington (Lord) & London County Council's Contract* (6), Russell, J., observed, at p. 261, as regards *Re Campbell* (3), that:

> when that case is looked at all that it decided was that where a fund was set aside out of a mixed residue to provide by the income thereof certain annuities, upon the cesser of which the persons entitled to residue would be entitled to the fund, settlement estate duty was payable on so much of the residue as had been set aside. H It was held that the fund was limited in trust for persons by way of succession. That decision does not justify the proposition that the existence of a jointure charged on an estate vested in an owner in fee made, under the old law, the estate a settled estate.

Two observations fall to be made in regard to these decisions. In the first place, they deal with cases in which a fund had been appropriated exclusively for the services of the annuity or annuities, and, so far from there being any expression of opinion in favour of the view that a mere gift in a will of an annuity has the result of effecting a settlement within the meaning of the Finance Act, the general opinion seems rather to tend the other way. In the second place, it is plain A that the judges placed great reliance on the circumstance that the Finance Act, 1894, defines a settlement by reference to the Settled Land Act, a statute which, as held by the House of Lords, required a generous interpretation: see *Bruce* (*Lord Henry*) v. *Ailesbury* (*Marquess*) (7). Their Lordships desire to express no opinion on the question as to B whether, according to English law, there is a settlement within the meaning of the Finance Act in a case where there has been a gift of an annuity by will, and no appropriation has been made out of which it is to be paid. The case which they have to decide depends upon the true construction of the Ordinance No. 3 of 1932 of Hong Kong.

C It is well settled that, in interpreting a taxing statute of a dominion or a colony which contains, on its face, no reference to its origin, or to previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken, or to rely D on decisions as to the true interpretation in the courts of Great Britain of those terms or sections: see *A.-G. for Ontario* v. *Perry* (8), at p. 487. Their Lordships are therefore bound to determine the present appeal simply on the true construction of the Ordinance. The cases above referred to have been mentioned partly because they may be of use E by way of illustration and partly because they were greatly relied on by the appellants. As regards sect. 5 (1), there can be no doubt as to its applicability in the present case. There was property of the testator in which Lady Chater had an interest ceasing at her death, and, to the extent to which a benefit accrued by the cesser of the annuity, that F property was deemed to be included in property passing upon the death of the deceased. The difficulty arises when we come to consider the true effect of sect. 25 (2), untrammelled by any authority. Was there, under the will of the testator, any property, or any estate, or any interest in any property, which, before the death of Lady Chater, stood limited G to or in trust for the residuary legatees by way of succession? It is clearly not enough to show that there was a species of charge upon the property of the testator for the benefit of Lady Chater. It must be shown that substantially the whole of certain property, or of the estate, or interest in it, was held upon trust, in effect, for Lady Chater during H her life, and, so far as benefit was concerned, passed to the residuary legatees upon her death. This, it may be noted—again by way of illustration—was the test adopted by KENNEDY, J., in *A.-G.* v. *Owen* (1) and followed by STIRLING, L.J., in *Re Campbell* (3); and that, as already pointed out, in cases where there were strong reasons for giving a wide interpretation to the word "settlement." The whole of the income of the estate was not applied in making the annual payments to Lady Chater. Nor can their Lordships hold that a hypothetical slice of the property passing by the will can properly be treated as an interest in that property within the meaning of sect. 25 (2). The " slice," indeed, is an expression employed in this connexion for the purpose of valuation only. Construing the Ordinance as it stands, and without reference to the Settled Land Act, their Lordships must come to the conclusion that the phrase " any property or any estate or any interest in any property," coupled with the words " stands limited " (which are by no means equivalent to " passes or is deemed to pass "), refers to definite property, or an estate, or interest in it, which actually exists, and can be precisely defined. It should, perhaps, be added that, for the purpose of an exemption, such as that given by sect. 25 (1), the actual facts must be looked at, and that it is impossible to hold that exemption should be granted merely because events which have not taken place might well have taken place, since they were clearly within the powers of the trustees. Their Lordships must therefore agree with the judgment of MacGregor, J., on the petition, and of the judges on the appeal to the Full Court.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed, with costs.

Solicitors: *Gibson & Weldon* (for the appellants); *Burchells* (for the respondent).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

COLLYER (INSPECTOR OF TAXES) *v.* HOARE & CO., LTD.

[KING'S BENCH DIVISION (Finlay, J.), **June 18, 21, 22, 28, 1937.**]

Income Tax—Profits from trade—Deduction—Deficiency in rent—Computation—Brewers—Leasehold premises let to tied tenant—Premium paid by brewers on grant or purchase of lease—Sum expended by brewers on alterations under covenant—Amount of debt foregone on assignment of lease to brewers in satisfaction of debt—Rack rent.

The respondent company from time to time purchased or acquired leases of licensed houses, which it let to tenants who were tied to the company for all the beer, wines and spirits sold in the premises let. The company was admittedly entitled in computing the profits of its trade for assessment under Sched. D, Case I, to a deduction of the difference between the rents paid by it for its leasehold houses or the Sched. A assessments on its freeholds and the rents received by it from the tied tenants. The company claimed that, in computing this deficiency of rent, the following sums should be spread over the period of the lease and the annual equivalent of the sum in question added to the sum which the company paid in the name of rent: (i) a premium paid by the company on the grant of a lease to the company, (ii) the consideration paid on the purchase by the company of an existing lease of premises, (iii) a sum expended by the company on alterations and improvements in a licensed house under a covenant so to do contained in a lease of the premises to the company, and (iv) the amount of debt foregone on the assignment to the company of a lease of premises in satisfaction of a debt due to the company:—

HELD: none of the allowances as claimed could be allowed; but in computing the deficiency of rent the figures to be taken were the rack rent or annual value on the one side and the aggregate of the tenant's rent and the annual equivalent of any premium paid by the tenant for his lease on the other.

[EDITORIAL NOTE. Under the decisions in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1) and *Hoare & Co., Ltd.* v. *Collyer* (2), brewery companies were allowed a deduction for "deficiency of rent" in the case of tied houses, being a calculated figure representing the amount the rent paid by the brewer was more than that paid by a tied tenant. Here it is sought to extend this principle to certain other payments by the brewers; but it is held that in such cases the deficiency of rent must be calculated in a rather different way, *i.e.*, by ascertaining the difference between the rack rent of the premises and the rent paid by the tenant, including in the latter any equivalent of a premium where necessary. If this view of the matter is taken, it avoids, in respect of the payments here in question, taking any capital payment into consideration in assessing income tax.

AS TO ALLOWANCES IN CASE OF TIED HOUSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 130, para. 246; and FOR CASES, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.]

Cases referred to:

(1) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399.

(2) *Hoare & Co., Ltd.* v. *Collyer*, [1932] A.C. 407; Digest Supp.; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169.

(3) *Brickwood & Co.* v. *Reynolds*, [1898] 1 Q.B. 95; 28 Digest 46, *231*; 67 L.J.Q.B. 26; 77 L.T. 456; 3 Tax Cas. 600.

(4) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266.

(5) *Russell* v. *Town & County Bank* (1888), 13 App. Cas. 418; 28 Digest 45, *227*; 58 L.J.P.C. 8; 59 L.T. 481; 2 Tax Cas. 321.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts allowing an appeal by the respondent company against assessments made upon it under Sched. D, Case I, in respect of the profits of its trade for the years 1924/25 to 1933/34 inclusive. The Special Commissioners held that, in computing the deficiency of rent in respect of any leasehold licensed house acquired by the company: (*a*) premiums paid by the company, though *prima facie* capital payments, ought to be taken into account in arriving at the deficiency of rent. They took this view because Rowlatt, J., in *Hoare & Co., Ltd.* v. *Collyer* (2) had said that if premiums received were taken into account, regard must also be had to premiums paid; (*b*) sums paid as the consideration for assignments of leases could not be distinguished from premiums paid on the grants of leases; (*c*) sums expended under a covenant by the brewer to make alterations and improvements ought to be taken into account except in so far as they had been allowed as a deduction against profits. Sums expended by the tenant under a covenant by him must be taken into account in computing the rent received by the brewer; (*d*) where leases were surrendered to the brewer in satisfaction of a deed, the cost of acquiring the lease should be treated as a sum paid for an assignment of a lease under (*b*) above. If the debt was greater than the value of the lease surrendered there should be an allowance of the excess as a bad debt.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *Cyril L. King, K.C.*, for the respondent company.

Finlay, J.: The facts of this case lie in a comparatively small compass. The appeal was by a well-known brewing company, Hoare & Co., Ltd., against assessments for a number of years. Para. 2 of the case sets out the familiar position with regard to tied houses. The company carried on its business of brewing at the Red Lion Brewery, and in order to increase its trade, had from time to time purchased or acquired leases of licensed houses, which it let on yearly tenancies, or for periods varying from 7 to 21 years and upwards, to tenants who were tied to the company for all the beer, wine, and spirits sold in the premises let. The company had about 1,000 of these houses, and it also had a few licensed houses which were let without a tie, although nothing turns on that. Para. 3 of the case describes the decision in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1), and it says, and rightly says, that, under that decision:

> the company was entitled in computing the profits of its trade for assessment under Case I of Sched. D to a deduction of the difference between the rents paid by it for its leasehold houses or the Sched. A assessments on its freeholds and the rents by it from the tied tenants, this difference being hereinafter referred to as "the deficiency of rent."

Then there is set out the result of a later case, *Hoare & Co., Ltd.* v. *Collyer* (2). The result of that case is set out as follows:

> It was held that, in computing the deficiency of rent in respect of any tied house, account must be taken of any premium paid by the tenant for his lease as well as of the rent. It was agreed that the premium should be spread over the term of the lease, and the aggregate of the tenant's rent and the part of the annual equivalent of the premium apportioned to each year be set against the rent paid by the brewer, or the Sched. A assessment of the house in order to ascertain the deficiency of rent (if any) on that house. A

Para. 4 is:

> It is admitted on behalf of the appellant [the inspector of taxes] that (apart from the question in issue in the present case) the sum to be taken for comparison with the rent received by the company from a tied tenant for the purpose of computing the deficiency of rent of the house is the rent paid by the company or the gross annual value of the house as assessed for the purpose of income tax under Sched. A, whichever is the greater sum. B

Para. 5 sets out the claim of the company. It is a claim relating to C the computation of deficiency of rent. The company claims that any sum falling within any of four categories set out in para. 6 paid or foregone by the company on its acquisition of the house should be similarly spread over the period of the lease and the annual equivalent of the sum in question added to the sum which the company paid in the name D of rent. It was agreed that, if the extra sum was to be taken into account at all, its annual equivalent should be determined on the basis of the 5 per cent. annuity tables.

Para. 6 sets out the four matters which arise, and para. 7 gives examples. It is not necessary that I should go through them in detail. The first E and the main one (as I think, the only one, perhaps, which needs very careful consideration, in this sense, that the others seem really to follow) is this:

> A premium paid by the company on the grant of a lease at a yearly rent to the company which has let the premises to a tied tenant at a yearly rent with or without a premium. F We have not thought it necessary to distinguish between cases where the company has let the premises at a premium and where it has not because the annual equivalent of the premium received (where a premium has been charged) is added to the rent in accordance with the decision referred to in para. 3 hereof. The example given in para. 7 (*a*) hereof is an example of this class of case.

Para. 7 (*a*) sets out the case with regard to a public house or inn G called the Red Lion in Ebury Street. There, by an indenture of July 16, 1923, the company was granted a lease of the premises for a term of 19 years from Lady Day, 1923, at a premium of £1,850 and a yearly rent of £150. The annual equivalent of the premium on the 5 per cent. tables is £153. The premises were let by the company on H a tenancy at a yearly rent without premium. The rent in the particular year selected was £252 14*s.* 10*d.* On that, the claim of the company is this, that one takes the yearly rent paid by the company, £150, and one takes the annual equivalent of the premium paid by the company, which is £153. One thereby gets £303. One has to compare that (this at least is common ground as to the other side) with the rent received from the tied tenant, which is £252 14*s*. 10*d*., and one thereby gets a claim by the company for £50 5*s*. 2*d*. The second case relates to a sum paid on the purchase by the company of an existing lease of premises which the company has let to a tied tenant at a yearly rent, with or without premium. The third case relates to repairs, and, as I gather (and I do not think that this was disputed), those repairs were repairs of a capital nature. The fourth case is a little complicated, though, in principle, I think it is the same, and in order to call attention to the fact it is necessary to observe only that, in that case, the claim of the company is to bring into account the annual equivalent of a loan made as long ago as Dec. 22, 1905.

In these circumstances, undoubtedly, a diffcult, and, I am bound to say, I think, a rather unsatisfactory, position arises. There is one thing that appears to be perfectly clear and well settled : in making computations for the purpose of income tax, capital expenditure is not allowed, and capital receipts are not to be brought in. There have been many cases on the subject (frequently very difficult cases, and cases which have got to the House of Lords), but those cases have been on the question whether a particular receipt is a capital receipt, or a particular payment is a capital payment, and I do not think the principle that, when one has ascertained that a particular sum is capital it falls to be excluded from income tax, has been, or, indeed, can be, questioned.

It would not, I think, be useful that I should go in any detail through the case of *Usher's Wiltshire Brewery* (1). The case there was examined in great detail in a series of elaborate opinions in the House of Lords. I propose to read only one passage, a well known passage from the opinion of Lord Sumner, which seems to give the gist of the matter so far as concerns rent foregone, which was the main, though not the sole, matter which was raised in *Usher's Wiltshire Brewery* (1). There was also a question of repairs in *Usher's Wiltshire Brewery* (1), and a question whether *Brickwood & Co.* v. *Reynolds* (3) was well decided, and it was ultimately held that that case was wrong. With regard to repairs, I would make only this observation, that the repairs which were in question in *Usher's Wiltshire Brewery* case (1) were clearly repairs of what one may conveniently call the nature of income. The outgoings for repairs there were not outgoings of a capital character. In that respect, as I understand the matter, they differed from the repairs which come into question in the present case.

The passage from the opinion of Lord Sumner, at p. 469, which defines the issue on the main question (the question of rent foregone) which there arises, is as follows :

> Next as to the rent. A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for

> it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt. In principle, therefore, I think that in the present case rent foregone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, or by letting houses in the same way, which they hire and then re-let at a loss, is money expended within the first rule applying to both of the first two cases of Sched. D, and that upon the findings of the special case, which are conclusive, it is "wholly and exclusively expended for the purposes of such trade."

A That, I think, as far as I am concerned, is enough about *Usher's Wiltshire Brewery* (1).

I turn to the other case, also a difficult case: *Hoare & Co., Ltd.* v. *Collyer* (2). There the difficulties are perhaps added to by the various B matters which arose as that case went through the various courts. The actual decision was that the premium received was a thing to be brought into account, and that the annual equivalent of it fell to be added to the rent received by the brewers. It was further held (and this was the main question when the case got as far as the House of Lords) that, in con- C sidering the amounts to be allowed as deductions in respect of deficiency, each tied house must be considered separately. That conclusion, which reversed the Court of Appeal on that point, was really reached by an application of the principle which had been then recently laid down in *Fry* v. *Salisbury House Estate, Ltd.* (4). It is necessary first to look D at the judgment of ROWLATT, J. It would anyhow be desirable to look at his judgment; it nearly always is, but it is the more necessary in this case, because on a passage in that judgment the special commissioners (as I will show in a few minutes) really based their decision in the present case.

E ROWLATT, J., discussed the matter, and he arrived at the conclusion that the premium in question there could not be brought into account. I will read a passage from the earlier part of his judgment which shows the point. He says this, at p. 181:

> Although in the case of houses leased by the brewers it is probable that what F they can deduct—I think the Lords so treated it—is the rent they pay, yet it is quite clear that in the case of annual value it is only the annual value under Sched. A by statute that they can deduct. Therefore you at once get an artificial limit brought in as to what they bring in on one side, and the taking of this general account seems to be very much hampered from that point of view too. It seems to me that it is extraordinarily difficult to contemplate working this system side by side with the special taxation of land and premises under Sched. A, and I think Mr. Hills frankly said if you do it, it does involve making allowances for taxes G under Sched. A. In other words, it involves this. It involves taking all these houses out of Sched. A altogether and treating the thing as a trade, the houses merely being items of the trade; just as an insurance company may be required by the Crown to let its investments disappear from taxation under the deducting schedules and be brought in as receipts in a mere trading account.

Then he goes on, at p. 182:

> H That leaves this question. Although premiums cannot be brought in as I have said as a subject-matter of taxation, I have not hitherto considered them as different from rent. I have merely said that you cannot bring in receipts as receipts by themselves. But can anything be brought in except the rent of the house itself to the extent of wiping out the deficiency? Can the premiums be brought in to the extent of wiping out the deficiency? Well now, I am bound to say I feel a good deal of difficulty there when one is confronted with the facts. Here is a brewer who says: "I have a house worth so much, and it stands me, in one way

> or another either as leaseholder or freeholder, in a charge of £100 a year, and I am only getting £50 for it, there is my loss of £50." You say: "Besides getting £50, you are getting a substantial premium; do not talk about loss on this house." Of course that appeals to one very much. That is the difficulty which I respectfully think we have got into by this step which has been taken in extending the doctrine of the *Russell* case (5) to the case of the tenant, because although in the House of Lords they only spoke of tenants letting at a rent *simpliciter*, and landlords taking from a superior landlord at a rent *simpliciter*, there is the other circumstance which they never looked at, namely, where the tenant may have paid a premium A and where the landlord himself, being a leaseholder, may also have paid a premium.
>
> Now I have come to the conclusion that one cannot look at premiums. The Attorney-General had to agree that if we are to look at premiums received we must look at premiums paid. I cannot conceive on the authorities how I can look at premiums paid to swell the amount which is brought in as rent paid. I do not see how I can possibly do that. It can only be brought in if you are to look at these people as traders, not only in rents, but as traders in property—which is the point B I have already expressed my opinion upon. Now if you cannot bring in the premiums on the one side, I cannot conceive how you can bring them in on the other. I think the Attorney-General admitted it, and I think really that disposes of the question. I do not think you can regard premiums at all. It is not a satisfactory position, but there it is. They have taken so much rent, and they have taken the premium, and in that position the figures must be dealt with, it not being workable to bring in premiums at all.

C

Then ROWLATT, J., went on to deal with another point, which, he said, was a more subtle and different point, and to that I shall have to make reference later in this judgment.

I said that I thought the difficulty was added to by the history of the case as it went through the courts. I am not going to follow its every D ramification, but, shortly put, that decision of ROWLATT, J., which was, of course, to the effect that premiums could not be brought in, was appealed against; it went to the Court of Appeal, and the Court of Appeal directed that certain further facts should be found. It is necessary only to refer to the facts which are set out at pp. 190, 191, of the report. E The first question they were asked to find was this:

> Whether the premiums mentioned in the first sentence of para. 4 of the said case, or any part of them in any form as a matter of accountancy should be taken into account for the purpose of ascertaining commercial profits over any given period.

To that the special commissioners answered: F

> The premiums should be taken into account in ascertaining the commercial profits of the respondents' business. The premiums apportioned over the respective periods of the leases should preferably be treated as revenue receipts, or alternatively, should be included in the rent account for the purpose of ascertaining the balance of that account to be brought into the profit and loss account of the business.

When the case and these further findings came on in the Court of Appeal, G the Court of Appeal held that all the tied houses and receipts from them must be massed together and considered as a whole. That decision of the Court of Appeal was reversed by the House of Lords, and the reason for that reversal was that the House of Lords considered that really the principle of the *Salisbury House* case (4) governed it, and, H therefore, the excess of rent could not be brought in. But the House of Lords in their opinions made it perfectly clear that the question (which by that time, in the process of going through the courts, had apparently become really a subordinate question) whether premiums could be brought in must be resolved by saying that, in some form or other, they could be brought in. It is not necessary to refer in detail to the various passages which make that clear. One may look at the respective opinions of LORD BUCKMASTER, at p. 210, of LORD WARRINGTON, at p. 211, and of LORD ATKIN, at p. 214. It is perhaps worth reading a sentence from the opinion of LORD ATKIN:

A
> The only question seems to me to be whether the tied rent, plus the premium, is in fact less than the Sched. A valuation or the rent paid by the appellants on freehold or leasehold houses respectively.

Then there is the opinion of LORD TOMLIN, at p. 216, and that of LORD MACMILLAN, at p. 217. The passage from the opinion of LORD ATKIN B which I have read, and other passages which might be read, I think, show that the House of Lords (perhaps happily for their peace of mind) had not anticipated the difficulty which has subsequently developed, because they make it clear that, as they supposed, the comparison was to be made between this figure, arrived at, no doubt, by bringing in the C premium, where there was a premium, on the one side, and the rack rent, or Sched. A, on the other side. They seem to me to make it clear that the comparison is between the sum paid by a tenant, that sum being increased by the premium, and the rent or the Sched. A value. It is not necessary, of course, to refer to the general rule of Sched. A, D which makes it perfectly clear that the general test is the full sum which would be paid by a tenant at rack rent.

Now I have to come to the actual problem which falls to be dealt with here, and I take the first, and the main, question that arises with regard to the premium. I think that the solution in that example is E not that the premium is to be brought in as a premium, but that £150 is not the rack rent. It seems to me, therefore, that what has got to be taken is what the premises would fetch at a rack rent. Similarly with regard to the repairs, it seems to me that the solution there is not that capital repairs are to be allowed, which seems to me to be contrary F to every principle of the income tax, but that those repairs, if they add to the value of the premises, will be reflected in the rack rent, if rack rent there is, or in the annual value of the premises. I cannot resist the view that to allow the claim—and indeed I did not understand that, in the most skilful argument, this was, or could be, questioned— G would be to bring into income tax computations capital expenditure, and that cannot, I think, be right. The solution of the matter, looking at the thing from the other side, may, I think, be as Mr. Hills suggested, that what has to be allowed for is reduction of rent only by reason of the tie. The reduction of rent by reason of the fact that there is a premium H is not a reduction by reason of the tie, and, for that reason, the annual equivalent of the premium must be added back. But, when one comes to the other side, no such difficulty exists, and it seems to me (and in this I am following verbally opinions in the House of Lords) that the rent or the annual value must be taken. It was conceded here that, apart from the special question arising here, the rent or annual value, whichever is the higher, is the thing to be taken. If this view (and it is the view which I have formed on this most troublesome matter) is right, the principle is maintained that capital payments and receipts are not taken into account. On the one side the premium is considered to arrive at the figure of rent foregone only by reason of the tie. On the other side of it, the comparison is with annual value or rent. On the whole, I think the commissioners made a mistake in applying and following, as they did, the *dictum* of Rowlatt, J., in *Hoare & Co., Ltd.* v. *Collyer* (2). It is not necessary for me to say how anxiously I should consider and how willingly I should follow any *dictum* of Rowlatt, J., but it is necessary to point out that this *dictum* was delivered in a judgment which was subsequently held, both in the Court of Appeal and in the House of Lords, to be wrong. I would further point out that, in the very passage upon which the commissioners place reliance, Rowlatt, J., with much emphasis said this, at pp. 182, 183:

> I cannot conceive on the authorities how I can look at premiums paid to swell the amount which is brought in as rent paid. I do not see how I can possibly do that.

It appears that Rowlatt, J., thinking, as we must now assume, erroneously, of course, that a premium could not be brought in on either side, was emphatic in the view that the premium now claimed could not be brought in. Unless I misinterpret the language of the special commissioners, I think that, in allowing the appeal, I am deciding as they would have decided if they had not felt themselves fettered by the *dictum*. Be that as it may, I have, of course, to do my best in this difficult matter to consider the question, and to consider it on principle. The conclusion at which I arrive is that the principle that what one takes is annual value or rack rent must be maintained, and that none of the allowances claimed can be allowed.

For these reasons I arrive at the conclusion that the decision of the special commissioners was wrong. The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Godden, Holme & Ward* (for the respondent company).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

Re SEYMOUR, THE TRUSTEE *v.* BARCLAYS BANK, LTD

[CHANCERY DIVISION (Clauson, J.), **July 9, 1937.**]

Bankruptcy—Preference—Relation back of trustee's title—Protection of bona fide transaction without notice—Discharge of overdraft at bank after presentation of petition but before receiving order.

Early in 1936 S. had a banking account at each of two branches of the respondent bank. The account at one of the branches had been dormant since Oct., 1935, and stood in debit as an overdraft secured by a guarantee. On Mar. 17, 1936, a petition in bankruptcy was presented against S. on an act of bankruptcy committed that same day. At all material times the bank was admittedly entirely ignorant of the fact that any petition was pending or that any act of bankruptcy had been committed. From towards the end of 1935 the manager of the branch at which S. had an overdraft had been pressing S. and the guarantor to pay off the overdraft. Pending the petition, S. sought to obtain an overdraft at the other branch, but the manager was not prepared to grant an overdraft, unless the overdraft at the first branch was first cleared off. On May 5, 1936, before the adjourned hearing of the petition, S. obtained an advance from a moneylender with which he paid off the overdraft at the first branch, and the guarantee was returned to the guarantor. S. then obtained an overdraft at the second branch. A receiving order was made against S. on July 27, 1936. The trustee in bankruptcy, asserting that his title related back to Mar. 17, 1936, claimed that the money paid in discharge of the first overdraft was the trustee's money, and he claimed its return :—

HELD : in the circumstances the bank was protected by the Bankruptcy Act, 1914, s. 45, and the trustee was not entitled to recover the sum paid to the bank in discharge of the first overdraft.

Re Badham, Ex p. Trustee (1893), 10 Morr. 252, *not followed.*

[**EDITORIAL NOTE.** The payment attempted to be set aside here, it will be noted, was made after the petition had been presented. The two previous decisions upon the point were apparently in conflict, although the second case treated the facts as distinguishable. The earlier case, *Re Badham* (1), is here plainly dissented from and is not followed, and it would now seem to be the law that a *bona fide* transaction without notice of the petition after the latter is presented is protected and is not affected by the doctrine of relation back of the trustee's title, and is not contrary to the policy of the Bankruptcy Acts.

AS TO TRANSACTIONS UNAFFECTED BY THE RELATION BACK OF THE TRUSTEE'S TITLE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 376-382, paras. 508-515 ; and FOR CASES, see DIGEST, Vol. 5, pp. 907-918, Nos. 7430-7510.]

Cases referred to :

(1) *Re Badham, Ex p. Trustee* (1893), 10 Morr. 252 ; 5 Digest 902, *7411* ; 69 L.T. 356.

(2) *Re Dunkley & Son, Ex p. Waller*, [1905] 2 K.B. 683 ; 5 Digest 909, *7443* ; 74 L.J.K.B. 963 ; 93 L.T. 248.

MOTION by the trustee in bankruptcy of L. J. Seymour asking for a declaration that the sum of £240 6*s*. 4*d*. paid by the bankrupt to Barclays Bank, Ltd., on May 6, 1936, formed part of the bankrupt's estate and was the property of the applicant, and that the payment thereof by the bankrupt to the bank was void against the applicant as trustee of the bankrupt's property, and that it was made in bad faith and contrary to the policy of the bankruptcy laws.

H. J. Wallington, K.C., and *V. R. Aronson* for the applicant.

W. N. Stable, K.C., and *Gerald R. Upjohn* for the respondent bank.

Clauson, J.: This is a motion by the trustee in the bankruptcy of Mr. Seymour, claiming as against Barclays Bank a declaration that the sum of £240 6*s.* 4*d.*, paid by the bankrupt to Barclays Bank on May 6, 1936, forms part of the bankrupt's estate, and is the property of the applicant, and that the payment thereof by the bankrupt to the respondent bank is void against the applicant as trustee of the bankrupt's property, and that it was made in bad faith and contrary to the policy of the bankruptcy laws.

The circumstances of the case are these: the bankrupt's position early in the year 1936 was that he had been made a bankrupt some years before, and had obtained his discharge from that bankruptcy. He had, for a period of time between 1932 and the end of 1934, had no less than five petitions in bankruptcy presented against him, which had successively, after various lapses of time, been dismissed. He had two banking accounts in the early part of the year 1936: one, his effective banking account, was at the Marble Arch branch of Barclays Bank, and the other account was at the Edgware Road branch. The latter had been dormant since the previous October, and stood in debit as an overdraft owing to the Edgware Road branch and secured by the guarantee of one Marks. On Mar. 17, 1936, a petition in bankruptcy was presented against Seymour on an act of bankruptcy committed that same day, namely, non-compliance with a bankruptcy notice. At all material dates, Barclays Bank was admittedly entirely ignorant of the fact that any such petition was pending, or that any such act of bankruptcy had been committed. The payment in question was one made after the petition. It was, accordingly, a payment to which the provisions of the Bankruptcy Act, 1914, s. 44, do not apply. The authority for that proposition is to be found in *Re Badham, Ex p. Trustee* (1), decided in 1893 by Vaughan Williams, J. From a date towards the end of 1935, the Edgware Road branch of Barclays Bank had been pressing the bankrupt and Marks, the guarantor, to pay off the overdraft. Pending the petition, the bankrupt seems to have approached the Marble Arch branch to obtain the benefit of an overdraft from it. While the managers of both branches were entirely ignorant of the bankruptcy petition, the manager of the Marble Arch branch was aware of the existence of the unpaid overdraft at the Edgware Road branch, and he was not prepared to grant an overdraft unless the Edgware Road branch overdraft was first cleared off. What the bankrupt did was this: on May 5, 1936, he approached a moneylender, that is after the petition had first come on for hearing but just before the adjourned hearing had come on, and obtained from him an advance of £300 on exceedingly onerous terms, which worked out, having regard to the bonus, at the rate of interest of about 142 per cent. per annum. With that £300, he proceeded to pay off the Edgware Road overdraft by handing over to the Edgware Road branch the sum of £240 6*s.* 4*d.* The effect of that payment was, first of all, to put an end to his liability to the Edgware Road branch, and, secondly, to release Mr. Marks, the guarantor, who a day or two afterwards received his guarantee back from the bank. It also had this further effect, that it left the road clear for the bankrupt to obtain from the Marble Arch branch the overdraft of £500 which he wanted. It was a somewhat desperate move, but a desperate move which conceivably might have led to his being ultimately able to arrange his affairs. But he was not able to arrange his affairs, and, in due course, a receiving order was made on July 27, 1936.

Now, the way in which the trustee formulates his claim is this: By virtue of the Bankruptcy Act, my title to the money which was in the hands of the bankrupt relates back to Mar. 17, 1936, the date of the act of bankruptcy; it was accordingly my money that the bank received, and the bank must pay my money back to me, having no title to my money. In answer Barclays Bank refers to sect. 45, which is in these terms:

> Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—(*a*) Any payment by the bankrupt to any of his creditors . . . Provided that both the following conditions are complied with, namely—(i) that the payment . . . takes place before the date of the receiving order; and (ii) that the [payee] has not at the time of the payment . . . notice of any available act of bankruptcy committed by the bankrupt before that time.

Accordingly, Barclays Bank comes forward and says that the payment took place before the date of the receiving order, that there is no question that the bankrupt owed Barclays Bank the money, and that the bank had no notice of any available act of bankruptcy. The bank points out that this is not a case which involves either the effect of bankruptcy on an execution or attachment, nor is it a case with respect to the avoidance of certain settlements, assignments and preferences. The bank then points out that, as this case is outside the latter words, nothing in the Bankruptcy Act is to invalidate the payment. The bank also points out that the trustee seeks to do what the section forbids him to do, namely, to invalidate the payment by calling in aid something in the Act, namely, the provision in the Act which gives him a title, in the circumstances which have happened, to money which was, apart from the question of the operation of the Bankruptcy Act, the bankrupt's money, when he paid it over to the bank. The bank's contention seems to me to be correct, and to be a complete answer to the trustee's claim. The section seems to me plain; the circumstances are such as to bring its protective operation into force; and Barclays Bank has, in my view, a perfectly good defence, by virtue of that section, to the claim put forward by the trustee. If that were all, I should be content to stop there, but it is not all. I have already referred to the decision of Vaughan Williams, J., in *Re Badham, Ex p. Trustee* (1), which was cited for the purpose of supporting the proposition that the section in the Act which relates to fraudulent preference relates to payments made before the petition, or, at all events, cannot relate to payments made after the petition where the petition results in a receiving order being made. That case, so far as I can see, is very much on all fours with the present case. It was a case where, after the petition, the bankrupt had paid certain creditors sums in discharge of their claims. The claim was put forward in the A first instance by the trustee as a claim based upon the fraudulent preference section. VAUGHAN WILLIAMS, J., pointed out that that would not do, and treated the claim as based, not upon fraudulent preference, but upon the title given, by the statute, to the trustee to the money in question, and his Lordship proceeded to consider the effect of the pro- B tective section, which was then sect. 49 of the Act of 1883, and which is now sect. 45 of the existing Act. The two sections are, but for one quite trifling matter, which does not affect this case, in precisely the same words. VAUGHAN WILLIAMS, J., held that he was free to hold that the payees in that case were not entitled to the benefit of the protective C section, and he took the view that he was not bound to accord the protection of sect. 49 to cases which fall outside sect. 48 with regard to fraudulent preferences. He said, at p. 257:

> It is in effect said that in every case which does not fall within sect. 48 I am bound to give the benefit of sect. 49. I do not agree. In my opinion I am not bound to give the benefit of sect. 49 to any transaction which is contrary to the D policy of the bankruptcy laws. The transaction with Messrs. Wilson, Pease & Co. is contrary to the bankruptcy laws and would have been so held long before there were any sections like these in the Acts of Parliament. It is, in effect, a common law fraud to make a payment contrary to the bankruptcy laws, and I do not intend to give the benefit of the protecting section to any such transaction. I hold that the money was the property of the trustee at the time when the bankrupt paid it away and the case does not come within the protecting section. I think I am, E in so holding, giving full effect to the words of the section.

With great respect to that very learned judge, I confess I cannot bring myself to give to the section any construction which would accord with the view which the judge in that paragraph appears to indicate as being the correct meaning of the section. I say that with less hesitation F because the matter came before BIGHAM, J., sitting as a bankruptcy judge in *Re Dunkley & Son, Ex p. Waller* (2). In that case, BIGHAM, J., saw his way to distinguish the facts of the case before him from the facts of the case in *Re Badham* (1), although I gather that he did not find stated in the report of *Re Badham* (1) the circumstances which were G present in *Re Badham* (1) and absent in the case before him. However, on that ground he distinguished *Re Badham* (1). He certainly indicated that he felt the greatest difficulty in construing the section in the way that VAUGHAN WILLIAMS, J., had construed it. I need scarcely say that I express with the greatest hesitation my view of what the section H means in its operation and application to the present case, as I am bound to confess that my view is not consistent with the view which VAUGHAN WILLIAMS, J., expressed so long ago as 1893 in *Re Badham* (1). I feel great hesitation in deciding what my duty is in the circumstances—as to whether I should take the course that VAUGHAN WILLIAMS, J., took, using his language, and refuse to accord the protection of the section of the Act. Although it is true, as was urged upon me by Mr. Wallington, that the section has been re-enacted, in recent years, in precisely the same terms as the old section, nevertheless the legislature must have had before it the view expressed by VAUGHAN WILLIAMS, J., as to the operation of the section. I think, however, that I ought to deal with the matter on the principle that governs decisions as between judges of co-ordinate jurisdiction sitting at *nisi prius*. The rule, I understand, has always been, as between judges sitting at *nisi prius*, that any judge is bound to pay full respect to the decision of a judge on the particular point before him, but is not bound by his decision, and is free, if he thinks it is wrong, to decide inconsistently with the previous decision, and leave the matter to be put right, if necessary, by the Court of Appeal. In the present case, I propose to act on my own view of the section, and leave it to the Court of Appeal, in the case of an appeal, to deal with the matter otherwise. Accordingly, I propose, in this case, to hold that the protective section covers the case, and that the applicant, the trustee, is not entitled to the declaration for which he asks. Accordingly, I dismiss the motion with costs.

Motion dismissed, with costs.

Solicitors: *Woolfe & Woolfe* (for the applicant); *Durrant Cooper & Hambling* (for the respondent bank).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

DONOGHUE *v.* ALLIED NEWSPAPERS, LTD.

[CHANCERY DIVISION (Farwell, J.), **July 6, 1937.**]

Copyright—Ownership—Newspaper articles—Information supplied by one person, articles written by another—Onus of proof—Copyright Act, 1911 (*c.* 46), *s.* 6 (3).

A series of articles entitled "[the plaintiff's] racing secrets" was published in a newspaper. The plaintiff had done none of the actual writing of any of the articles, but he had related his experiences to F., who had made notes from which F. had written up the articles. The articles were read over to the plaintiff before publication, and alterations suggested by him were sometimes adopted. F. did not take down the plaintiff's information verbatim, but in the articles the plaintiff's experiences were in some cases given in the form of dialogues. Articles based upon the original series of articles were later published in another publication and entitled "My Racing Secrets. By Steve Donoghue," i.e., the plaintiff:—

HELD: (i) the plaintiff was neither the owner nor the joint owner of the copyright in the original articles.

(ii) the presumption under the Copyright Act, 1911, s. 6 (3), that the plaintiff was the author of the later articles was rebutted.

[EDITORIAL NOTE. This case considers the position arising in respect of copyright where a celebrity supplies the material for a biography of or an article upon himself, and a journalist or other writer puts the material into literary shape. The principle is that there is no copyright in an idea, but only in the form, whether it is a written production or a picture, in which the idea is ultimately put, and the copyright is vested in the person who has clothed the idea with the form.

As to Subject-Matter of Copyright, see HALSBURY, Hailsham Edn., Vol. 7, pp. 520, 521, para. 822; and for Cases, see DIGEST, Vol. 13, pp. 164, 165, Nos. 17-31.]

Case referred to:

(1) *Evans* v. *Hulton (E.) & Co., Ltd.* (1924), 131 L.T. 534; Digest Supp.; MacG. Cop. Cas. (1923-28) 51.

Action for an injunction to restrain the defendant company from printing, publishing, selling or otherwise circulating certain articles, and for damages for infringement of copyright. The facts are set out in the judgment.

Sir Patrick Hastings, K.C., and *A. A. Gordon Clark* for the plaintiff.

Fergus Morton, K.C., and *F. E. Skone James* for the defendant company.

Farwell, J.: The plaintiff, Mr. Stephen Donoghue, is a very well known jockey, whose name, I think one may say, is of value in the newspaper world, and whose reminiscences or adventures may be of value, apart from any literary merit, or anything of that kind, owing to the fact that they are the adventures of a person well known to the public. The plaintiff claims an injunction to restrain the defendant company from printing, publishing, selling, or otherwise circulating certain articles, and for damages for infringement of copyright. The defendant company seeks to resist that claim upon three grounds: (i) that Mr. Donoghue was not and is not either the sole or the joint owner of the copyright in the articles in question; (ii) that, under and by virtue of an agreement, the copyright, if it was in Mr. Donoghue at all, was assigned by an equitable assignment to the proprietors of the *News of the World*, and therefore is no longer in Mr. Donoghue; and (iii) that, if there was any copyright in Mr. Donoghue, in fact he consented to the publication, although he sought afterwards to recede from that position.

In 1931, the persons responsible for the Sunday paper, the *News of the World*, were minded to publish in their paper a series of articles entitled "Steve Donoghue's Racing Secrets," and for that purpose they employed a Mr. Felstead to act on their behalf. Mr. Felstead was described in the witness-box as a free-lance journalist, and he is a person who has considerable experience and knowledge of racing matters. He apparently knew Mr. Donoghue, and he got into touch with him, and the result of it was that, on Apr. 4, 1931, the plaintiff entered into a contract with the *News of the World*, in these terms:

> I agree to supply the proprietors of the *News of the World* material for approximately 50,000 words relating to my experiences on the turf and other matters within my knowledge, for the sum of £2,000, payment to be made as follows: £500 on the signing of this contract (receipt of which I hereby acknowledge) and the remaining £1,500 when Mr. S. T. Felstead, acting on behalf of the *News of the World*, has written up the material for publication and has it approved by me for use and delivered the copy to you. In consideration of the above-mentioned

> remuneration, I undertake that I will not in the course of completing this contract supply any material for publication to any other newspaper firm whatsoever.

The contract is signed by the plaintiff over a 6*d*. stamp. The plaintiff and Mr. Felstead then proceeded to carry out the work necessary to comply with the contract. Mr. Donoghue is the author of a book published some years ago, but, notwithstanding that fact, I have formed the conclusion—and I hope I am not doing him any injustice in saying this—that he is probably very much more familiar with a race-horse than he is with a pen, and I doubt very much whether he would, unaided, find it easy to write a series of articles for any newspaper at all. There is no doubt that Mr. Donoghue himself did none of the actual writing of any of the articles which were published. The course which was adopted was this: Mr. Felstead got into communication with the plaintiff on a number of occasions, and the plaintiff on those occasions related to Mr. Felstead the various adventures which he thought might be supplied to the *News of the World*. Mr. Felstead himself does not write shorthand, and there is no evidence whatever that any of the information given by Mr. Donoghue to Mr. Felstead was taken down in shorthand, or verbatim, or anything of that kind at all. Mr. Felstead made notes as the conversations went on, and he then proceeded to write up the articles required. When the article was in type, or in manuscript form, Mr. Felstead took it to the plaintiff, and he read it over to him, and, from time to time, in going through the article, the plaintiff thought that alterations were necessary or desirable, and such alterations were written in by Mr. Felstead himself in the margin, but, as it appears, they were not always adopted in the ultimate form, Mr. Felstead apparently, in some cases at any rate, preferring the original language to the alterations which Mr. Donoghue suggested. However that may be, Mr. Donoghue undoubtedly read, or had read over to him, these articles from time to time, as and when they were prepared by Mr. Felstead, and they may have been slightly altered as the result of suggestions made by him when reading over, and they were then sent to the newspaper, and duly appeared.

There were several articles, and they appeared Sunday after Sunday in the *News of the World*. They were entitled "Steve Donoghue's Racing Secrets. Enthralling Stories of the Sport of Kings." The first one, which appeared on May 17, 1931, is entitled "My Greatest Derby. By Steve Donoghue." There follows an article which I hesitate to describe as literary, but at any rate it is an article which is written in the modern language that one expects to find in papers of that kind. Included in the article, there are the various stories and adventures which the plaintiff had told to Mr. Felstead, given in many cases in the form of dialogues, and apparently they would seem, on the face of them, to be more or less the dialogue, or intended to seem to be the dialogue, or the actual conversations, which had taken place on these various occasions. The plaintiff was, of course, duly paid the £2,000 which the *News of the World* contracted to pay him.

In 1936, Mr. Felstead was anxious to make some use of the articles which he had, with the assistance of the plaintiff, supplied to the *News of the World.* Mr. William Lees was at that time concerned in the publication of a paper known as *Guides and Ideas*, and Mr. Felstead suggested to Mr. Lees that an article called "My Racing Secrets. By Steve Donoghue" would be suitable material for that paper, the whole idea being that the original articles which had been supplied to the *News of the World* should be used, but that they should be reduced in length, and that a certain amount of new material should be inserted in them, so that the public might be induced to think that they were something new. It was suggested to Mr. Lees that he should pay £150 for such an article. The idea was not wholly unacceptable to Mr. Lees, and there was undoubtedly communication between Mr. Felstead and the plaintiff as to the publication of such articles. There is a very acute difference between the account given by Mr. Felstead and those given by the plaintiff and other witnesses on his behalf, and I think it is right to say at once that I accept the evidence of Mr. Donoghue, and that of the lady who was his secretary, in preference to that of Mr. Felstead, where their evidence does not tally. I have no doubt whatever that the plaintiff was speaking the truth to the best of his recollection in the witness-box, as was the secretary, and I do not accept the view that he, Mr. Donoghue, ever agreed to accept £150, or £200, or any other sum, for the publication, or the re-publication, of these articles in this particular paper. In fact he, Mr. Donoghue, at that time had some mind to publish his own reminiscences, and there were some negotiations going on with another paper with a view to those reminiscences being published, and he told me in the witness-box, and I accept it, that he was not prepared to entertain the proposal of Mr. Felstead. Apparently, Mr. Felstead either did not trouble his head very much about Mr. Donoghue's consent, or he thought that he could persuade him to give his consent, because he told Mr. Lees that he had got Mr. Donoghue's consent, and, so far as Mr. Lees was concerned, he accepted Mr. Felstead's word for it. He made no inquiry of Mr. Donoghue, and I do not doubt that he thought he could safely accept Mr. Felstead's word in the matter. Mr. Felstead was paid £300 by Mr. Lees, and he endeavoured to persuade Mr. Donoghue to accept part of that cheque in payment for any rights that Mr. Donoghue had in regard to these articles, but that Mr. Donoghue refused to accept. He was not prepared to take anything at all, or to have anything whatever to do with the matter, and, when these articles duly appeared in the paper, he, through his solicitors, immediately complained. In fact, when he complained, the further publication of the articles was stopped, and this action was then commenced.

The first question that I have to determine is whether the plaintiff is or is not either the sole or the joint owner of the copyright in these articles, that is to say, in the original articles which appeared in the *News of the World.* If Mr. Donoghue has no copyright, either as sole owner or as joint owner, in these articles, then of course this action necessarily fails, and it is unnecessary then for me to consider the further question which I shall have to consider if that is not the position, namely, as to the effect of the agreement of Apr. 4, 1931, and whether that agreement amounts to an equitable assignment of Mr. Donoghue's copyright to the *News of* A *the World*. It is necessary, in considering whether Mr. Donoghue is the owner or part owner of the copyright in this book, to see what it is in which a copyright exists under the Copyright Act, 1911. This, at any rate, is clear, and one can start with this beyond all question, that there is no copyright in an idea, or in ideas. A person may have a brilliant B idea for a story, or for a picture, or for a play, and one which, so far as he is concerned, appears to be original, but, if he communicates that idea to an author or a playwright or an artist, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in a C form, whether by means of a picture, a play, or a book, and the owner of the idea has no rights in that product. On the other hand, this, I think, is equally plain, that, if an author employs a shorthandwriter to take down a story which the author is composing, word for word, in shorthand, and the shorthandwriter then transcribes it, and the author D then has it published, the author and not the shorthandwriter is the owner of the copyright. A mere amanuensis does not, by taking down word for word the language of the author, become in any sense the owner of the copyright. That is the property of the author. I think the explanation of that is this, that that in which the copyright exists is the particular E form of language by which is conveyed the information which is to be conveyed. If the idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture or a play, then there is no such thing as copyright at all. It is not until it is (if I may put it in that way) F reduced into writing, or into some tangible form, that you get any right to copyright at all, and the copyright exists in the particular form of language in which, or, in the case of a picture, in the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it.

G In the present case, apart altogether from what one may call merely the embellishments, which were undoubtedly supplied wholly by Mr. Felstead, the ideas of all these stories, and, in fact, the stories themselves, were supplied by the plaintiff; but, in my judgment, upon the evidence, it is plain that the particular form of language by which those stories H were conveyed was the language of Mr. Felstead and not that of the plaintiff. Although many of the stories were told in the form of dialogue, and to some extent Mr. Felstead no doubt tried to reproduce the story as it was told to him by the plaintiff, nevertheless the particular form of language in which those adventures or stories were conveyed to the public was the language of Mr. Felstead, and not the language of Mr.

Donoghue. *Evans* v. *Hulton (E.) & Co., Ltd.* (1), is, I think, very near to the present case, and I feel that, if I were to decide in favour of the plaintiff on this first point, I really should be disregarding the decision of Tomlin, J., in that case. No doubt it is quite true, as Mr. Clark very ably pointed out, that the facts are not on all fours, but, if one looks closely into the circumstances of the case before Tomlin, J., I think one is driven to the conclusion that the principles upon which that judgment turns are really the principles which I have to apply in this case. No doubt in that case the person who supplied the information was a foreigner, and no doubt he did not convey the information in a form which would have been at all adaptable to an article in a newspaper, and to that extent it may be that the person who wrote it down and supplied the article had more to do, possibly, than in this present case. But, as it seems to me, the principle upon which Tomlin, J., proceeded in that case is the one which I am bound to apply here. What Tomlin, J., said at p. 56 was this :

> One thing is reasonably plain, I think, that probably Mr. Zeitun would not himself claim that he was capable of producing in the English tongue a literary work which would find a market. He certainly agrees that he has never attempted to do so, and I should doubt his capacity to do so. The fact that he is the subject-matter of the production in the sense that it is an incident from his life, for which he provided the material, does not seem to me to make him in any sense the joint author with Mr. Evans of the manuscript which was in fact written, and, upon the facts which I have stated, I find that he did not take any part in producing the express matter which is the original literary work, the subject-matter of copyright.

What I understand the judge to mean by " the express matter " is that which I have endeavoured to define as the particular form of language in which the information is conveyed, and, although it may be that, in the present case, the plaintiff could give more help to Mr. Felstead than Mr. Zeitun could give, in *Evans* v. *Hulton (E.) & Co., Ltd.* (1), to the author of the manuscript, nevertheless, although Mr. Donoghue supplied all the substance of the articles, the articles themselves, and the information which was in them, were conveyed in language which was the language of Mr. Felstead, and for which Mr. Donoghue himself was not responsible.

I come to the conclusion, with some regret, that the plaintiff has failed to show that he is the owner or part owner of the copyright in these articles. The articles in this paper *Guide and Ideas* were published as being the adventures of Steve Donoghue, entitled " My Racing Secrets. By Steve Donoghue," and no doubt that was because, both in that case and in the earlier case, the persons who are responsible for the papers desired to lead the public to believe that what they were reading was something of which Steve Donoghue himself was the author, and I think it is probable that so describing the articles does have the effect, under the Copyright Act, 1911, s. 6, of throwing the onus, in a case of this kind, on the defendant company. But, notwithstanding that, it appears to me that I am forced to come to the conclusion—although, as I say, rather unwillingly—that Mr. Donoghue was not the author, or even the joint author, of the articles in the *News of the World*. It must necessarily follow that he cannot sustain this action, and that the action fails, accordingly, and must be dismissed with costs.

It is unnecessary, in the view that I take of the matter, to deal with the question of whether the agreement of Apr. 4, 1931, operated as an equitable assignment or not, but, as this case may well go further, I think it would be right for me to say that, on the pure question of fact as to whether Mr. Donoghue ever agreed or consented to the publication of the second series of articles, on the evidence that I have heard, having seen the witnesses in the witness-box and heard them cross-examined, my view is that the account given by Mr. Donoghue is the right one, and that he never did consent, and, if his consent was necessary, it never was obtained. That is not, of course, material upon the view that I take of this matter, and, upon the short ground that Mr. Donoghue is not the owner or the joint owner of the copyright in the articles in question, the only result can be that the action is dismissed with costs.

Action dismissed, with costs.

Solicitors: *W. H. Court & Son* (for the plaintiff); *Theodore Goddard & Co.* (for the defendant company).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BAKER (Liquidator of First National Pathé, Ltd.) *v.* COOK (Inspector of Taxes).

[KING'S BENCH DIVISION (Finlay, J.), **June 25, 28, 1937.**]

Income Tax—Profits from trade—Company in liquidation—Contracts entered into by company before liquidation performed by agreement by another company—Part of profits arising from performance of contracts paid to company in liquidation—Agent.

Under an agreement, whereby a company sold all its assets to the appellant company, it was agreed that, in the event of the liquidation of the appellant company, the appellant company would sell and the vendor company would purchase, *inter alia*, the appellant company's goodwill, copyright in films, and the benefit of all booking agreements for certain films entered into by the appellant company. It was provided that the vendor company should perform and carry into effect on behalf of the liquidator of the appellant company all booking agreements entered into by the appellant company prior to the commencement of the winding up, and that the vendor company should pay to the liquidator of the appellant company a sum equivalent to 90 per cent. of the gross moneys received by the vendor company under such booking agreements after deducting therefrom all moneys which the vendor company might have expended in performing and carrying into effect such booking agreements. The vendor company was to retain for its services the remaining 10 per cent. The appellant company went into liquidation, and the vendor company duly carried out its obligations under the agreement. The question arose as to whether the liquidator was liable to pay tax upon the sums representing 90 per cent. of the moneys received under the booking agreements and paid to the liquidator of the appellant company:—

HELD: there was evidence on which the commissioners could find that the vendor company was carrying on a trade on behalf of the liquidator of the appellant company, who was therefore liable to be taxed upon the profits made.

[**EDITORIAL NOTE.** Generally speaking a liquidator sells the assets of a company lock, stock and barrel, but in the present case they are sold, under a previous arrangement, to a company for the purpose of the business being carried on. The further question then arises whether the liquidator is the person carrying on the business, and upon this it is decided that the company is carrying on the business as agent of the liquidator. A

As to Continuation of Business for Purposes of Winding Up, see HALSBURY, Hailsham Edn., Vol. 17, pp. 296, 297, para. 191; and for Cases, see DIGEST, Supp., Income Tax, 99*q*., 119*a*.]

Cases referred to: B

(1) *Lord Advocate* v. *Gibb* (1906), 8 F. (Ct. of Sess.) 887; 28 Digest 5, case *c*.

(2) *J. & R. O'Kane & Co.* v. *Inland Revenue Comrs.* (1922), 12 Tax Cas. 303.

(3) *Cohan's Executors* v. *Inland Revenue Comrs.* (1924), 12 Tax Cas. 602.

(4) *Hillerns & Fowler* v. *Murray* (1932), 146 L.T. 474; Digest Supp.; 17 Tax Cas. 77.

(5) *Wilson Box* (*Foreign Rights*), *Ltd.* (*in Liquidation*) v. *Brice*, [1936] 3 All E.R. 728; Digest Supp. C

Appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, affirming an assessment made upon the liquidator of First National Pathé, Ltd., under Sched. D, Case I, for the year 1932/33 in respect of the profits of trade. The facts are set out in the judgment. D

Roland Burrows, K.C., and *Hon. Quintin Hogg* for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

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Finlay, J.: This matter relates to an assessment made upon the liquidator of a company called First National Pathé, Ltd., which was incorporated on Dec. 24, 1927, its object being to carry into effect two agreements, (i) an agreement between itself and Pathé Frères Cinema, Ltd., and (ii) an agreement between itself and First National F Pictures, Ltd. With regard to First National Pictures, Ltd., I need say nothing. That was a subsidiary company established in London by an American company, and the facts with regard to it are the same, or so nearly the same as to make no matter, as the facts with regard to the other company which one may follow. Now, the business of Pathé G Frères Cinema, Ltd., was an English business of making and distributing cinema films. There was an agreement of July 9, 1928, by which that company sold its assets to the appellant company. The result of that and of the agreement with the American company was that these two businesses became combined in the appellant company. What has H happened is that the businesses so combined have now been again distributed.

The appellant company, after the agreements, carried on the business and had its office, its staff, and a studio for the production of the films. On Oct. 31, 1931, there was a resolution to wind up the appellant company, and Mr. Baker was appointed the liquidator. The effect of that was to bring into operation a clause in each agreement, which provided:

> 16. If the purchasing company shall be wound up whether voluntarily or otherwise (except for the purposes of re-organization re-construction or amalgamation) then the purchasing company shall forthwith upon such winding up sell to the vendor company and the vendor company shall purchase—

A the goodwill, copyright in the pictures, and so on, and:

> the benefit of all booking agreements entered into by the purchasing company for the exhibition of films forming part of the said Pathé Gazette, Pathé Pictorial and Eve's Film Review and which at the commencement of the winding up had not been released by it for public exhibition.

The purchase price is defined as being a sum to be agreed between the B purchasing company and the vendor company, or, in default of agreement, to be ascertained by a valuation. Then cl. 16 (4) provides:

> (i) The vendor company shall perform and carry into effect on behalf of the liquidator of the purchasing company all booking agreements entered into by the purchasing company prior to the commencement of the winding up for the exhibition after that date of films forming part of the said Pathé Gazette, Pathé C Pictorial and Eve's Film Review and which at that date had been released by the purchasing company for public exhibition. (ii) The vendor company shall pay to the liquidator of the purchasing company a sum equivalent to 90 per cent. of the gross moneys received by the vendor company under the said booking agreements after deducting therefrom all moneys which the vendor company may have expended in performing and carrying into effect the said booking agreements in respect of such expenses as are set forth in cl. 8 (2) of this agreement and the vendor D company shall retain for its services the remaining 10 per cent. of the said gross moneys.

Now, under this clause, the plant, stock, and so forth were handed over to a new company (which took the place of Pathé Frères Cinema, Ltd.) at a price which was agreed. The offices of the appellant company were given up, the staff was dispersed, and:

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> the liquidator was left in possession of the cash in the bank, the books, the benefit of any contracts made or to be made for exhibiting films on hand at the date of liquidation [that is important] and the debts due to the company.

It is found in para. 8:

> F After the liquidation, the liquidator produced no new films and by himself entered into no new contracts for the distribution of films. The new Pathé Company took over the entire management of the news reels and short periodicals which remained the property of the liquidator and did everything necessary to fulfil the contracts, receiving 10 per cent. of the gross receipts and paying 90 per cent. to the liquidator. That class of film was ephemeral and could have been shut down at any time without loss. With regard to the other British films which remained the property of the liquidator and which were distributed on a percentage basis, G the new Pathé Company similarly took all responsibility for them. It carried out existing letting contracts and paid 90 per cent. of the proceeds to the liquidator, and it also made new letting contracts in its own name in order to exploit such films. In the case of these contracts it paid, by arrangement, 80 per cent. of the proceeds to the liquidator.

All the business, the new business, so to speak, was entered into by the H two companies on their own behalf. Now, that sounds a little complicated, but the general position is sufficiently clear. The amalgamated company, so to speak, was coming to an end, and the business was being distributed to the other two companies or their successors, two companies which had, so to speak, come into the amalgamation, and, as regards the general business, it is quite clear, of course, that the amalgamated company went out of business, ceased to have an office and staff, or anything, but there was (and this gives rise to the point in the case) an extremely important exception. Obviously, the whole thing, lock, stock and barrel, might have been handed over to the two companies, but that was not done. What was done was this : it was arranged that, with regard to what remained, which can be conveniently called "current films," all the necessary steps for exploiting them, if necessary, making new arrangements for their being shown, and so on, was to be done by the new companies, by the Pathé Company, in the instance I am following out, and the Pathé Company was to take a commission for its trouble, which was either 10 per cent. or 20 per cent., and the rest of that was to go to the appellant company. A B

On those facts, the contention of the liquidator was, of course, that no trade had been carried on by him, and that the assessment was wrongly made. The inspector contended that the new companies carried on the trade of exploiting the particular films, what I may call the "current films", and making contracts on behalf of the liquidator, and reference was made, on behalf of the Crown, to *Lord Advocate* v. *Gibb* (1). In these circumstances, the commissioners found as follows : C

> We, the commissioners, who heard the appeal, held that trade was being carried on. It was clear that in effect the result of the arrangements made as hereinbefore set forth was merely that the previous one trade carried on by the appellant company was divided into two parts, of which each of the new companies carried on one but that in all other respects, so far as the public was concerned—and this as understood was admitted—things went on exactly as before. D

That seems to me to be quite true, but it does not, so far, of course, grapple with the actual point in the case. They go on : E

> The question, therefore, which we were asked to decide was whether parts of what may be termed the new trades of the new companies could be treated as mere liquidation of the previous one trade. It was admitted that these parts could not be separated from these trades and shown separately as a matter of account. We did not consider that there was a partnership between the liquidator and the new companies, so that a joint assessment could be made upon them. We held that the arrangements hereinbefore set out constituted the new companies agents for the liquidator. As in our view it was part of a trade we held that in both cases the liquidator must be held to be himself trading through the new companies and was accordingly properly assessed. F

Then there was an agreement as to the liquidator's share of the profits, if profits there were.

Several cases were called to my attention. There is a well known case from Ireland, *J. & R. O'Kane & Co.* v. *Inland Revenue Comrs.* (2), which related to a firm of wine and spirit merchants. The substance of the decision can be got from a passage in the opinion of LORD BUCKMASTER in the House of Lords, where he says this, at p. 347 : G

> H My Lords, I find it difficult to think that these considerations can in the circumstances of this case afford any protection to the appellants. For in truth it is quite plain that right up to the end of 1917 they were engaged in trading which, so far as the external world is concerned, was the ordinary method of carrying on trade modified only by arrangements which were merely part of the machinery of business dealing adopted to effect their intention to retire. It may well be accepted that they did so intend ; yet the intention of a man cannot be considered as determining what it is that his acts amount to ; and the real thing that has

to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business ?

Then, in *Cohan's Executors* v. *Inland Revenue Comrs.* (3), there was a firm of ship-brokers and managers. The principal partner in the firm had placed orders for the construction of ships ; he died, having given A an order for a ship, and his executors, refusing an offer to cancel the contract, had the contract completed, and thereby made a profit. The question was whether there was evidence not only that the deceased carried on trade, but whether—and this was the crucial point—his executors continued to carry it on ? It was held on the facts there B that there was no evidence that the executors continued to carry on trade. ATKIN, L.J., said this, at p. 618 :

> Now, from the facts I have stated, and those are the whole of the facts, what is there to indicate that these executors, dealing with this one asset, were in fact carrying on business ? It seems to me there is nothing. I have asked myself, in what way did their conduct differ from the conduct of executors who determined C not to carry on business, and made up their minds not to carry on business ; and I find nothing that would differentiate their conduct from that state of things. It is said that they ought to have released the ship in its incomplete form straight away. I apprehend that there is no obligation upon an executor at once to deal with executory contracts and terminate them in that way. It is a question of what is the best way of dealing with the estate, and if there is an executory contract which will result in the creation of a chattel which will form part of the estate, D and the executors are under a contract which binds them to complete that executory contract, it appears to me it is well within their power to do so, and that in so doing there is no evidence that they are carrying on a business.

Then there is *Hillerns & Fowler* v. *Murray* (4). There the matter—a similar and rather analogous matter—was discussed rather fully. The passage to which I desire to call attention, and which seems to me to E be in point here, is a part of the judgment of ROMER, L.J., in the Court of Appeal. The Court of Appeal there differed from ROWLATT, J. What ROMER, L.J., said, at p. 91, was this :

> It was said by Mr. Needham that this court held in *Cohan's* case (3) that where in such a case the partners do no more than is necessary for winding up the partnership F affairs, they cannot be said to be carrying on a business. *Cohan's* case (3), in fact, did not lay down any such proposition, nor, with all respect to Mr. Needham, could the court possibly have done so. When a partnership is dissolved, the partners, in whose control the assets happen to be, owe a duty to the partnership to realise those assets to the best advantage and, in order to realise the assets to the best advantage, it is sometimes necessary to continue to carry on the business. Where, for instance, the goodwill of the business is of value and cannot be immediately sold, it is necessary to carry on the business to preserve the value of that G goodwill pending a sale. Where there is stock-in-trade which can only be sold at a sacrifice by what is called a forced sale—some immediate sale by auction—it may be necessary, in order to dispose of that stock-in-trade to the best advantage, to carry on the business so that the stock-in-trade can be sold in the usual course of trade. That seems to me to have been the case in Ireland which came before the House of Lords in *O'Kane's* case (2). Or it may be, and in my opinion this is what happened in the present case, the partnership may be possessed of out- H standing contracts of a beneficial character. In that case, instead of shutting up the whole business and letting the people who suffered damage by breach of contract be paid their damage at winding up, it is considered more beneficial to the partnership to continue the business for the purpose of completing the contract. In those circumstances, of course, it would be impossible to say that the fact that all that was done by the partners was to realise the assets to the best advantage necessarily showed that they were not carrying on a business, because in many cases, in fact I think one might say in most cases, in the case of a winding up of a partnership it is necessary, for the proper getting in of the assets and the winding up of the affairs

of it, to carry on the business for a short time, or to carry on the business to a limited extent. *Cohan's* case (3), as I understand it, was a case in which the court came to the conclusion that there was no evidence that the executors, for the purposes of disposing of a particular asset in the way that they did, were carrying on the business.

The only other case to which I may perhaps refer is *Wilson Box (Foreign Rights), Ltd.* (*in liquidation*) v. *Brice* (5), which does not seem A
to me to qualify the principles laid down in the cases already referred to. The question then must quite clearly be this: Was there here evidence that a trade was being carried on on behalf of the liquidator of the company? The matter is defined in the Companies Act. Sects. 191, 228, 248 make it quite clear that a liquidator can carry on business B
so far as necessary for the winding up. It is, to my mind, perfectly clear that there were profits earned in respect of these current films, and, as to these profits, either 80 per cent. or 90 per cent. went to the liquidator, the remaining 10 or 20 per cent. being retained by the company, operating as a sort of commission for its trouble in exploiting these current films to C
the best advantage.

Now, the question is as to the 80 or 90 per cent. which goes to the liquidator. It is somewhat surprising, perhaps, if that is not taxable, but of course one accepts the familiar view that the Crown has got to show that it falls within the Act, and, quite plainly, if there is any evidence D
on which the commissioners could arrive at their finding, their finding being in substance that this trade (I am speaking of the trade with reference to current films) was carried on by the Pathé Company as agent for the liquidator, to whom it accounted for the profits, taking a deduction for its trouble, then of course the Crown is right. Of course, E
if the whole thing had been sold, lock, stock and barrel, then no business would have been carried on by the liquidator, but also, in that event, the whole of the profits would have been assessable in the hands of the operating company, and it seems to me that what was done here makes the whole difference. It seems absolutely certain that a trade here was F
being carried on in respect of these current films. Whose trade was it? I think that there was ample evidence that it was the trade of the liquidator. He had reserved his rights with regard to these films, he was to take the profits in respect of them, after allowing a sum for the trouble of the companies, and the substance of the thing was, therefore, G
that the two companies were on his behalf carrying on the trade in respect of these current films, carrying it on on behalf of the liquidator, who therefore is liable for the profits.

For these reasons, in my opinion, the conclusion arrived at by the special commissioners was a conclusion which there was evidence to H
support, and, on that ground, this appeal must be dismissed.

Appeal dismissed, with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

QUEEN ANNE'S BOUNTY *v.* TITHE REDEMPTION COMMISSION AND ANOTHER.

[CHANCERY DIVISION (Bennett, J.), **July 7, 8, 9, 1937.**]

Ecclesiastical Law—Tithe rentcharge—Redemption—"Arrears"—Order of county court for recovery before appointed day—Order for costs—Tithe Act, 1891 (*c.* 8), *s.* **2**—*Tithe Act,* 1936 (*c.* 43), *s.* 20.

The plaintiffs were owners within the Tithe Act, 1936, s. 20 (3), of a tithe rentcharge charged upon certain lands of which R. was the owner and occupier. In Sept., 1934, and in Sept., 1936, the plaintiffs applied to the county court for an order for the recovery of sums due in respect of the tithe rentcharge. On each occasion an order was made for the recovery by distress of the sum due together with a sum for costs. On Apr. 17, 1937, the plaintiffs gave notices to R. and to the Tithe Redemption Commission in accordance with the Tithe Act, 1936, s. 20 (3). The Tithe Redemption Commission contended that the sums in respect of which orders had been made by the county court were not "arrears" within sect. 20, and that the commission had no power to recover and to give a discharge for such sums:—

HELD: (i) "arrears" in sect. 20 referred to the sums which became due on account of tithe rentcharge before the appointed day (Oct. 2, 1936), but not to any right or liability in respect of sums which may have accrued or become due before the appointed day. The two sums in respect of costs in the county court, were, therefore, not "arrears."

(ii) "arrears" included the sums due for tithe rentcharge in respect of which an order for recovery by distress had been made as well as sums in respect of which no such order had been made.

[**EDITORIAL NOTE.** The question here is purely one of construction of the word "arrears" in the Tithe Act, 1936, which is held to include recoverable arrears accrued due before the appointed day whether a court order for their recovery has been made or not; but, in cases where an order has been obtained, the sums allowed for costs are not "arrears."

AS TO THE TITHE ACT, 1936, see HALSBURY, Supp., Ecclesiastical Law, para. 1485; and FOR CASES, see DIGEST, Supp., Ecclesiastical Law, Nos. 3490c-3513b.]

Cases referred to:

(1) *Queen Anne's Bounty* v. *Thorne*, [1934] 1 K.B. 297; Digest Supp.; 150 L.T. 135.

(2) *Rawlence & Squarey* v. *Spicer, Withers & Co.* v. *Spicer*, [1935] 1 K.B. 412; Digest Supp.; 104 L.J.K.B. 89; 152 L.T. 81.

ORIGINATING SUMMONS taken out by Queen Anne's Bounty (i) for the determination of the question whether upon the true construction of the Tithe Act, 1936, and in the events which had happened certain sums of money referred to in the judgment constituted arrears within sect. 20 of that Act, and (ii) for a declaration, that the power to recover and give a discharge for those sums was on Apr. 1, 1937, and was now vested in the Tithe Redemption Commission. The facts and the relevant provisions of the Tithe Act, 1936, are set out in the judgment.

Sir William Jowitt, K.C., P. E. Sandlands, K.C., and *A. H. Armstrong* for the plaintiffs.

The Attorney-General (*Sir Donald Somervell, K.C.*), *The Solicitor-General* (*Sir Terence O'Connor, K.C.*), and *Hubert Hull* for the Tithe Redemption Commission.

R. W. Goff for the defendant Rosser.

Jowitt, K.C.: The tithe-owner has a power of distress to secure payment. The liability to pay has never been a personal one. In 1891 an Act was passed which took the matter out of the hands of the tithe-owner. Since then, the method of enforcing payment has been through the county court which can appoint officers to distrain or it may appoint a receiver. The Tithe Act, 1936, has abolished tithe altogether. It compensates the tithe-owner by giving him security and it relieves the tithe-payer of part of that which he previously paid. He no longer has to pay the tithe-owner but he pays to a body called the Tithe Redemption Commission. The question which arises in the present case is with regard to arrears which became due before the appointed day, Oct. 2, 1936. The word "arrears" in sect. 20 (1) of the Act of 1936 means arrears of tithe rentcharge. Arrears means all the amount due, except the amount of the costs. It is necessary to consider what is to be done with the large number of cases in which a county court order has been made in respect of arrears and this case has been selected because one order was made before, and one after, the appointed day. If the view I put forward is correct, the tithe-owner ceased to have any powers of collection after Apr. 1, 1937, but he may look to the commission to give him the satisfaction to which he is entitled. If the sums in respect of which an order has been made by the county court are arrears within the meaning of sect. 20, it is quite certain that the tithe-owner no longer has any power in relation thereto but that the commission has all the powers available. [Counsel referred to *Queen Anne's Bounty* v. *Thorne* (1), *Rawlence & Squarey* v. *Spicer* (2).]

The Attorney-General: I rely upon the difference in the position before an order has been made and after an order has been made. The case really proceeds on that ground and one has to consider the case in the light of the actual form of words which is before the court. When one examines sect. 20, one finds that the words are inapt to cover cases in which an order has been made. One is familiar with the general principle of merger and one has to look at the special form of order which is made in tithe recovery cases to see how far it applies. The main question is whether "arrears" means sums the right or liabilty in respect of which has not been the subject of an order of the court, or whether the word "arrears" includes sums the right or liability in respect of which has been the subject of an order of the court. The cases in which an order of the court has been satisfied must, of course, be excluded. The word "arrears" is capable of the first construction. In itself it is a word which could be construed as meaning only arrears which have not been the subject matter of an order of the court. The form of the court order itself referred to tithe rentcharge and it is not a form of order which could be made against an individual personally. The business of recovering is put in the hands of an officer of the court. If sect. 20 (i) is capable of both constructions, it is necessary to consider the remainder of the section. An award for costs 25 days after the appointed day could not come within the definition of arrears. Subsect. (7) puts upon the commission the liability to make payment to the tithe-owner of an amount equal to the arrears in respect of which the notice is served. The Tithe Act, 1891, preserves the power of taking land in possession given by the Tithe Act, 1836. Sect. 12 of the Act of 1842 gave the owner of a tithe A rentcharge power to let for one year land which had been taken under a writ of possession. In considering whether "arrears" covers cases where there has been an order of the court, it is necessary to consider the steps which may be taken by way of execution under that order. Sect. 20 (8) (ii) quite clearly points to orders made prior to Apr. 1, 1937. B Power is given to the county court to give such directions as the court thinks just and equitable to prevent injustice which might otherwise arise. Proceedings under an order made before Apr. 1, have been suspended by virtue of this section. When one considers the previous sections and bears in mind the fact that these orders contain provision C for the payment of costs, to hold that "arrears" includes the amounts for which orders have been made between October and April and say that part is to be enforced by one person and part by someone else would involve the splitting of the orders. Therefore "arrears" in sect. 20 cannot include cases where there has been an order of the court.

D *Goff:* If the arrears in respect of which orders have been made do not pass to the commission, the tithe-payer does not get the benefit of sect. 20 (4) which would enable him to apply to the commission. If the construction contended for by the Attorney-General is correct and sums in respect of which an order has been made are not arrears within E the meaning of sect. 20, the tithe-payer cannot get the benefit of the machinery contained in sect. 20 by which he would be entitled to have the matter of recovery referred to a commission for review. The committee is given certain powers under sect. 20 (6). The tithe-payer who may apply is one upon whom a notice has been served under subsect. (3). F Unless these sums are "arrears" within the meaning of the section, subsects. (4) and (6) do not apply, but if the sums in respect of which an order has been made are "arrears" within the meaning of the section, the tithe-payer may give notice to the commission that he desires his case to be reviewed. If the sum in respect of which an order has been G made is not within the section, the subsection which permits an application to be made would not apply to him at all.

Jowitt, K.C., in reply.

BENNETT, J.: This is an originating summons dealing with a question H of construction, arising out of the Tithe Act, 1936, s. 20, the question being what is meant by the word "arrears" in that section. I think that, in order to make the point to be decided clear, the best course to take is to read or to refer to the relevant provisions of the Tithe Act, 1936, and then to state the facts to which that legislation has to be applied, first stating that the plaintiffs are Queen Anne's Bounty and the defendants are the Tithe Redemption Commission, a body established by the Tithe Act, 1936, and Mr. Henry Lewis John Rosser, the owner and occupier of some lands which were charged with tithe rentcharge.

The Tithe Act, 1936, provides that:

> 1. Subject to the provisions of this Act, all tithe rentcharge shall be extinguished on Oct. 2, 1936 (in this Act referred to as "the appointed day"), and accordingly as from that day the land out of which any tithe rentcharge issued immediately before that day shall be absolutely discharged and freed therefrom.
>
> 2. (1) Subject to the provisions of this Act, stock (to be called "redemption stock"), charged by way of guarantee on the Consolidated Fund and the growing produce thereof, shall be issued for the compensation of the persons interested in a tithe rentcharge in respect of the extinguishment thereof by this Act.
>
> 3. (1) Subject to the provisions of this Act, an annuity (to be called a "redemption annuity") shall be charged in respect of the land out of which a tithe rentcharge extinguished by this Act issued immediately before the appointed day, for the use of His Majesty, for the period commencing on the appointed day and ending on the day preceding the sixtieth anniversary thereof.

Sect. 4 establishes the Tithe Redemption Commission. Sects. 5 and 6 deal with the obligations of the owners of tithe rentcharges to give particulars to the commission, and as to the documents to be placed at the disposal of the commission. Sect. 7 deals with the issue of stock. Sects. 9, 10 and 11 are machinery. Sect. 16 (1) provides that:

> An instalment of an annuity payable on any payment date shall be a debt due to His Majesty from the person who is on that date the owner of any land in respect of which the annuity is charged.

Sect. 20 provides as follows:

> (1) The extinguishment by this Act of tithe rentcharge shall not affect any right or liability in respect of sums which became due on account thereof before the appointed day (in this Act referred to as "arrears"). (2) On Apr. 1, 1937, power to recover and give a discharge for arrears shall vest in the commission to the exclusion of any other person, and the subsequent provisions of this section shall have effect with respect to the recovery thereof on or after that date. (3) No legal proceedings for the recovery of arrears of a rentcharge shall be commenced or continued by the commission on or after the said Apr. 1 until one month after the person who would have been entitled to recover the arrears (in this section referred to as the "tithe-owner") has, by notice in writing served after that date, given to the person who for the purposes of an application for an order under the Tithe Act, 1891, s. 2, for the recovery of the arrears would be treated as the owner of the land out of which the rentcharge issued (in this section referred to as the "tithe-payer"), and to the commission, particulars in writing in the prescribed form of the arrears which the tithe-owner claims to be recoverable from the tithe-payer. (4) A tithe-payer upon whom a notice is served for the purposes of the last foregoing subsection may, within one month after service thereof upon him, or within such extended period as the commission may in special circumstances allow on application being made to them in that behalf by the tithe-payer, serve upon the commission notice in writing in the prescribed form stating that he desires to have the matter of the recovery from him of the arrears referred to a committee (to be called the "arrears investigation committee") which shall be established for the purposes of this section and shall consist of a chairman appointed by the Lord Chancellor and two other members appointed by the Minister. (5) Where a tithe-payer duly serves notice on the commission claiming to have the matter of the recovery from him of arrears referred to the committee, the commission shall refer the matter to them and shall not commence or continue any legal proceedings for the recovery of the arrears until the matter has been disposed of by them. (6) If the tithe-payer satisfies the committee, on a reference to them under this section, that his financial circumstances are such as to render it fair and reasonable that a part or the whole of the arrears should be remitted, or that any order made for the recovery thereof should provide for the recovery thereof by instalments, the committee, after giving to the tithe-owner an opportunity of making representations, may direct accordingly. (7) Where a tithe-payer serves notice on the commission claiming to have the matter of the recovery from him of arrears referred to the committee,

> he shall be deemed thereby to admit legal liability for the payment thereof, and as soon as the matter has been disposed of by the committee, the commission shall pay to the tithe-owner an amount equal to the arrears in respect of which the notice was served, less an amount equal to any remission directed by the committee: Provided that this subsection shall not have effect as respects any arrears which are irrecoverable by the commission by virtue of subsect. 10 (*a*) of this section. (8) As respects any arrears as to which a tithe-payer does not claim a reference to the committee within one month after service on him of a notice giving particulars thereof served for the purposes of subsect. (3) of this section, or within such extended period as may have been allowed under subsect. (4) of this section, the commission shall at the expiration of that period, unless they are satisfied, after consultation with the tithe-owner, that the tithe-payer is not legally liable for the payment thereof, or that there is no reasonable prospect of the recovery thereof or of any part thereof, take all requisite steps, including if necessary the commencement or continuance of legal proceedings, for the recovery thereof, and pay to the tithe-owner a sum equal to the amount thereof in respect of which the tithe-payer has admitted or admits legal liability or the court has made or makes an order for recovery. (9) For the purposes of the Tithe Act, 1925, sums received by a tithe-owner from the commission under this section in respect of any arrears shall be deemed to be sums received by him on account of tithe rentcharge for the year in which the arrears became due, and a proportionate part of any remission directed by the committee of arrears of a rentcharge to which the provisions of sect. 4 of that Act, relating to sums payable by way of sinking fund payment, apply shall be treated as attributable to the sum so payable for that year. (10) The right to recover arrears vested in the commission by this section may be enforced in any manner in which the right of the commission to recover an instalment of an annuity may be enforced under sect. 16 of this Act: Provided that: (*a*) the provisions of the Tithe Act, 1891, s. 10 (2) (which provides that a sum on account of tithe rentcharge shall not be recoverable under that Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable), shall have effect in relation to the recovery of arrears by the commission from a tithe-payer, so, however, that in reckoning the said period of two years time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer, during which legal proceedings may not, by virtue of this section, be commenced or continued, shall be excluded; (*b*) the court before which legal proceedings for the recovery of arrears are taken by the commission shall give effect to any direction given by the committee in relation thereto. (11) A county court by which directions for the execution of an order for the recovery of arrears have been given before Apr. 1, 1937, shall have power to give such directions as the court thinks just and equitable for the prevention of injustice which might otherwise arise from the suspension of proceedings by virtue of this section on that date.

The facts of the case are these. At all material times, the plaintiffs, Queen Anne's Bounty, were owners, within the meaning of the Tithe Act, 1936, s. 20 (3), of a tithe rentcharge, a charge upon certain lands in the parish of Winslow in the county of Hereford, and the defendant Rosser was the owner and occupier of those lands. On Apr. 1, 1934, there was due to the plaintiffs a sum of £10 0*s.* 8*d.*, being one and a half years' arrears of tithe rentcharge. On Apr. 1, 1936, in addition to the sum of £10 0*s.* 8*d.*, there was due to the plaintiffs a sum of £12 14*s.* 8*d.*, two years' arrears from a period which began on Apr. 1, 1934. On Sept. 27, 1934, the plaintiffs made an application under the provisions of the Tithe Act, 1891, s. 2, to the county court at Hereford for an order for the recovery of the sum of £10 0*s.* 8*d.* due in respect of the tithe rentcharge issuing out of the lands owned and occupied by the defendant for the period of one and a half years, and which became payable on Apr. 1, 1934. On Nov. 14, 1934, an order was made by the county court in these terms:

> It is this day ordered that the sum of £10 0*s.* 8*d.* be recovered together with costs in respect of tithe rentcharge issuing out of the lands described in the first part of

> the schedule to this order, due for the period of one and a half years and for the purpose of such recovery, George E. Jones, an officer appointed by this court, shall distrain upon those lands and also on the lands described in the second part of the same schedule which are liable to be distrained on under the Tithe Act, 1836, s. 85, for the said sum together with 7*s.* 6*d.* for costs and also for the costs of the distress, and that for the making of such distress this order shall be such officer's warrant.

On Sept. 25, 1936, a similar application was made to the Hereford County Court for a distress order in respect of the sum of £12 14*s.* 8*d.*, arrears of the two years which became due on Apr. 1, 1936. In respect of that sum, on Oct. 21, 1936, after the appointed day, the day upon which, by the Tithe Act, 1936, the land was absolutely discharged and freed from tithe rentcharge, the court made an order for the recovery by distress of that sum, and also for the sum of 7*s.* 6*d.* for costs. On Apr. 17, 1937, the plaintiffs, as tithe-owners, gave notices to the defendant, Mr. Rosser, and to the defendants, the Tithe Redemption Commission, in accordance with the provisions of the Tithe Act, 1936, s. 20 (3), and, in answer to those notices, the secretary to the commission, on Apr. 22, 1937, wrote to the secretary of Queen Anne's Bounty this letter:

> I have received the notice dated Apr. 17, 1937, which, under the Tithe Act, 1936, s. 20 (3), has been served by Queen Anne's Bounty upon the Tithe Redemption Commission claiming that the sums therein specified and described as "arrears" are recoverable as arrears from Mr. H. L. J. Rosser, of Drythistle Hill, Winslow, Bromyard. It is observed that, with the exception of the last item (£2 13*s.* 3*d.*), all these sums are the subject of orders made by the Bromyard County Court on Nov. 14, 1934, and Oct. 21, 1936, respectively. I am directed to inform you that the commission are of opinion that sums ordered to be recovered by an order of the court are not "arrears" within the meaning of sect. 20 and, therefore, are not within the scope of subsect. (2) and the following subsections of that section. For this reason, the commission consider that (with the exception of the last item mentioned above) they are not concerned with the sums specified in the notice; that no payment by the commission to Queen Anne's Bounty under the section can in any event be expected by you in respect of them; and that accordingly you should take such steps as you may consider proper for the recovery thereof.

Upon that, this originating summons was issued, and by it the court is asked for a determination of the question:

> Whether upon the true construction of the Tithe Act, 1936, and in the events which have happened the sums of money set out in the notice dated Apr. 17, 1937, given by Queen Anne's Bounty to the Tithe Redemption Commission and in the notice dated Apr. 17, 1937, given by Queen Anne's Bounty to the said Henry Lewis John Rosser under sect. 20 (3) of the said Act constitute arrears within the meaning of sect. 20 of the said Act.

The court is also asked for:

> A declaration that the power to recover and give a discharge for the said sums was on Apr. 1, 1937, and is now vested in the defendants the Tithe Redemption Commission.

The sums specified in the notice include the arrears in respect of which a distress order was made on Nov. 14, 1934, and 7*s.* 6*d.* for costs, and they also include sums for which a distress order was made on Oct. 21, 1936, and a sum of 7*s.* 6*d.* for costs.

Before again referring to sect. 20, I desire to refer to the Tithe Act, 1891, s. 2, which is as follows:

> (1) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on A the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner.
>
> (2) Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer B who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under the Tithe Act, 1836, s. 82.
>
> (9) Nothing in this Act shall impose or constitute any personal liability upon any C occupier or owner of lands for the payment of any tithe rentcharge, or any other sum recoverable or payable under this Act, and the court shall not, by virtue of this Act, or of the County Courts Act, 1888, have any power to imprison any such occupier or owner by reason only of the nonpayment of such tithe rentcharge or other sum, and shall in any other case have no other or greater powers of fine or imprisonment than are conferred by the County Courts Act, 1888.

D Now, the plaintiffs argue, on the language of sect. 20, that there was vested, on Apr. 1, 1937, not merely the arrears of the tithe rentcharge referred to in the two distress orders, but also the two sums each of 7*s.* 6*d.* for costs, and that argument is rested upon what is said to be the definition of "arrears" in sect. 20 (1), which reads as follows:

> E The extinguishment by this Act of tithe rentcharge shall not affect any right or liability in respect of sums which became due on account thereof before the appointed day (in this Act referred to as "arrears").

The argument was that "arrears" means, not sums which became due on account of tithe rentcharge before the appointed day, but any right F or liability in respect of sums which became due on account thereof before the appointed day, and, on that footing, the claim that there was vested in the defendants, the Tithe Commission, not merely the arrears of tithe rentcharge but the costs. Now, "arrears" is not a term of art. It is a term commonly used to denote overdue payments, such G as mortgage interest and annuities which fall to be paid over periods of time. To put upon the subsection the construction the plaintiffs sought to put upon it is straining the language of it, particularly when you find that the language in sect. 20 (1) is a reproduction of the language which you find in the Tithe Act, 1891, s. 2. That section opens with these H words: "Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear." This subsection reads: "The extinguishment by this Act of tithe rentcharge shall not affect any right or liability in respect of sums which became due on account thereof before the appointed day." For myself, I have no doubt but that "arrears," in that subsection, refers to the sums which became due on account of tithe rentcharge before the appointed day and not to any right or liability in respect of sums which became due before the appointed day.

Upon that interpretation, in my judgment, it is clear that the two sums of costs, each of 7*s.* 6*d.*, were not due in respect of sums which became due on account of tithe rentcharge before the appointed day. They were sums which became due because an order of the county A court had been made that they should be paid by the defendants. That decides the first question against the plaintiffs.

The second question was whether arrears should include both sums in respect of which no order for recovery by distress had been made and sums for which an order for recovery by distress had been made. On B behalf of the plaintiffs, supported by the defendant Rosser, it was argued that the word had the wider meaning. On behalf of the Tithe Redemption Commission, it was argued that the word had the narrower meaning, and that there were excluded sums in respect of which an order had been made for recovery by the county court. In considering the argument, C in my judgment, it is important to notice that the order in no way changes the character of the obligation; it remained, after the order of the county court was made, as it was before. There was never any debt due from the tithe-payer to the tithe-owner; it was a charge upon the land, and, in my judgment, notwithstanding the order made by the D county court, it remains a charge upon the land, and all that the order of the county court did was to enable a particular remedy to be put in force for the recovery of that sum charged upon the land. It remained, as far as I can see, after the order, just as it was before the order, an arrear due on account of tithe rentcharge, and there is no language in E sect. 20 of the Act which indicates that the word is to have any other meaning than that. On the contrary, there are provisions in subsects. (8) and (11), and, I am inclined to think, in subsect. (6), which make it quite clear that, when sect. 20 was being framed, the intention of Parliament was that "arrears" should include not only sums in respect of which F no order for recovery thereof had been made, but also sums in respect of which an order for the recovery thereof had been made.

I propose to make a declaration accordingly.

Solicitors: *Solicitor to Queen Anne's Bounty* (for the plaintiffs); *Solicitor to the Ministry of Agriculture and Fisheries* (for the Tithe Redemp- G tion Commission); *H. Potter*, agent for *Abell, Jackson & Reece*, Worcester (for the defendant Rosser).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

H

WALKER *v.* WALKER AND WALKER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **June 21, 1937.**]

Divorce—Procedure—Decree nisi—Costs against co-respondent—Reconciliation—Motion for rescission of decree—Service—Substituted order for costs against co-respondent—Service of fresh order.

A husband obtained a decree *nisi* of dissolution of marriage on the ground of the wife's adultery with the co-respondent, who was ordered to pay the costs of the suit. An order for payment of the taxed costs had not been complied with. The husband and wife became reconciled. The husband moved the court to rescind the decree *nisi* and to dismiss the petition and for a new order against the co-respondent directing him to pay the taxed costs of the petition:—

HELD: the decree *nisi* should be rescinded and the petition dismissed. The original order condemning the co-respondent in costs should be revoked and a new order made that the co-respondent pay the taxed costs of the petition. Such an order could only be made where the co-respondent had been served with notice of the motion and with a copy of the affidavit in support, and provided also that a copy of the new order proposed to be made was served on the co-respondent and an affidavit of such service filed.

[**EDITORIAL NOTE.** The dismissal of the petition has the effect of revoking the order for costs and that is the reason why a fresh order against the co-respondent has to be made. For his protection the co-respondent is to be served with a copy of the order proposed to be made against him.

AS TO COSTS AGAINST CO-RESPONDENT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 764, 765, para. 1206; and FOR CASE, see DIGEST, Vol. 27, p. 477, No. 5042.]

Case referred to:

(1) *Quartermaine* v. *Quartermaine & Glenister*, [1911] P. 180; 27 Digest 477, *5042;* 80 L.J.P. 89; 105 L.T. 80.

MOTION by a husband petitioner for the rescission of the decree *nisi* and for an order condemning the co-respondent in the taxed costs of the petition.

On Nov. 25, 1936, the husband obtained a decree *nisi* of dissolution of his marriage on the ground of the wife's adultery with the co-respondent, who was ordered to pay the costs of the suit. The costs were taxed, and in Feb., 1937, an order was made directing the co-respondent to pay the taxed costs into court within 7 days. This order had not been complied with. The petitioner and the respondent became reconciled. The court was now moved on behalf of the petitioner to rescind the decree *nisi* and to dismiss the petition, and for a new order against the co-respondent directing him to pay the taxed costs of the petition. Notice of motion and a copy of the affidavit in support were served on the King's Proctor and on the co-respondent. The King's Proctor intimated that he had no objection to the rescission of the decree. An affidavit of this service on the co-respondent had been filed.

S. E. Karminski for the petitioner.

SIR BOYD MERRIMAN, P.: The decree *nisi* will be rescinded and the petition dismissed. The original order condemning the co-respondent in costs must also be revoked and, adopting the course taken in *Quartermaine* v. *Quartermaine & Glenister* (1), a new order made that the co-respondent pay to the petitioner the taxed costs of the petition. This order can only be made when the co-respondent has been served with notice of the motion and with a copy of the affidavit in support and provided also that a copy of the new order is served on the co-respondent and an affidavit of such service is filed. There will be no order as to the costs of to-day's motion.

Solicitors: *Boxall & Boxall*, agents for *Cliffords*, Derby (for the petitioner).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

PARKER *v.* OLOXO, LTD., AND SENIOR.

[Manchester Summer Assizes (Hilbery, J.), **June 29, 30, July 1, 1937.]**

Negligence—Dangerous article—Sale of—Liability of wholesaler and retailer. Sale of Goods—Dangerous article—Liability of wholesaler and retailer to purchaser and inter se—Sale through sundriesman—Indemnity given at lecture and demonstration.

The plaintiff had been in the habit of having her hair dyed with henna at the second defendant's shop. The second defendant suggested that the plaintiff's hair should be dyed with Oloxo, a dye which she described as harmless, and which was prepared by and bought by the second defendant from the first defendant. The plaintiff raised objections to the use of such a dye but was assured it was safe to use. The plaintiff as the result of the use of the dye had an acute attack of dermatitis and nervous trouble. The first defendant by its agent had warranted the dye as safe, but for trade reasons it had supplied the second defendant through a wholesale hairdressers' sundriesman. A booklet was issued with the dye which stated it was dangerous if used without a skin test; but no warning was given to the second defendant as to the danger. A certain quantity of the dye being purchased by the second defendant, she was entitled to and did attend certain lectures and demonstrations given on behalf of the first defendant and the lecturer upon behalf of the company stated that the company would indemnify hairdressers using this dye against claims arising out of its use:—

Held: (i) the plaintiff was entitled to recover against the second defendant in contract.

(ii) the plaintiff was entitled to recover against the first defendant in tort.

(iii) the second defendant was entitled to recover from the first defendant damages for breach of contract and those damages were the damages the second defendant had to pay to the plaintiff in this action and her costs of the action.

(iv) the indemnity given at the lectures was not made at such a time that it could be considered a part of the contract with the second defendant.

[EDITORIAL NOTE. This case fully considers the position of wholesaler and retailer in the case of the supply of a dangerous article, and a dangerous article that has given rise to considerable litigation—namely hair-dye. It also considers two unique matters. The first is how these relationships are affected by a trade rule that retailers must not be supplied direct by the manufacturers or their agents, but through a wholesale sundriesman. It also considers the effect of lectures and demonstrations of the use of the article at which an indemnity against claims arising out of the user of the article is given.

As to Liability for Dangerous Things, see HALSBURY, Hailsham Edn., Vol. 23, pp. 631-634, paras. 886-887; and for Cases, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364; and Vol. 39, pp. 457-459, Nos. 848-857.]

A Cases referred to:

(1) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, *9*; 52 L.J.Q.B. 702; 49 L.T. 357.

(2) *Blacker* v. *Lake & Elliot, Ltd.* (1912), 106 L.T. 533; 36 Digest 56, *353*.

(3) *Cavalier* v. *Pope*, [1905] 2 K.B. 757; 42 Digest 968, *3*; 74 L.J.K.B. 857; 93 L.T. 473; *affd.*, [1906] A.C. 428.

B (4) *George* v. *Skivington* (1869), L.R. 5 Exch. 1; 39 Digest 441, *705*; 39 L.J. Ex. 8; 21 L.T. 495.

Action claiming damages in contract and tort in respect of personal injuries against Oloxo, Ltd., as the distributor of a hair-dye, and against Mrs. Senior, a hairdresser. Mrs. Senior claimed damages for breach of C contract from Oloxo, Ltd., or to be indemnified against her liability to the plaintiff. The facts appear from the judgment.

G. J. Lynskey, K.C., and *P. Butlin* for the plaintiff.

R. K. Chappell, K.C., and *H. I. Nelson* for the first defendant.

F. Bancroft Turner for the second defendant.

D

Hilbery, J.: Prior to June, 1936, the plaintiff had been in the habit of having her hair treated by the defendant, Mrs. Senior, with henna, to colour it. Once a fortnight she had been to the defendant's, Mrs. Senior's, shop. The visits were alternately for an application of E henna and a shampoo. A fortnight before June 2, the defendant, Mrs. Senior, suggested to the plaintiff that she should have her hair dyed with Oloxo, a liquid dye which the defendant, Mrs. Senior, had bought from the defendant company, Oloxo, Ltd. The plaintiff was unwilling to have this dye used on her head, giving as her reason that so many F liquid dyes caused skin trouble. She asked if it was safe. The defendant, Mrs. Senior, said it was quite safe and perfectly harmless. The plaintiff said she would think about it, and decide before she came back in a fortnight. On June 2, she came back, and the defendant, Mrs. Senior, inquired if she had decided. The plaintiff again asked if it was safe, and again G the defendant, Mrs. Senior, said that it was safe for the plaintiff to use. On this assurance, the plaintiff agreed to have Oloxo applied, and to pay the defendant's, Mrs. Senior's, charge for the application. I have no doubt that it was intended by both parties that that assurance that the Oloxo was safe for the plaintiff should be a warranty, H and an essential term of the contract for its application to the plaintiff's head by the defendant, Mrs. Senior, for reward. The result of the application was that the plaintiff developed an acute and a very painful attack of dermatitis, her scalp, neck and face swelling, and the irritation spreading over her body, and affecting her nerves, so that she still suffers from some nervous affection.

The defendant, Mrs. Senior, had purchased the Oloxo from the defendant company, Oloxo, Ltd. That company is registered in England with a nominal capital of £100 in £1 shares, of which 13 are issued and 10 of those shares are held, through a nominee, by the manufacturers of the Oloxo, Inc., in New York. Oloxo, Ltd., is the selling company in England, controlled by the American corporation.

Oloxo, Ltd., sent a traveller to call on Mrs. Senior, and I accept Mrs. Senior's evidence of what took place. At the interview with that salesman, one Leslie Briggs, he informed her that a set of lectures and demonstrations on hair-colouring was then being arranged by Oloxo, Ltd., and that she could attend those lectures if she gave an order for one guinea's worth of the Oloxo hair-dye. Leslie Briggs admitted that Mrs. Senior was anxious about the safety of Oloxo, and told him she did not use certain dyes because she did not think them safe. Mrs. Senior said, and I accept it, that he told her that Oloxo was safe. Upon that assurance, she gave her order for one guinea's worth. Without that assurance, I am satisfied she would not have given her order.

The contract between Mrs. Senior and Oloxo, Ltd., was, I am satisfied, that, in consideration of her giving an order for one guinea's worth of the Oloxo dye, Oloxo, Ltd., warranted it was safe, and undertook to permit her free attendance at the lectures and provide her with one case of bottles of Oloxo. The traveller informed Mrs. Senior, when this had been arranged, that her order must go to a wholesale hairdressers' sundriesman, as Oloxo, Ltd., did not sell direct to a hairdresser. It is suggested that the order form for one guinea's worth of Oloxo was addressed to Messrs. Watts, who are hairdressers' sundriesmen. In these circumstances, it is urged that Oloxo, Ltd., did not contract with Mrs. Senior, or sell her the Oloxo which did harm, but that she bought from Messrs. Watts. I am of opinion that she did contract with Oloxo, Ltd., for her supply, in the terms I have mentioned, and that the addressing of the order to Messrs. Watts was merely the method of carrying out the contract made by Oloxo, Ltd., with Mrs. Senior. It was machinery chosen by Oloxo, Ltd., to suit its own organisation and methods of business. It did not alter or transfer the contract it had made. It merely gave effect to it. The fact that Messrs. Watts accepted Mrs. Senior's order, and that there was also privity between her and Messrs. Watts, does not seem to me to exclude the continued efficacy of the contract made between Oloxo, Ltd., and Mrs. Senior.

The Oloxo was not as warranted. It was not safe for application to the head for the purpose for which it was sold, both by Oloxo, Ltd., to the defendant, Mrs. Senior, and by Mrs. Senior to the plaintiff. It was a dangerous and injurious thing to apply to the plaintiff's head. Oloxo, Ltd., knew it was not safe. Mr. Armitage, the managing director, said that he regarded it as a dangerous preparation to use without a skin test. Mr. Briggs, the northern representative of the company, said that he would regard it as dangerous without a skin test. It was known by the responsible personnel of Oloxo, Ltd., that it might be injurious to any person whose skin was susceptible to that which the liquid contained, and that the only way in which a hairdresser could know whether it would turn out to be injurious to a particular customer was by making a skin test.

A It is clear from the booklet issued with the boxes of Oloxo that the defendant company well knew that Oloxo might injure anyone whose skin was susceptible to the irritating agent which the analytical expert, called by the defendant, Oloxo, Ltd., said was present in Oloxo as its dye basis. In those circumstances, Oloxo, Ltd., supplied it to Mrs.
B Senior, for use by her upon the heads of her customers. Oloxo, Ltd., not only failed to give warning that it was dangerous to use on the head without first making a skin test, but also gave an express warranty that it was safe. COTTON, L.J., in *Heaven* v. *Pender* (1), said at p. 517:

> Anyone . . . who without due warning supplies to others for use an instrument
> C or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

The Oloxo was, in the circumstances that I have found, sold, as part of the contract made by Oloxo, Ltd., with Mrs. Senior, to Mrs. Senior, a hairdresser, for use, and expressly for use, as a dyeing agent on the
D heads of customers of the hairdresser. Oloxo, Ltd., knew it would be so used, and it knew that it was dangerous to use it in that way without a test. Unless it gave warning that a test was necessary, it committed, in my opinion, a breach of the duty which it owed in those circumstances.

The matter went further, for it not only failed to warn the hairdresser
E that it was dangerous to use the Oloxo on the head of a customer without a test, but it also expressly warranted that Oloxo was safe. In those circumstances, it was, in acting in that way, assisting to bring about the application of that Oloxo to the head of the customer without there being any test made by the hairdresser. It appears to me that, when
F Mrs. Senior did with the Oloxo that which she was intended by Oloxo, Ltd., to do with it, upon the basis of the warranty that it had given in respect of that Oloxo that it was safe, and it turned out to be injurious to the head of the customer (the plaintiff in this case) the injury which the customer sustained was in the direct line of consequence
G from the breach of duty of which Oloxo, Ltd., had been guilty.

In those circumstances, it appears to me that there is a responsibility made out in tort on the part of Oloxo, Ltd., at the suit of the plaintiff. It has been urged that there is another principle in the law of torts on which Oloxo, Ltd., is responsible. My attention is called to the statement
H of that principle in *Blacker* v. *Lake & Elliot, Ltd.* (2). LUSH, J., says, at p. 540:

> The second case in which the vendor may be liable is when the chattel itself belongs to that specific class of things which are noxious or dangerous in themselves. In such a case if the vendor sells the chattel to one person contemplating or knowing that it will be used by another, he is under a duty towards the person who he knows will use it not to misrepresent its real nature.

In *Cavalier* v. *Pope* (3), COLLINS, M.R., adopted this point of view. In discussing *George* v. *Skivington* (4), he said at pp. 761, 762:

> In this latter case there is neither fraud, misrepresentation, nor warranty, nor the handing over possession of a thing known to be dangerous without warning. There is nothing but remissness in carrying out a contract. The defendant himself was not even aware that such a contract had been made, and there is no evidence that the agent made any misrepresentation or did not intend, A if this were material, that what he promised should be performed. I need therefore, say no more upon this point than that I cordially concur in the learned judge's view; neither is it necessary to consider whether, even if she was entitled to claim the benefit of the contract, the damages which she claimed could be treated as flowing from the breach.

Now, before that passage and that principle can be applied to this B case, one must decide whether this article falls within the category of chattels which is subject to those words. In other words, was this an article of a dangerous nature, which Oloxo, Ltd., knew to be dangerous? Well, as I have said in the course of this case, I find it very difficult to know exactly what is intended by the words "chattel of a dangerous C nature." Strictly speaking, of course, an inanimate chattel has not a nature, but, without being too nice about words, I can think of only the wild animal as something which has a dangerous nature. Most inanimate things become dangerous only if, in certain circumstances, they are likely to be employed dangerously. This article in question is a very good D example of the difficulties that arise in determining whether or not this article shall be put into the category of articles dangerous in their nature. It had, inherent in it, a danger. It is quite true, I think, on the evidence, that, in the vast majority of cases, the article might be used without ill effect. But the danger that was inherent in this article was that nobody E could tell, unless a skin test was made, whether or not an individual person on whom it was to be used would suffer.

It seems to me that when Oloxo, Ltd., with that knowledge, sells that article for application to the heads of all and sundry, who might contract, in the application of that article to their heads, some F skin trouble, and when it gives no warning that, unless a skin test was made, it was dangerous, it must be held to have been selling an article which comes within the category of a thing dangerous in itself. The danger was in it, and it was a chemical danger, which could not be known or apparent to any user of the article. It was none G the less existent for every user merely because, in large numbers of cases, the danger resulted in no injury, because any user might be susceptible.

I think that, in addition to the reasons I have given for holding the defendant, Oloxo, Ltd., liable to the plaintiff in tort for the breach of H duty of which it was guilty, it is liable upon this principle enunciated by LUSH, J., in *Blacker* v. *Lake & Elliot, Ltd.* (2). It handed over an article which it knew was dangerous, in the sense that it might be dangerous to any user, and one could ascertain whether it would be dangerous to the user only by making a skin test. It handed it over, for use on persons, to a hairdresser who was ignorant of that quality in its nature, without warning the hairdresser. Thereby it committed a breach of duty, not only to the person with whom it contracted, but also to all the persons, and the plaintiff was one, who, to its knowledge, might use it.

A In the circumstances, I think that the plaintiff is entitled to recover in contract against Mrs. Senior, and in tort against Oloxo, Ltd.; and that, for the reasons I have given, Mrs. Senior is entitled to damages against Oloxo, Ltd., for breach of warranty, and for breach of the contract which I have indicated, and which, in my view, it made in the case
B of Mrs. Senior. I think that Mrs. Senior's claim against Oloxo, Ltd., is truly for damages for breach of its contract with her. I do not think there was a term included in it that it would indemnify her, because I think that the contract was made with Oloxo, Ltd., and completely made with it before there was given to her that assurance that it would indemnify
C her. I am satisfied that Mr. Armitage, on behalf of Oloxo, Ltd., at the lectures, which were subsequent to the making of the contract, attended by Mrs. Senior, did assure every hairdresser present that Oloxo, Ltd., enjoyed a unique position in relation to the hairdressers who bought Oloxo from it, in that it was willing to indemnify, and did indemnify,
D the hairdressers against any claim which arose through the use of Oloxo. But it has, of course, gone back on that representation. I do not think, as I have said, that it was made at the time when it can be deemed to be a part of the contract made between Oloxo, Ltd., and Mrs. Senior. I do not think it matters. I think the measure of damages to which
E Mrs. Senior is entitled, and to which she would be entitled in an action overt, is quite rightly stated to be such damages as she has to pay to the plaintiff, and the costs to which she has been put through the claims being made upon her, provided that such costs have been reasonably incurred, in the circumstances.

F In my view, all the costs that Mrs. Senior has incurred in this matter have been reasonably incurred. [His Lordship then dealt with the question of damages.]

Solicitors: *Atkinson, Saunders & Co.*, Manchester (for the plaintiff); *Drake, Son & Parton* (for the first defendant); *Samuel Bishop & Sons*,
G Manchester (for the second defendant).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

Re CHETWYND'S ESTATE, DUNN TRUST, LTD. *v.* BROWN.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 2, 1937.]**

Contract—Constructive contract—Money paid—Implied request—Discharge of promissory note—Note not enforceable.

In 1930, at the request of C., who wished to borrow £120 from certain moneylenders, S. signed with C. a promissory note by which he and C. promised jointly and severally to repay to the moneylenders £156 by 5 equal consecutive monthly instalments of £6, the first payment to be made on Nov. 24, 1930, and the balance of £126 to become due and payable on Apr. 24, 1931. In the event of default in payment of any instalment so much of the balance as represented principal became payable forthwith. The note or memorandum of the contract signed by C. and S. did not comply with the Moneylenders Act, 1927, s. 6, but neither C. nor S. was aware that this made the contract unenforceable. C. duly paid the first instalment, but made default in respect of the second. S. was in communication with the moneylenders in Jan., 1931, and, without referring to C., he discharged the whole liability on the promissory note for £138. When C. heard that S. had discharged the whole liability he wrote to S. offering to pay interest on the £138 so that S. should suffer no loss. No payment, however, was ever made by C. to S. An administration action was brought after C.'s death against his executors, and in that action S. applied to rank as a creditor for £138, basing his claim on a request by C. implied by law that S. should pay the moneylenders and an implied promise by C. to repay S., supported by C.'s letter ratifying what S. had done. The application was opposed on the grounds that: (i) as the note was not enforceable, the request ought not to be implied, and (ii) in the circumstances in which S. made the payment, it ought not to be decided that the payment was made in pursuance of any implied request by C., but for the purposes of protecting S.'s own interests:—

Held: (i) in the circumstances of the case a request to discharge the liability ought to be implied.

(ii) although S. was discharging a liability of his own, he ought to be presumed to be acting, so far as the person accommodated, C., was concerned, in pursuance of the request which the law implied.

Decision of Bennett, J., [1936] 3 All E.R. 254, *affirmed.*

Sleigh v. *Sleigh* (1850), 5 Exch. 514, *explained.*

[**EDITORIAL NOTE.** Generally speaking, in order to succeed in an action for "money paid," it is necessary to show that the payment was made under legal compulsion. A person may, however, elect to adopt such a payment, and if he elects to adopt it, he will become liable to repay the money. In cases, however, where the nature of the instrument makes a notice or other formality necessary before payment, there will be no liability to repay unless such formality is complied with, and that is the distinction between this case and that of *Sleigh* v. *Sleigh* (2). It is, however, for this purpose inmaterial that the contract to pay the money, i.e., the promissory note in this case, is one that is unenforceable, so long as it is not void, and both parties are unaware of the unenforceability.

As to Recovery of Voluntary Payments, see HALSBURY, Hailsham Edn., Vol. 7, pp. 266, 267, para. 368; and for Cases, see DIGEST, Vol. 12, pp. 522-524, Nos. 4341-4367.]

Cases referred to:

(1) *Alexander* v. *Vane* (1836), 1 M. & W. 511; 26 Digest 130, *939*; 5 L.J. Ex. 187.

(2) *Sleigh* v. *Sleigh* (1850), 5 Exch. 514; 6 Digest 129, *862*; 19 L.J. Ex. 345; 15 L.T.O.S. 475.

Appeal from a judgment delivered by Bennett, J., and reported in [1936] 3 All E.R. 254. The facts are set out in that report and in the judgment of Sir Wilfrid Greene, M.R.

H. J. Wallington, K.C., and *Cyril Salmon* for the appellant company.

M. J. L. Beebee for the respondent, Mr. W. R. Stephenson.

F. S. Laskey for the executors of the will.

Sir Wilfrid Greene, M.R.: On Oct. 24, 1930, the present respondent, Mr. Wilfrid Stephenson, signed a joint and several promissory note. The other signatory to the note was the testator, Sir Guy Chetwynd. The note was a joint and several promissory note, the terms being to pay to a company called B. S. Rhodes, Ltd., or order, the sum of £156. The method of payment was to be 5 equal consecutive monthly instalments of £6, the first to be paid by Nov. 24, 1930, and the balance of £126 to become due and payable on Apr. 24, 1931. There was a default clause, under which the whole of the principal became payable on default of payment of the first or any of the succeeding £6 instalments. Sir Guy Chetwynd paid the first instalment, but omitted to pay any of the subsequent instalments. The consequence was that Mr. Wilfrid Stephenson, after making some investigations, paid, on Jan. 27, 1931, the sum of £138 in full discharge of that note, which was then handed back to him. He thereby relieved Sir Guy Chetwynd of what *prima facie* appears to be the liability which the note imposed upon him.

If the matter had remained there, and there had been no further facts in the case, there could, in my opinion, have been no question of Mr. Stephenson's right to recover against the estate of Sir Guy Chetwynd the amount which he had paid. The case would have been a simple one of a guarantor entering into an obligation of guarantee at the request of the principal debtor and making the payments on default of the debtor. If the position be analysed, taking the facts as far as I have stated them: when Mr. Stephenson, at the request of Sir Guy Chetwynd, went to the office of B. S. Rhodes, Ltd., and signed these documents, Sir Guy Chetwynd impliedly requested him to pay Rhodes if he—Sir Guy—made default, and impliedly undertook to pay to him anything that he might so pay.

That is a perfectly simple and ordinary case, the legal foundation of which is beyond dispute. In the present case, however, there was an additional fact, which is said to alter the result. For B. S. Rhodes, Ltd., are moneylenders, and, under the Moneylenders Act, 1927, s. 6, provision is made by which no contract for repayment of a moneylender's loan is to be enforceable unless certain requirements laid down in the section are complied with. The section does not have the result that there is no contract; it merely makes the contract unenforceable. In this case, however, it is not disputed that the conditions laid down by the section were not complied with, and the result is that, had B. S. Rhodes, Ltd., sued either Sir Guy Chetwynd or Mr. Stephenson on the note, sect. 6 would have afforded a good defence. It is said that, in view of that circumstance, the whole position is changed, and that it is not possible to imply as a term of the transaction any request by Sir Guy Chetwynd to Mr. Stephenson to pay that sum. It is said that the request which is to be implied is not merely, "Please pay if I do not," but "Please pay whatever sum, if any, I am liable to pay under this contract." A

That appears to me to be entirely unreal. In the present case, there can be no question on the evidence that either of these gentlemen had in his mind for one moment any doubt as to his liability, or as to the enforceability or unenforceability of this contract of loan. When they went there, the intention to be imputed to both of them, and, to my mind, the only intention, was that Sir Guy Chetwynd intended to pay, that Mr. Stephenson intended to pay if called upon, and that Sir Guy Chetwynd intended to reimburse Mr. Stephenson if Mr. Stephenson paid. It never entered into the head of either of them, so far as anything appears from the evidence, that sect. 6 had any effect on the validity of the contract. Nor am I prepared to assume for one moment that, if they had learned of the existence of the section, and had known that it affected the contract, their actions would have been in any way different. Nor do I think that the implication which the law raises would have been at all different in such a case. It seems to me that the simple implication that arises here is a request by Sir Guy Chetwynd to pay if he—Sir Guy Chetwynd—does not pay. I cannot find any justification, either in the circumstances of the contract or in any authority that has been cited to us, for adding to this case the qualification which counsel has suggested should be added to the ordinary implication which arises in cases of guarantee. B C D E

There are two authorities to which I should make a short reference. The first is *Alexander* v. *Vane* (1), where a person became guarantor of a liability which was being incurred in respect of the purchase of some harness by a purchaser. The liability which the guarantor was incurring there was a liability which could not be enforced as against him, because no note or memorandum was signed in relation to it, as required by the Statute of Frauds. In spite of the fact that the guarantor was under no liability, he made the payment which he had undertaken to pay, and it was said that, as he was under no liability, he ought not to recover. LORD ABINGER, C.B., said this, at p. 513: F G

> Now, although he was under no obligation to pay it, and had entered into no contract which bound him to do so, he had nevertheless made an engagement which bound him in point of honour, and that was entered into in the presence of the defendant. The payment must therefore be taken to have been made by his authority. The promise was, that, if the defendant did not pay, the plaintiff would; there was therefore an agreement, that, if the money was paid for the defendant, it might be recovered from him. H

PARKE, B., said this, at p. 514:

> The plaintiff is bound to prove that he paid this money with the authority of the defendant. If the engagement had been made in the absence of the defendant, it

> would have given no authority to the plaintiff to pay the money, and the payment would have been made without any authority, express or implied. But, it being made in the presence of the defendant, there was an implied contract, that, if the plaintiff paid the money the defendant would repay it. It is precisely the same as if the defendant had requested the plaintiff to pay the money.

Now, it was impossible, in that case—at any rate, the court decided that it would not be legitimate—to read into the simple request a request to pay only if the guarantor was liable under the guarantee. Had such a qualification been read in, the case would have been decided the other way. The case was treated, however, as being a perfectly ordinary one of a request to pay, without any reference to the question of the legal liability of the guarantor.

But the case on which Mr. Wallington relied very strongly is *Sleigh* v. *Sleigh* (2), which was decided in 1850, some years after the case of *Alexander* v. *Vane* (1), and PARKE, B., was a party to that decision also. The plaintiff was the drawer of an accommodation bill accepted by the accommodated party and not paid on maturity. The holder of the bill did not present it, nor was any notice of dishonour given. In those circumstances, the drawer of the bill, the accommodation party, paid off part of the amount due under the bill. If he had paid off the entire bill, and had become the holder of it, then, of course, as was pointed out in the judgment, his position would have been different. But he paid part, and he then proceeded to bring an action to recover the amount paid as money paid for the use of the defendant, who was the accommodated party, the acceptor. It was held that he was not entitled to recover, and PARKE, B., says this, at pp. 516, 517:

> Now there is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him (BYLES ON BILLS, p. 94); and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it, makes no difference.

Then he says, a little lower down:

> . . . where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant.

Mr. Wallington says with regard to that case that there the payer—the guarantor, the accommodation party—was under no liability to discharge the amount of the bill. Similarly, here he says that there was no liability to discharge the amount of the bill, and, just as, in that case, the authority implied was not one which covered the facts of that case, so here he says the authority to be implied must be an authority which extends only to the limit of the legal liability, whatever it might be. It appears to me that, in that case, the real distinction is this. That was a case where the well known machinery with regard to bills of exchange was at the very heart of the transaction, because everybody knew that notice of dishonour was required, and everybody knew that due presentation was required. In a case of that kind, where you are dealing with a very special type of contract, such as that which arises under a bill of exchange, it appears to me quite reasonable that the court should treat the case as one where the only implied authority to pay was to pay in accordance with the rules affecting that particular subject matter, and where it could not imply, from the facts, any authority or request by the accommodated party to pay otherwise than in accordance with the ordinary routine applicable to bills of exchange. In the present case, no question of that sort arises. The implication is, in my opinion, a request to pay this sum and no more ; not, " This sum or such part of it (if any) as is not made irrecoverable by the Moneylenders Act " ; but simply, " This sum." I entirely agree with the decision of Bennett, J., and, in my judgment, this appeal should be dismissed.

There is, however, one more point which Mr. Wallington made, and which I should mention, to show that I have not forgotten it. He said that, when you look at the circumstances of payment in this case, the payment ought to be taken to have been made by Mr. Stephenson, not in response to any implied request, but in order to discharge his own liability as a principal debtor under the note. It seems to me that this is a refinement for which there is no justification on the facts of the present case at all. It is perfectly true that Mr. Stephenson was primarily liable, but he became primarily liable at the request of Sir Guy Chetwynd. When he discharged that primary liability, he was doing it under exactly the same implied request as if he had been, not a principal debtor, but merely a bare guarantor, and nothing else. It seems to me that there is nothing in that point, and therefore, as I said, the appeal must be dismissed with costs.

Romer, L.J. : I agree. If the contract with the moneylender had been one which was enforceable by him, then it is plain, from the decision in *Alexander* v. *Vane* (1), that the court would imply a contract between Sir Guy Chetwynd and Mr. Stephenson, entered into at the same time and as part of the transaction embodied in the joint and several promissory note, that, if Mr. Stephenson paid any part of the moneys under the promissory note, Sir Guy Chetwynd would indemnify him against such payment. The law would imply such a contract, because, in the circumstances, the parties must necessarily have intended so to contract. Now, in point of fact, we know that the contract with the moneylender was not enforceable by him, by reason of the provisions of the Moneylenders Act, 1927, s. 6. Of that fact, however, both parties—Sir Guy Chetwynd and Mr. Stephenson—were at all material times in ignorance. If they were ignorant of that fact, they thought that the moneylender could enforce his contract, and, being of that opinion, their intention at the time of the signing of the joint and several promissory note must have been precisely the same as that which it would have been if the contract had been enforceable in fact. It seems to me that BENNETT, J., has arrived at the right conclusion, and that this appeal must be dismissed.

MACKINNON, L.J.: I agree. I think that the only interest in this A case is the apparent divergence—apparent at first sight—between the judgment of PARKE, B., in 1836, in *Alexander* v. *Vane* (1) and the judgment of the same judge 14 years later in *Sleigh* v. *Sleigh* (2). I think the explanation of the divergence is that the request to be implied from the facts in the latter case was: "Pay the bill if you receive notice of its B dishonour," but the request to be implied from the facts in *Alexander* v. *Vane* (1) was: "Pay for the harness if I do not." The request to be implied in *Alexander* v. *Vane* (1) was not: "Pay for the harness if I do not, and if you are legally compellable to pay." In this case, I think the proper request to imply from the facts of the transaction is, on the C part of Sir Guy Chetwynd: "Pay this bill if I do not." I do not think that the facts bear the implication that the request was: "Pay this bill if I do not, and if you are legally compellable to pay it." That being so, the present case is exactly the same as that of *Alexander* v. *Vane* (1), and the decision of BENNETT, J., was right.

D *Appeal dismissed, with costs.*

Solicitors: *Woolfe & Woolfe* (for the appellant company); *Vizard, Oldham, Crowder & Cash* (for the respondent); *Patersons, Snow & Co.* (for the executors of the will).

[*Reported by* DEREK H. KITCHEN, ESQ., *Barrister-at-Law.*]

Re PIPE, LEDGER *v.* MOBBS.

[CHANCERY DIVISION (Bennett, J.), **June 30, 1937.**]

Charities—Gift to holder of office—Whether holder of office for the time being—Scheme.

A testatrix bequeathed one quarter of her residuary estate to the "Mayor of Lowestoft for the benefit of poor and needy fishermen of Lowestoft":—

HELD: the testatrix intended the fund to be administered by the Mayor of Lowestoft for the time being, and a scheme should be directed to be drawn up.

[**EDITORIAL NOTE.** The question that arises here is whether the court will construe the gift as one to the holder of the office for the time being or to the holder at a particular time, e.g., at the death of the testatrix, at the date of the will or at the date of payment and transfer.

AS TO GIFT TO HOLDER OF AN OFFICE, see HALSBURY, Hailsham Edn., Vol. 4, pp. 165-167, para. 220; and FOR CASES, see DIGEST, Vol. 8, pp. 317, 318, Nos. 982-992.]

SUMMONS taken out by the executor of the will, dated Nov. 8, 1934, of Mrs. Marie Jemima Pipe, who died on Mar. 7, 1936, for the determination of the question whether one quarter of the residuary estate of the testatrix should, as and when the same or any part thereof became payable, be paid and transferred (*a*) to the Mayor of Lowestoft at the date of the will, or (*b*) to the Mayor of Lowestoft at the date of the death of the testatrix, or (*c*) to the Mayor of Lowestoft at the date of such payment or transfer, or (*d*) to any and if so to what other person or persons.

By her will the testatrix had devised and bequeathed one quarter of her residuary estate to "the Mayor of Lowestoft for the benefit of poor and needy fishermen of Lowestoft."

T. K. Wigan for the applicant.

G. P. Slade for the Mayor of Lowestoft at the date of the will and the present mayor.

Wilfrid M. Hunt for the Mayor of Lowestoft at the date of the death of the testatrix.

A. Andrewes Uthwatt for the Attorney-General.

BENNETT, J.: I am going to decide that what the testatrix intended was that this fund should be administered by the Mayor of Lowestoft for the time being and that she never intended a particular person, either the person who was mayor at the date of the will or at the date of her death, to administer the fund. I will, therefore, direct a scheme.

Solicitors: *H. C. L. Hanne & Co.* (for the applicant); *Treasury Solicitor* (for the Attorney-General); *Sharpe, Pritchard & Co.* (for the other respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. *v.* DAVIS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Finlay and Goddard, JJ.), **July 12, 1937.]**

Criminal Law—Indictment—Joinder of offences—Two counts of murder—Undesirability.

The appellant was charged upon an indictment which contained two counts, the first charging that on a day between Apr. 20 and Apr. 29, 1937, he murdered his wife, and the second charging that on a day between Apr. 21 and Apr. 29, 1937, he murdered his niece. The appellant was convicted of murder:—

HELD: although the joinder of two murders in one indictment was undesirable, the fact that in the present case there were two counts did not, in the circumstances, invalidate the conviction.

[EDITORIAL NOTE. The Indictments Act, 1915, does not prohibit the joinder of offences in one indictment, but rather contemplates such joinder. The joinder, therefore, of two murders in one indictment does not invalidate an indictment as going to the root of the jurisdiction, but, at the same time, the court states that it is an undesirable course to take.

AS TO JOINDER OF OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, paras. 179, 180; and FOR CASES, see DIGEST, Vol. 14, pp. 226-231, Nos. 2111-2174.]

Case referred to:

(1) *R.* v. *Jones*, [1918] 1 K.B. 416; 15 Digest 803, *8701*; 87 L.J.K.B. 448; 118 L.T. 657.

APPEAL against conviction. The appellant, Philip Edward Percy Davis, was charged at Bodmin Assizes upon an indictment which contained two counts, the first charging that on a day between Apr. 20 and Apr. 29, 1937, he murdered his wife, and the second charging that on a day between Apr. 21 and Apr. 29, 1937, he murdered his niece. The only defence was that at the time of the committing of the act, the appellant was, within the meaning of the criminal law, insane. After a summing up against which there was no complaint, the jury found the appellant guilty of murder.

J. Lhind Pratt and *Leslie Brooks* for the appellant.

G. D. Roberts, K.C., and *L. R. Miller* for the Crown.

LORD HEWART, L.C.J. [delivering the judgment of the court]: [His Lordship stated the facts.] By his notice of appeal, the appellant raises two points, in neither of which does his counsel persist. The court has permitted the counsel for the appellant to take two other points, neither of which is contained in the notice of appeal. The first point is that in this indictment there were two counts, each of which charged the crime of wilful murder, two separate and distinct charges of murder relating to the death of two different persons. It is admitted from the bar that at the trial the counsel for the Crown, the indictment having been drawn in that way, offered either to proceed upon one count only, or to frame two indictments, each of which should mention only one crime of wilful murder. The counsel for the appellant, in the exercise of his discretion, desired neither of those courses to be taken, and dealt with the indictment as it was. Nevertheless, he is inclined, if possible, to-day, in spite of what had been offered and done in the court below, to take the point that there is a fundamental objection to an indictment for murder in which two murders are charged.

No doubt it is highly undesirable in a case of murder that more than A one charge should be made. This court has no doubt upon that point. This court has no doubt that the proper course here was to charge each murder separately in a separate indictment. But it is one thing to say that a certain course is undesirable, and it is another thing to say that it goes to the root of the jurisdiction. It is quite manifest that it does B not. The Indictments Act prohibits no such joinder. On the contrary, it contemplates in general terms the joinder of charges in one indictment. With regard to the case of *R.* v. *Jones* (1) to which our attention has been directed, where an indictment for murder contained also a charge of robbery with violence, it was said that a trial for murder is too serious C and complicated to have other counts inserted, and such was not the intention of the Indictments Act, 1915. In our opinion, it is not accurate to say that the joinder of these counts was fatal, and, indeed, when one looks at the facts of the two cases, it is apparent that together they may well have been regarded as substantially one transaction. Of D course, if there had been two separate indictments, it would have been easy and proper for the prosecution to tender evidence relating to the whole of the matter with reference to one indictment only. I repeat that, in our opinion, a joinder of two murders in one indictment is undesirable. But it is a matter of judicial discretion, and the fact that E there were two counts here, in our opinion, does not, in the circumstances, in the least invalidate this conviction.

Finally, it was said that the judge had erred in making reference to the fact that the appellant had not been called to give evidence. There is really nothing in that point. It is open to the judge in a proper case to F direct the attention of the jury to the fact that the prisoner has not gone into the witness-box, and, in so directing the jury in this case, in our opinion, the judge made no error.

In those circumstances, this appeal must be dismissed.

Appeal dismissed. G

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

H

Re HAMMERSMITH (BERGHEM MEWS) CLEARANCE ORDER, 1936. APPLICATION OF WILMOT AND ANOTHER.

[KING'S BENCH DIVISION (Swift, J.), **July 7, 1937.**]

Public Health—Housing—Clearance order—Validity—Garage with dwelling-rooms above—Separately let with no communication.

A clearance order was made in respect of certain premises consisting of garages and workshops with dwelling rooms over, the dwellings not being let, occupied or used in connection with the garages and not being in communication therewith. The owner of the premises contended that it was not within the powers of the local authority under the Housing Acts to order the demolition of the whole of the premises, as the garages and workshops were not dwellings or parts of dwellings. It was also contended that, if that part of the building which was a dwelling were taken away and certain repairs were effected to that part which remained, it might become a desirable garage and could not be a danger to anyone living in the neighbourhood:—

HELD: the structure was all one building, and the local authority had acted within its powers in ordering the demolition of the whole.

[**EDITORIAL NOTE.** It was here sought in the case of a demolition to divide the premises horizontally and say that the order ought not to be made in respect of such part of the houses as is not used as a dwelling-house. Such division, however, was not allowed.

AS TO DEMOLITION ORDERS, see HALSBURY, Supp., Public Health, paras. 1034-1042; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502*g*-502*v*.]

Case referred to:

(1) *Re Falmouth* (*Well Lane, Sedgmond's Court and Smithick Hill*) *Clearance Order*, 1936, *Application of Halse*, [1937] 3 All E.R. 308; Digest Supp.

APPLICATION under the Housing Act, 1930, s. 11 (3), by persons aggrieved by a clearance order confirmed by the Minister of Health.

Hon. S. O. Henn Collins, K.C., and *H. Heathcote-Williams* for the applicants.

Valentine Holmes for the Minister of Health.

SWIFT, J.: On July 10, 1936, the Metropolitan Borough Council of Hammersmith made a clearance order under the Housing Act, 1930, in respect of an area in its district which is known as the Berghem Mews. The order which it made is known as the Hammersmith (Berghem Mews) Clearance Order, 1936, and that order affected the property of Mr. Thomas David Wilmot, who was the owner of a number of garages, dwelling-houses, premises and workshops in the area, which buildings constituted one side of the mews which it was proposed should be demolished. The order having been made, the proper public local inquiry was held, by order of the Minister, and, in due course, the Minister, acting on the report of the inspector whom he had sent to inquire, confirmed the order which had been made by the borough council, and from that confirmation Mr. Wilmot now appeals under the Housing Act, 1930, s. 11, on the ground that he is a person aggrieved by the order, and that he desires to question its validity on the ground that (i) it is not within the powers of the Act, or (ii) some requirement of the Act has not been complied with.

Mr. Henn Collins, on behalf of Mr. Wilmot, has contended before me that, although it may be perfectly right to order the demolition of the dwelling-houses which are above the garages and workshops in Berghem Mews, it is outside the powers of the Act to order the demolition of the garages and workshops themselves, because, he says, they are not in themselves insanitary, they are not part of the dwelling-houses, and they A do not come within sect. 1 (1) of the Act of 1930. I am unable to accept that contention. One has only to glance at the photographs which are exhibited to the affidavits to realise that these structures are all one building; the dwelling-house above and the garage or workshop below are all part of the same edifice. It seems to me impossible to say, when B the local authority has come to the conclusion that they are insanitary for the purpose of any portion of them being used as dwelling-houses, and that the proper way of dealing with them is for them all to be swept away, that you are to bisect them horizontally so that that portion which hitherto has been used for people to eat and to sleep in shall go, and that C portion in which they have only worked shall remain. These, to my mind, are all one building. I think, although it is not for me to think about it, having heard the description of the condition of the part of the buildings in which people have hitherto existed, that it is perfectly right that the council should have said that the buildings as a whole D should go. But whether that was right or whether that was wrong is not a matter for me. The question is: Did the council do anything which was not within its powers under the Act? That it failed to comply with any requirement of the Act has not been suggested. Every requirement was complied with, the proper reports were made to it, it passed the E proper resolutions, it sent the proper form of order up to the Minister, the proper public local inquiry was held, and the Minister made his order in the proper form, having considered the whole matter. The requirements of the Act were complied with; the only question which has been contended before me is whether or no it was within the powers of the F Act for the council to make the clearance order that it did. The ground upon which it is contended that it was not within its power is that, if that portion of the building which is now a dwelling-house were to be taken away, and if certain repairs were then effected to that part of the building which remained, such as putting on a new roof, and probably doing some- G thing to the walls, it might become a very desirable garage for somebody, and, at any rate, could not be a danger to anybody living in the neighbourhood. Well, even if those optimistic schemes could in truth be carried out, and I have no reason to believe that they could, it does not seem to me that it is any answer to the power of the local authority to H act under the Housing Act, 1930, s. 1 (1). First of all, I am satisfied that the garages are part of the dwelling-houses, and the rooms above, where people live, stand or fall with the garage below, and so the garage below is dependent for its existence upon the existence of the rooms above. If one takes away the rooms above, one has no garage; one has got some doors, and one has got some walls, but one has got no roof; one has got what seems to be much wanted in this neighbourhood, a sort of big dustbin, a place in which people can deposit rubbish, but which is no good for anything else until one has partially rebuilt it by at any rate putting a roof on it. It seems to me to be really fantastic to suggest A that these buildings are partly dwelling-houses and partly not, and that, therefore, the council can deal with the part which is a dwelling-house, and cannot deal with the part which is not. Much the same argument was advanced before this court in the *Falmouth* case (1), and the argument was rejected then, as the argument is rejected now. I think the council B was well within its powers, and I think the Minister was well within his. I see no ground whatever for holding that the order is not within the powers of the Housing Act, 1930, and this appeal is dismissed.

Appeal dismissed with costs.

Solicitors: *Herbert A. Phillips* (for the applicants); *Solicitor to the* C *Ministry of Health.*

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

D

MILK MARKETING BOARD *v.* C. WARMAN AND SONS.

[KING'S BENCH DIVISION (Charles, J.), **June 23, 27, 28, 1937.]**

Agriculture—Marketing scheme—Explanatory leaflet—Representation—Warranty—Reference to prevention of undercutting. E

The Milk Marketing Board was established under the Agricultural Marketing Act, 1931, s. 6, and regulated by a scheme which was one of the Statutory Rules and Orders. The Board also issued an explanatory leaflet which contained (*inter alia*) the following: "In various parts of the country at the present time the producer-retailer is feeling the pinch of severe undercutting, and the stabilisation of the industry which F will result from the operation of the scheme will end all his anxiety under this head since undercutting will be impossible."

In action to enforce certain levies under the scheme the defendant set up that the above passage was a representation that undercutting would be stopped by the operation of the scheme and that the Board had failed to stop undercutting. He set this up as a defence upon the G footing that the above statement was a warranty or agreement, and also as the basis of a counterclaim claiming damages for breach of a duty:—

HELD: (i) if the passage amounted to a representation at all, it applied wholly to the future, and there was no representation as to any present fact that could be relied upon in law.

(ii) there was no duty upon the Board to stop undercutting.

H (iii) upon the facts the Board had taken all reasonable steps to prevent undercutting.

[EDITORIAL NOTE. An attempt is here made to set up a leaflet or explanation issued with the Milk Marketing Scheme as a warranty or as the basis of a claim for breach of duty. Representations cannot be made the subject of a defence or claim if they relate to the future, and upon this ground it is here held that the explanatory leaflet cannot be relied upon as a ground of defence or of a counterclaim. This purely legal discussion is of practical importance, as in the result it prevents these marketing schemes being attacked upon technical grounds arising out of the incidental literature necessarily distributed when they are launched.

As to Marketing Schemes, see HALSBURY, Supp., Agriculture, para. 641; and for Cases, see DIGEST, Supp., Agriculture, Nos. 476 *f*-476 *k*.]

Cases referred to:

(1) *A.-G.* v. *Great Eastern Ry. Co.* [1880], 5 App. Cas. 473; 13 Digest 356, *932*; 49 L.J.Ch. 545; 42 L.T. 810.
(2) *General Dairies, Ltd.* v. *Maritime Electric Co.*, [1935] S.C.R. 519; Digest Supp.
(3) *Paul (R. & W.), Ltd.* v. *Wheat Commission*, [1936] 2 All E.R. 1243; Digest Supp.; 105 L.J.K.B. 563; 155 L.T. 305.
(4) *McManus* v. *Bowes*, [1937] 3 All E.R. 227; Digest Supp.
(5) *Coldman* v. *Hill*, [1919] 1 K.B. 443; Digest Supp.; 88 L.J.K.B. 491; 120 L.T. 412.
(6) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; 35 Digest 47, *417*; 51 L.J.Ch. 113; 45 L.T. 485.

Action to recover the sum of £182 10*s.* 6*d.*, levies due under the provisions of the Milk Marketing Scheme 1933, s. 65 (1), in which the defendant relied upon the non-fulfilment of certain statements relating to undercutting contained in a leaflet explaining the scheme.

R. P. Croom-Johnson, K.C., and *B. J. M. Mackenna* for the plaintiff Board: The Board had no power to enter into any agreement with any producer promising him anything less than was in the scheme, for any consideration, including that of a vote in favour of the scheme. In any case, there was not any consideration for any such promise, and, the alleged agreement being one which the Board could not make, we are not now to be estopped from denying our power to make it, and the court cannot, indeed, infer any such agreement. There is much authority to show that, if powers are not expressly given to a statutory body, they are not given at all: Halsbury's Laws of England, Hailsham Edn., Vol. 8, p. 72, para. 152; *A.-G.* v. *Great Eastern Ry. Co.* (1). To make a contract of the nature alleged would be totally inconsistent with the terms and conditions laid down in the scheme, and *ultra vires* the Board. There was nothing in the scheme which made it obligatory on the Board to enforce the term, inserted in the prescribed contracts, that the purchaser of milk from the farmer wholesale would not sell the milk, or allow it to be sold by retailers, at a price less than the prescribed price; the Board had a discretion in these matters, nor could it merely stop the supplies of milk to a wholesaler, for some wholesalers might have many thousands of contracts to fulfil, and the Board had at all times a duty toward the whole of the milk industry of the country.

The pamphlet issued by the Board was an explanation of the scheme, and nothing more, and not in any way a promise or an offer that the scheme would work out as hoped. There is no defence to the statutory obligation to pay the levies: *General Dairies, Ltd.* v. *Maritime Electric Co.* (2).

The defendant firm's counterclaim cannot be sustained, for the reason that the damage suffered flowed from its own wrong in selling the milk at a cut price, in direct violation of the terms of its licence, and as far as the defendant firm's claim was one for breach of a statutory duty, the Public Authorities Protection Act, 1893, applies: *Paul* (*R. & W.*), *Ltd.* v.
A *Wheat Commission* (3), *McManus* v. *Bowes* (4).

G. J. Paull and *W. S. Chaney* for the defendant: There was a misrepresentation made to those whose votes were desired, to the effect that the scheme was such as to enable the Board to prevent undercutting, and having made that misrepresentation, it cannot now come to the court
B and sue for levies when its right to do so depended upon the votes obtained. As to the counterclaim the pamphlet stated that, if those who were the recipients of those documents voted for the scheme, and the scheme came into force, the Board would do all in its power to prevent undercutting, and would in fact prevent undercutting.

C A misrepresentation set up as a defence to an action does not depend on any contractual relationship, and, once the breach of duty has been committed we must assume that damage did occur: *Coldman* v. *Hill* (5). Indeed, the Board's attitude that no man can take advantage of his own wrong is the very thing that we say of the Board, for having obtained the
D defendant firm's vote by means of a misrepresentation of fact, it cannot now claim levies from it: *Redgrave* v. *Hurd* (6).

Charles, J.: In this case the Milk Marketing Board makes claim against C. Warman & Sons for the sum of £182 10*s*. 6*d*. for payment of
E levies due under the Milk Marketing Scheme, 1933, s. 65 (1). The claim as launched was a simple claim for recovery of levies by the Milk Marketing Board, which it was bound by the statute to recover, and the defence was simply a non-admission that the defendant firm had not paid the levies, and that at the trial of the action, they will contend that they are not
F producers, not subject to the statutory rules and orders set forth in the statement of claim and, if the defendant firm is subject to the said statutory rules and orders, which is denied, the defendant firm denies that there are any levies due under any such statutory rules and orders as alleged. As time went on, the defence broadened out into something
G very different from the defence as originally drawn. It was resettled, and resettled again, and then included an elaborate counterclaim. It is quite unnecessary for me to go into the history of the origin of the Milk Marketing Board in any detail. Suffice it to say that it was a board which came into being by the operation of the Agricultural Marketing
H Act, 1931, s. 6. A scheme was drawn up, a detailed and elaborate scheme, and that scheme came into its full operation on Oct. 22, 1933, having been duly approved, as it had to be approved. As part of that scheme—I shall refer to the scheme in a little more detail in a moment—the Board was appointed—it is important to notice this—as the administrative body to administer the scheme as it was and as it remained when it came into

full force. The scheme enjoined on the Milk Marketing Board the duty of collecting levies in certain proportions, according to production and sale. It is those levies which it sought to collect and failed to collect, which are the subject of the plaintiff Board's claim in this action.

A word as to the defendant firm, which carries on the business of cattle dealers in Stepney. Ancilliary or subsidiary to that cattle-dealing enterprise, it carries on a dairy. It is rather a curious dairy, because the cows in that dairy are the subject of sale, and the result is, as I think Mr. Warman, junior, described it, the firm had a sort of flying squad of cows, here to-day and gone tomorrow, and replaced with others; but undoubtedly in Stepney this dairy business is a dying business. It is going down and down. The decline between 1933 and 1936 is very striking, the drop is, I think, from £300 odd to £200 odd. Mr. Warman, one can quite understand—Mr. Warman, senior, particularly, gave his evidence with great candour and great honesty—was living on rather a narrow margin. Stall-fed cows are more expensive than cows in the country. He had a shifting population of cows in his dairy. He was in an area into which had entered three or four great combines in competition. There was a strong competition from small shopkeepers, who sold a great many things other than milk, and were probably the chief offenders, perhaps, in the question of undercutting, which is a matter I shall have to discuss in a moment. One may well imagine that the Milk Marketing Board found the area of Stepney an especially difficult one with which to deal, more particularly, as, with great candour, Mr. Warman has told me, since he added to this difficulty by himself undercutting when he found that to sell at the licensed price set him behind his competitors. Without more ado, he undercut the whole of his trade over the counter about 50 per cent. or slightly less of his trade by way of retail.

It is necessary to see just what Mr. Warman's position was when he went into this scheme, for the whole defence is now, although there were many other, or some other, defences adumbrated, and even strenuously argued, which are now abandoned, that he entered upon the scheme because of misrepresentations on the part of the plaintiff board itself, in a pamphlet and in a letter of Aug. 21, 1933. He himself says that he was misled by the pamphlet, to which I shall refer, and that, if he had not been so misled, he would not have voted against the scheme, but he would not have voted for it. He asks me, therefore, to infer that the majority of the 65,000 would have taken the same view as that which he did, and the scheme would never have come into operation at all, because I was desired to infer that all, or a majority, of the 65,000 would have gone the same road as Mr. Warman.

How stands the misrepresentation that is alleged? It is said that, before he voted, he received a document which was called the "Milk Marketing Scheme Explained." It is said to be explanatory, and I am quite clear from reading the document that it is nothing more. It deals with the registration of milk-producers, the exemptions, and then a sort of general paragraph, why the scheme is necessary, a sort of explanatory thing that might be put in a newspaper by a journalist:

> (*a*) To ensure that all milk sold for liquid consumption brings to farmers as a body the full liquid milk price. (*b*) To ensure that distributors who pay the full liquid milk price do not have their position undermined by others who buy milk at "cut" rates. (*c*) To ensure reorganisation of the industry which the Government has stated must coincide with import control. (*d*) The Milk Marketing Board A will prescribe contract prices and conditions for milk sold for liquid consumption and for milk sold for the various classes of manufacture. Contracts will be made, as hitherto, between sellers and buyers, but the board will be an additional party to all contracts, which will have to be registered with the board.

Upon one of those prescribed contracts, a great deal of argument, so far as the counterclaim is concerned, has arisen.

> B It will be within the power of the board to prescribe retail prices by the provisions of the contract. Producer-retailers will be required to contribute to the board a sum per gallon slightly less than that contributed by other producers in view of the increased expense to which they are put in regulating their output to meet demand.

Then there is explained the question of premiums, the transport charges, C unsold milk, which refers to producer-retailers, then bad debts, maintenance of existing relations between sellers and buyers, accredited producers, and then the much-discussed paragraph, the position of producer-retailers. It is particularly this paragraph which is complained of and rested upon as a defence by the defendant firm in this action:

> D In various parts of the country at the present time the producer-retailer is feeling the pinch of severe undercutting, and the stabilisation of the industry which will result from the operation of the scheme will end all his anxiety under this head since undercutting will be impossible. The scheme is designed to secure to him as a producer all the advantages which it offers to producers generally, and, as a retailer, he should reap the benefit resulting from the stabilisation of retail prices. In addition, the producer-retailer will be eligible for the premium payable in respect E of level dairies and also eligible to receive the premium payable to accredited producers as soon as the register of such producers has been compiled.

It is said that that is a representation of fact, and that it was not true, it is not alleged it was wilfully made, it was an innocent untruth, and that, in face of that innocent untruth, the defendant Mr. Warman was cajoled F into giving his vote in favour of the scheme. I am quite clear, having considered it as closely as I can, and listened to every argument on both sides, that it was no more than an explanatory pamphlet, which indicated what was believed and hoped by all parties would be the result of the milk marketing produce operations under the scheme, and, having regard to G some of the letters which I have seen from wholesalers through whom complaints were made, I am very far from saying that there has not been a very large measure of success in the operation of it, but we must remember that Mr. Warman and his son, certainly quite intelligent people, had to make an application, and, unless he did make an application to the Board before Aug. 19, he would not be entitled to vote on H the question as to whether the scheme was to remain in force, and he had to make his application for registration. It is significant to observe that, upon the same application form, one finds this:

> The leaflet explanatory of the scheme is enclosed and a copy of the full scheme may be obtained on payment of 8*d*. at the offices of the Board.

It was perfectly open to Mr. Warman, if he had any doubts about the scheme, or if he thought it was hopeful only, to get a scheme, to look at the scheme for himself. I do not know if he did that. I have had no evidence that he did. But, in my view, to say that that explanatory pamphlet contains misrepresentations of fact is absurd on the face of it. Everything in that explanatory leaflet is looking ahead, what would A happen, what might happen, what it is hoped would happen. There is no single misrepresentation of fact that I can find in that pamphlet at all, and the letter which was written by the clerk copies out some words from the pamphlet as to undercutting, and that is all. Finding, as I do, that there is no misrepresentation of fact in this pamphlet, the defence, B and the only defence, left (for the defence of contract with a warranty collateral to that contract has been abandoned) comes to an end, and fails.

So I have to pass to the counterclaim. The counterclaim again rested upon various bases, but, after we have had the opportunity of argument C this way and that way, the matter has been whittled down to Aye or No, was the plaintiff Board guilty of a breach of duty ? It is put by the defendant firm in this way : it had a duty resting upon it to stop undercutting, that was the first duty ; it has not stopped undercutting, and I, the defendant, am damnified by its failure to stop undercutting ; secondly, D it has not taken any, or any sufficient, steps to try to stop undercutting, and thereby it has again failed in its duty, and again I, the defendant, am damnified ; it has failed in its duty particularly by omitting to implement cl. 12 of the prescribed contract, taken in conjunction with cl. 7, and, if it had done its duty in that behalf, it would have stopped the E supplies to the offending wholesalers, and all would have been well, undercutting would have gone. Let me examine that for a moment. The defendant puts it in this way. It is a little difficult to understand, and the part that is, perhaps, the most difficult to understand is the part that rejoices in green ink, superimposed on the red ink, which is F the first amendment to the defence. It is said that there is :

> a duty imposed upon the plaintiffs by the said Act [the Agricultural Marketing Act, 1931] and the scheme and imposed upon the plaintiffs by their conduct aforesaid to ensure that other retailers in the district of Stepney did not sell milk below the prices laid down in the said licence issued to the defendant and to ensure that all retailers of milk in the said district should be required to maintain the said price. G

Of course, when one knows that Mr. Warman himself was a most determined undercutter, that sounds a little odd.

> Further it was and is a duty of the plaintiffs to ensure that the scheme be administered impartially and without any undue preference being shown to any class of retailer.

H

I do not think really that it is seriously suggested that this body has acted partially. Mr. Carroll, the secretary of the local Stepney Cowkeepers' Association, said :

> Really what we have to look at is results, we have not the results we expected and that is why we are put out with the Milk Marketing Board because of its failure to show results.

Para. 20 is the most important paragraph :

> In breach of their duty aforesaid [that is to ensure that milk was not sold under the prescribed price] contrary to their representation aforesaid and in breach of the terms of the warranty and agreement aforesaid [that is gone] the scheme was not so drawn as to render undercutting impossible and the plaintiffs have failed, neglected and refused to take any or any sufficient steps to ensure that other retailers in the district of Stepney do not sell milk under the prices contained in the licence issued to the defendant and have taken no or no sufficient steps to see that the price of milk in A the said district is maintained. Further by reason of the failure neglect and refusal aforesaid the plaintiffs have shown partiality and undue preference to such other retailers in the district of Stepney who sell milk under the prices contained in the said licence.

That is, Mr. Warman himself, among other people. Then para. 21 says :

> By reason of the premises it was and is a condition of any liability upon the B defendant to pay to the plaintiffs any sums under para. 65 (1) of the scheme that the plaintiffs should have taken and are taking the steps referred to in para. 18 hereof and should ensure the price maintenance referred to in the said paragraph. By reason whereof and by reason of the plaintiffs' failure and acts referred to in para. 20 the defendant is under no liability in respect of the sums sued for in this action.

That goes to defence, and I have dealt with that.

C Let me now consider breach of duty. The Milk Marketing Board is established simply and solely as an administrative body. It is not within its power to do any act, or abstain from any act, without the authority of the scheme, which was produced under the Act of Parliament from which it derives its authority. I have searched the scheme through D and through, and nowhere does the scheme provide that it is a duty, a statutory duty, that is, of the Milk Marketing Board, to stop undercutting. The Board is governed by the scheme, and may not and cannot lawfully go outside it. I find, on a close examination of the correspondence, the interviews, and the reports of the officers of the board, E that the Board has made vigorous and successful efforts to stop undercutting, and, if one looks at the correspondence, one sees that wholesaler after wholesaler, having been warned and admonished by the Board, has fallen into line. But the most bitter complaint of all is made against the Board in regard to the failure of its duty, if such duty ever existed— F in my view it never did, there is no statutory duty—to implement cl. 12 of the prescribed contract. It is necessary, therefore, to see what cl. 12 says :

> Subject to the provisions of cl. 13 of this agreement the purchaser will not sell by retail any milk (whether delivered under this agreement or otherwise) nor permit the milk to be delivered under this agreement to be sold by retail at a cut G price.

In cl. 7 of the agreement I find the following :

> The board may (without prejudice to any other remedies available either to the vendor or the board) by written notice to the purchaser forthwith terminate this and such other registered agreements to which the purchaser is a party as the H board may think fit in either or any of the cases following, namely . . .

One of the cases following is under cl. 7 (*f*) : " If the purchaser shall commit any breach of his obligations under cl. 12," so it is said that it could have put cl. 12 with cl. 7 into operation if it had liked, it did not do it, and, as a result, it failed in its duty. The mere reading of that clause is quite sufficient to establish that it is a clause non-obligatory and purely permissive. The Board has to regard the scheme as a whole, and has to do its best with the scheme as a whole. It is said that there is a statutory duty in some way laid upon it of which there has been a breach, because it has not used a particular weapon, which is put into its hands for it to use only if it thinks fit, and if it thinks desirable, in the interest of the scheme and all the people who are within the scheme. It is said that that is a breach of its duty, and that damages flow from the breach. It would be quite impossible to find in favour of that contention without entirely disregarding the word "may." If one does not disregard the word "may," it is quite patent that it is given the power, if it thinks fit and proper, to take certain steps. It need not take those steps, it is not its duty to do so, and it would be perhaps inconsistent with its duty if it took it, if that particular step would be inimical to the scheme as a whole. Whether it would or would not, I know not. It is a very vast and involved scheme, and the Board, as I have said, obviously taking constant and vigorous, and sometimes successful, measures to stop undercutting, has not seen fit to put cl. 12 into operation. I have no doubt there are good reasons; it is not for me to comment upon it one way or the other. The Board has thought fit not to put it into operation. Even if there were no good reasons, I find, on consideration of all the documents, of the evidence which has been given, of the memoranda by the officers of the Milk Marketing Board, and of the letters written by them to the wholesalers, that the failure, I will say the comparative failure, to stop undercutting in Stepney is not a breach of a duty upon which the defendant firm can rely by way of counterclaim.

I have very little to add in regard to those two findings which I have made upon the defence and upon the counterclaim. A question, and a somewhat difficult question, was raised upon the operation of the Public Authorities Protection Act. But, finding, as I do, that there is no breach of duty, and that the defendant must fail on his counterclaim, it is unnecessary for me to deal with the question of the Public Authorities Protection Act, save only to say that, if it were necessary for me to decide it, I should be inclined to decide that the Milk Marketing Board had the protection of that Act.

As there is no breach of duty, the counterclaim fails, and there must be judgment for the plaintiff Board, for £182 10*s.* 6*d.*, and costs, and on the counterclaim with costs.

Judgment for the plaintiff board for £182 10*s.* 6*d.*, *and costs, and on the counterclaim with costs.*

Solicitors: *Ellis & Fairbairn* (for the plaintiff Board); *H. Rogers Lewis* (for the defendant firm).

[*Reported by* J. MacGillivray Asher, Esq., *Barrister-at-Law.*]

PAKENHAM *v.* PAKENHAM (TURNER INTERVENING).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **July 2, 1937.**]

Divorce—King's Proctor—Duties on investigation—Interviewing party—Whether solicitor ought to be approached first.

Where the King's Proctor is investigating a certain matter at the request of the court, and, in the discharge of his duties, he wishes to interview one of the parties to a suit, there is no need for him to approach in the first place the solicitor on the record representing that party.

[**EDITORIAL NOTE.** The procedure of the King's Proctor is quite properly not subject to the usual rules and reliance is place upon the control of the Attorney-General and the court to prevent any vexatious proceeding.

AS TO INTERVENTION BY THE KING'S PROCTOR, see HALSBURY, Hailsham Edn., Vol. 10, pp. 768-770, paras. 1213-1215; and FOR CASES, see DIGEST, Vol. 27, pp. 479-483, Nos. 5067-5134.]

PETITION by a wife for dissolution, on the ground of the husband's adultery with a woman named, the name of the woman having been given by the husband. Service was effected upon a woman with the same surname but with one different Christian name. She intervened and denied the charges. At the hearing, on Feb. 9, 1937, LANGTON, J., adjourned the matter, requesting the assistance of the King's Proctor with regard to the identity of the woman with whom adultery was alleged.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *John Foster* appeared on behalf of the King's Proctor at the resumed hearing.

The Solicitor-General, after stating the result of the inquiries by the King's Proctor, asked for the direction of the court in respect of certain complaints made by the solicitor for the intervener, that the King's Proctor's agents had acted improperly in interviewing the intervener in the absence of her solicitor. The King's Proctor held the view that these complaints were unjustifiable. It was desired that it should be made clear that the King's Proctor was entitled to more co-operation than he had received from the solicitor for the intervener. Every assistance had been given by the other solicitors concerned.

Allister Hamilton for the petitioner.

R. T. Barnard for the respondent.

W. Russell Lawrence for the intervener.

At the request of the court, the solicitor for the intervener made a statement explaining his attitude.

LANGTON, J.: This case came before me on Feb. 9, 1937. At the conclusion of the case, I was left in great doubt as to the identity of the woman named in the case. It seemed right to me, in view of the fact that she was defending the case, that I should have more information. The lady, although defending the case, was not present in court, and, therefore, was unable to comply with the request I made that she should go into the box and assist me in clearing up matters that were within her knowledge. I accordingly adjourned the case, and asked for the assistance of the King's Proctor to clear up this doubtful question as to the identity of the woman named in the case. I will deal first with the situation as it is to-day. For reasons which I will deal with hereafter, no further information has really been obtained at all. In view of the fact that adultery was plainly proved in the case, I do not think it is necessary to withhold from Mrs. Pakenham any longer the decree to which I am satisfied she is entitled. Also, in view of the fact that I am not satisfied as to the identity of the woman named, the decree will not be a decree on a finding of adultery with the woman named, but on a finding of adultery with a woman unknown.

Now, the other matter is a question which to my mind has no real importance at all. Mr. Lewis, the solicitor for the woman named in the case, has taken action in this matter, which he has been frank enough to come here and explain in full. He started, I think, under one grave misunderstanding. That grave misunderstanding was that he imagined that the King's Proctor, when requested by the court to investigate a matter concerning a divorce case, had no other and greater duty than and no position separate from that of an ordinary solicitor engaged in a case. To my mind, that is a wholly wrong conception of the King's Proctor's duties and office. The King's Proctor, when asked by the court to investigate a certain matter, has a duty quite different from and other than the duty of a solicitor engaged in a case. The King's Proctor saw fit, in this particular case, in discharge of his duty, to instruct an agent in Manchester to approach the woman named direct. Mr. Lewis, when he heard of this, took umbrage at once, and, although I am satisfied that he was completely wrong in taking umbrage at all, I have a certain sympathy with him in that a solicitor who is keenly concerned with, and keenly insistent on, his client's interests might well wish and hope that he should have the first and every opportunity of advising and assisting that client in the litigation which is entrusted to his charge. I see there in Mr. Lewis's feelings upon that matter something that is certainly commendable, even if it happens to be ill-judged. But, having started with this complete misapprehension of the King's Proctor's position, and then having taken umbrage at an action which was quite justified on the part of the King's Proctor, Mr. Lewis embarked upon some letters and actions which can be qualified only as unjustified, very hasty, and ill-judged. I am perfectly satisfied, having heard Mr. Lewis, that those actions were embarked upon from excess of zeal, and not from any real desire on his part to obstruct or impede the course of justice. I think it is necessary for me to say that, in this case, the King's Proctor, who was placed in an exceedingly difficult position, has not acted in any way or to any degree improperly. I have taken a little time, and asked the assistance of the Solicitor-General, upon the question whether, in these circumstances, where there is a solicitor on the record, the King's Proctor

ought or ought not to have approached the solicitor in the first instance.
Having heard the Solicitor-General, and having reflected upon the
matter, I think it would be quite impossible and quite wrong to endeavour
to fetter the action of the King's Proctor in such a way. It is very easy
to understand that there may be cases in which the King's Proctor would
A seek at once the assistance of a solicitor in the case, the most reliable
source which he could possibly approach. On the other hand, there may
be cases in which he would feel not only that it would be the wrong way
to approach the matter, but also that it might greatly embarrass the
solicitor himself. Therefore, I am quite satisfied that it would be very
B unwise to lay down any such principle at all. I am equally satisfied
that the King's Proctor, in acting as he has in this case, has done nothing
at all in the slightest degree in excess or disregard of his duty. On the
contrary, he has endeavoured to solve a very difficult problem, and has
had no assistance from anybody. Fortunately, in my view, the problem
C is not very important, and it is no good incurring any further expense,
time, and trouble, in delaying a decree in this case in the hope of solving
a not very important puzzle. The result, therefore, will be that there
will be a decree *nisi* with costs.

Solicitors: *King's Proctor; Kinch & Richardson*, agents for *Percy*
D *Hughes & Roberts*, Birkenhead (for the petitioner); *Layton & Co.* (for
the respondent); *Lewis & Co.* (for the intervener).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

E *Re* LYNCH-WHITE, SMITH *v.* LYNCH-WHITE.

[CHANCERY DIVISION (Crossman, J.), **July 6, 8, 1937.**]

Wills—Capital or income—Clause negativing apportionment—Profits from underwriting syndicate—Profits for year ascertainable only after passing of two further years.

F By his will a testator declared that "all income arising from any part
of my estate shall at all times be used and applied as income and no
part thereof shall be added to capital and in particular all income
received immediately subsequent to my death shall be treated wholly
as income and shall not be apportioned." The testator was a member of
three Lloyd's underwriting syndicates. It was not possible to ascertain
what profits were made or what loss was suffered by a syndicate in any
G particular year until two further years had passed. A question arose
as to how the testator's interests in the syndicates were to be treated
as between capital and income, the testator having given the income of
his residuary estate to his widow during her widowhood:—

HELD: (i) the profits from the syndicates were "income arising from
any part of my estate" within the meaning of the will.

H (ii) the profits of the syndicates accrued at the end of each year,
although they could not be ascertained until after two further years
had passed. The profits so accruing up to the death of the testator
were to be treated as capital, and the profits so accruing subsequent to
the death of the testator were to be treated as income.

[EDITORIAL NOTE. This case deals with the particular case arising under the usual syndicate agreement of Lloyd's underwriters, but will also be applicable in the case of many partnership agreements which have in practice the same effect. The clause negativing apportionment is not one that has any standardised form and is subject to some variation, but the decision here is one that will, it is believed, apply to the majority of, if not all, such clauses.

As to the Right to Income, see HALSBURY, 1st Edn., Settlements, Vol. 25, p. 607, para. 1071 ; and for cases, see DIGEST, Vol. 40, p. 677, No. 2135 *et seq.*]

Cases referred to :

(1) *Jones* v. *Ogle* (1872), 8 Ch.App. 192 ; 44 Digest 535, *3516 ;* 42 L.J.Ch. 334 ; 28 L.T. 245.

(2) *Browne* v. *Collins* (1871), L.R. 12 Eq. 586 ; 36 Digest 450, *1160.*

(3) *Lambert* v. *Lambert* (1874), 29 L.T. 878 ; 36 Digest 450, *1159.*

(4) *Ibbotson* v. *Elam* (1865), L.R. 1 Eq. 188 ; 36 Digest 455, *1201.*

Summons by the trustees to determine whether certain sums of money and investments which had been paid and transferred to the executors of the testator and which represented the testator's share in the assets of three underwriting syndicates at Lloyd's of which he was a member formed part of the capital or of the income of his estate, and whether rules of law laid down in the cases of *Howe* v. *Lord Darmouth* and *Re Earl of Chesterfield's Trusts* were applicable in the administration of the estate.

R. W. Goff for the plaintiffs.

R. W. Jennings for the widow.

J. E. Hodge for the persons entitled to the capital of the estate after the widow's death.

Crossman, J. : In this case, the question I have to decide is as between the tenant for life and the residuary legatees, under the will of the testator, Mr. Lynch-White, and the difficulty is, I think, entirely due to the rather remarkable way in which the accounts of the syndicates of which the testator was a member—syndicates of Lloyd's underwriters—are made up and treated. The question is whether certain sums which have been received by the testator's executors from these syndicates, as profits of the business carried on by these syndicates, are to be treated as capital or income under his will. The matter is not entirely simple, because it is complicated by the fact that the will of the testator contains a rather special provision dealing with capital and income. The first part of the will is in usual form, that is to say, the testator gives all his real and personal estate to his executors upon trust :

> 6. (*a*) To sell call in and convert the same into money with power to postpone and out of the proceeds to pay my funeral and testamentary expenses debts and legacies and to invest the residue and to stand possessed of the residuary moneys and the investments representing the same upon the trusts following :—in trust during the widowhood of my wife to pay the income thereof to my wife during her life free of all death duties as long as she shall remain my widow.

Then there is a trust after her death as to the capital.

The other clause of the will which it is material to notice is cl. 7 :

> I hereby declare that all income arising from any part of my estate shall at all times be used and applied as income and no part thereof shall be added to capital

and in particular all income received immediately subsequent to my death shall be treated wholly as income and shall not be apportioned.

The first question which arises is on the construction of the will: what is given to the tenant for life or during widowhood? The actual trust for the widow is to pay her what the testator calls the income thereof,
A that is, the income of the residuary moneys and the investments representing the same. The residuary moneys are the proceeds of the conversion of his real and personal estate, after payment of funeral and testamentary expenses, debts, and legacies, and making certain appropriations. The question is whether, under that, standing alone, the
B widow can possibly be entitled to receive these sums of money which were received from the syndicates at Lloyd's in respect of the testator's share in the profits. I have rather elaborate evidence to tell me what these sums were, and the main point about the evidence is this, that the syndicates appear to have carried on business from year to year, treating
C every year from Jan. 1 to Dec. 31 as a year of the business in which risks were underwritten, and those risks led to claims being made, not only in the year in which they were underwritten, but also in the second and third year, the two subsequent years, so that it was impossible to say whether the profit had been made in the year in which the risk
D was undertaken until three years had expired. The result was that the profits which were earned in respect of the year in which the risk was undertaken could not be finally ascertained or distributed until three years afterwards.

Certain sums have been paid over to the testator's estate. There are
E three sums paid from the Williams syndicate, five sums from the Graham syndicate, and three sums from the Rose-Thompson-Young syndicate. What I have to consider is whether these sums, in so far as they were paid and ascertained after the death of the testator, could be treated as income for the purpose of the trust to pay income to the widow, or
F whether I should treat them as capital of the estate, in which case the tenant for life receives only the income from them.

The first question is on the construction of the will, and on that I have come to the conclusion that, when the testator declared "all income arising from any part of my estate shall at all times be used and
G applied as income and no part thereof shall be added to capital," he was including income which came to the hands of his executors in the nature of income, and Mr. Hodge's argument, that these profits do not come within that clause because they do not "arise from any part of my estate," I cannot agree with, because I find they did arise from a
H part of his estate, from his business; the profits arose from the fact that he was interested in the syndicates, and I think that that is income arising from a part of his estate, and, although it may be that the income would have to be carried in as part of the estate for purposes of inland revenue, this clause seems to me to make that income something which is to be used and applied as income under the terms of his will. So far

as it is income, and income which is to be treated as accruing after the death of the testator, it is income which is payable to the widow under cl. 6 (*a*) of the will.

That makes it necessary for me to determine whether it is income payable to the tenant for life, because it has come after the death of the testator, or whether it is income which is to be treated as capital for the purpose of the will. It is true that the clause says "all income arising from any part of my estate shall at all times be used and applied as income and no part shall be added to capital," but that cannot make income something which is not income in any sense. It is something which could not be capitalised, which could be treated as income. What part of this income is to be capitalised? That seems to me to depend on a principle which has been stated differently by Mr. Jennings and by Mr. Hodge, and was, in the first instance, stated in the last edition of Gover on Capital and Income, at p. 30. I do not read it as authority, but I read it as stating that what Mr. Hodge says is the right principle.

> Profits of a private business or partnership are not apportionable under the Act [the Apportionment Act] *Jones* v. *Ogle* (1), but must be taken as having accrued entirely at the end of the period for which they are declared, and not before.

For that, *Browne* v. *Collins* (2) and *Lambert* v. *Lambert* (3) are referred to. That principle is what Mr. Hodge supports. Mr. Jennings, on the other hand, puts his proposition in this way. He says, profits are deemed to accrue at the end of the period in respect of which profits are ascertained, and he refers for that to *Ibbotson* v. *Elam* (4), at p. 193. I do not think I can accept that passage from *Ibbotson* v. *Elam* (4) as a passage—it is stating the law in general terms—which I can rely upon here. I think this matter is correctly stated in Gover on Capital and Income: you have not only to look at the time in which the profits were ascertained, you have also to look at the conventional period which the partners have decided is the period at which the profits are to be ascertained.

That leaves me a question of fact on these Lloyd's syndicates. Did the partners agree that the partnership period—if it was a partnership—in this case was a period of three years, so that the profits are declared only for a period of three years? In that case, all profits which were finally ascertained after the testator's death in that way obviously would become income coming to the tenant for life. It is admitted that the profits are not apportionable, and everything which has accrued after the death of the testator comes to the tenant for life, even though it may have been earned partly in the life of the testator. On that question of fact I have come to the conclusion, looking at these accounts and the way they were drawn up, that the conventional period is the original period of one year, and not a period of three years. The period of one year is always carried forward from year to year, and called the 1931 account right through, until the profits of that year are ascertained. It is true one cannot ascertain the profit of that year till the two years have elapsed, but it is the profit of 1931 from the business in that year;

one has to make payment in respect of two years after, and the sum is different from the sum at the end of the first year; but, in the view I take, it is profit for the original year. If it is profit for the original year, I hold that the end of the original year is the period to which one has to look as the period when the profit accrues. In that case, everything which accrued up to the death of the testator must be treated as capital, and everything which accrued subsequent to the death of the testator must be treated as income.

Solicitors: *Moon, Gilks & Moon* (for all parties).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

E.B.M. CO., LTD. *v.* DOMINION BANK.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan), **March 12, 15, 16, 18, 19, June 11, 1937.**]

Privy Council—Canada—Companies—Charge on property—Company acting through directors for benefit of directors—Enforceability.

As additional security for an advance to three partners, who, in addition to and apart from the partnership, were directors of a limited company, a bank accepted a document charging the company's interest in certain bonds which had been deposited with the bank to meet any judgment which might be obtained against the company in then impending litigation. The document was signed by the three partners and the company's seal was affixed thereto, accompanied by the signature of one of the partners as president and of another as secretary of the company. No resolution was ever passed, either by the company or by the directors, authorising the creation of the charge. The partners held all the shares in the company except two which were held by two other directors of the company. There were also persons equitably interested in the shares. The litigation against the company was concluded substantially in the company's favour, and the bank claimed the balance of the proceeds of sale of the bonds in reduction of the partners' indebtedness:—

HELD: as the company, acting through its directors, and not by its shareholders in general meeting, had purported to apply its property for the benefit of those directors, the transaction was unenforceable, and the court would not inquire whether the company had derived any benefit from it. The bank was, therefore, bound to account to the company for the balance of the proceeds of sale of the bonds.

Decision of Court of Appeal for Ontario, [1934] O.L.R. 560, *reversed.*

[EDITORIAL NOTE. The directors of a company are in a fiduciary position and there can, therefore, be no transaction either by way of sale or charge of property between themselves and the company without full disclosure. How far this is necessary where practically the whole of the shares are held by the directors is in issue here, but the doctrine applies where the shares are the subject of equitable interests in favour of the parties other than the directors.

AS TO CONTRACTS BETWEEN COMPANY AND ITS DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 321-323, para. 535; and FOR CASES, see DIGEST, Vol. 9, p. 470, Nos. 3075-3082.]

Cases referred to:

(1) *Salomon* v. *Salomon & Co., Salomon & Co.* v. *Salomon,* [1897] A.C. 22; 9 Digest 34, *11*; 66 L.J.Ch. 35; 75 L.T. 426.

(2) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89 ; 9 Digest 35, *14 ;* 77 L.J.K.B. 834 ; 99 L.T. 39 ; 5 Tax Cas. 358.

(3) *Inland Revenue Comrs.* v. *Sansom*, [1921] 2 K.B. 492 ; 28 Digest 101, *612 ;* 90 L.J.K.B. 627 ; 125 L.T. 37 ; 8 Tax Cas. 20.

(4) *Parker & Cooper, Ltd.* v. *Reading*, [1926] Ch. 975 ; Digest Supp. ; 96 L.J.Ch. 23 ; 136 L.T. 117.

(5) *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1854), 1 Macq. 461 ; 10 Digest 1176, *8339 ;* 2 Eq. Rep. 1281 ; 23 L.T.O.S. 315. A

(6) *Underwood (A. L.), Ltd.* v. *Bank of Liverpool, Same* v. *Barclays Bank*, [1924] 1 K.B.775 ; Digest Supp. ; 93 L.J.K.B. 690 ; 131 L.T. 271.

(7) *Bonanza Creek Gold Mining Co., Ltd.* v. *R.*, [1916] 1 A.C. 566 ; 13 Digest 357, *936 ;* 85 L.J.P.C. 114 ; 114 L.T. 765.

(8) *Carling Export Brewing & Malting Co., Ltd.* v. *R.*, [1931] A.C. 435 ; Digest Supp. ; 100 L.J.P.C. 140 ; 145 L.T. 26. B

(9) *Re Newman (G.) & Co.*, [1895] 1 Ch. 674 ; 9 Digest 173, *1102 ;* 64 L.J.Ch. 407 ; 72 L.T. 697.

(10) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327 ; 9 Digest 97, *406 ;* 25 L.J.Q.B. 317.

(11) *Cook* v. *Deeks*, [1916] 1 A.C. 554 ; 9 Digest 467, *3055 ;* 85 L.J. P.C. 161 ; 114 L.T. 636. C

(12) *Re Thomson, Thomson* v. *Allen*, [1930] 1 Ch. 203 ; Digest Supp. ; 99 L.J.Ch. 156 ; 142 L.T. 253.

(13) *Parker* v. *McKenna* (1874), 10 Ch.App. 96 ; 9 Digest 493, *3240 ;* 44 L.J.Ch. 425 ; 31 L.T. 739.

(14) *Bray* v. *Ford*, [1896] A.C. 44 ; 17 Digest 172, *737 ;* 65 L.J.Q.B. 213 ; 73 L.T. 609. D

(15) *Mercantile Bank of India, Ltd.* v. *Chartered Bank of India, Australia & China, & Strauss & Co., Ltd. (in Liquidation), Chartered Bank of India, Australia & China* v. *Mercantile Bank of India, Ltd., & Strauss & Co., Ltd. (in Liquidation)*, [1937] 1 All E.R. 231; Digest Supp.

(16) *Burland* v. *Earle*, [1902] A.C. 83 ; 9 Digest 535, *3526 ;* 71 L.J.P.C. 1 ; 85 L.T. 553. E

(17) *MacDougall* v. *Gardiner* (1875), 1 Ch.D. 13 ; 9 Digest 580, *3880 ;* 45 L.J.Ch. 27 ; 33 L.T. 521.

(18) *Dominion Cotton Mills Co., Ltd.* v. *Amyot*, [1912] A.C. 546 ; 9 Digest 615, *4088 ;* 81 L.J.P.C. 233 ; 106 L.T. 934.

F

APPEAL from a judgment of the Court of Appeal of Ontario (LATCHFORD, C.J.A., RIDDELL, MASTEN, FISHER, DAVIS, JJ.A.), dated June 29, 1934, dismissing an appeal from a judgment of the Supreme Court of Ontario (KELLY, J.), dated Jan. 4, 1934.

The facts of the case are set out in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN. G

Sir Stafford Cripps, K.C., *Marcel Marcus*, and *Granville Slack* for the appellant company.

W. N. Tilley, K.C., for the respondent bank.

Cripps, K.C. : The agreement of July 12, 1929, is not binding on the appellant company, which is a legal entity distinct from its shareholders and directors. It was *ultra vires* the company and illegal, and the directors had no authority to make it on behalf of the company. Even if the agreement was *intra vires* the company, neither the directors nor the shareholders of the company at any time authorised the signing of H the agreement, nor was it subsequently sanctioned or ratified. It was entered into, to the knowledge of the respondent bank, solely to secure loans to Low, Leon and Burns, for the purposes of their own business, which was distinct from that of the company, and in which the company had no interest. The appropriation of its assets was a breach of trust A by the directors, of which the respondent was aware. Even if the respondent bank acted innocently and without notice, it is not entitled to retain moneys obtained in fraud of the appellant company. [Counsel referred to *Bonanza Creek Gold Mining Co., Ltd.* v. *R.* (7), *Carling Export Brewing & Malting Co., Ltd.* v. *R.* (8), *Salomon* v. *Salomon & Co.* (1), B *Inland Revenue Comrs.* v. *Sansom* (3), *Underwood (A. L.), Ltd.* v. *Bank of Liverpool* (6), *Re Newman (G.) & Co.* (9), *Royal British Bank* v. *Turquand* (10), *Cook* v. *Deeks* (11), *Aberdeen Ry. Co.* v. *Blaikie Brothers* (5), *Re Thomson, Thomson* v. *Allen* (12), *Parker* v. *McKenna* (13), *Bray* v. *Ford* (14), *Mercantile Bank of India, Ltd.* v. *Chartered Bank of India, etc.* (15), C *Gramophone & Typewriter, Ltd.* v. *Stanley* (2).]

Tilley, K.C. : The assignment of July 12, 1929, was executed under the appellant company's corporate seal, by its proper officers, and is binding upon it. It was in the interest of the appellant company, and was within its powers under its charter and the Dominion Companies D Act ; it was accepted in good faith and without notice or knowledge of any defect. The appellant company was a party to a joint adventure with Low, Leon and Burns, and was entitled to render them financial assistance. [Counsel referred to *Burland* v. *Earle* (16), *Parker & Cooper, Ltd.* v. *Reading* (4), *MacDougall* v. *Gardiner* (17), *Dominion Cotton Mills* E *Co., Ltd.* v. *Amyot* (18).]

Cripps, K.C., in reply.

LORD RUSSELL OF KILLOWEN : In this case, E.B.M. Co., Ltd. (a company incorporated by Dominion letters patent dated May 8, 1922, F and granted under the Dominion Companies Act) appeals from a judgment and order of the Court of Appeal for Ontario, which affirmed a judgment or order of KELLY, J., in favour of the respondent, the Dominion Bank. The relevant facts which led up to the litigation in which this appeal arises must first be stated, the appellant company G being referred to as the old company, and the respondent bank being referred to as the bank.

The old company (the name of which was originally Carling Export Brewing & Malting Co., Ltd., the change of name being effected by supplementary letters patent dated Oct. 24, 1930), was formed for the H purpose, and with the object, of carrying on the business of brewers and maltsters in all its various branches, and for other purposes and objects enumerated in the letters patent. It also possessed all the powers conferred by sect. 32 of the Dominion Companies Act. The old company carried on its business as brewer until June, 1927. Its shareholders at all relevant times were 5 in number, viz. Charles Burns, Marco Leon, his wife Freda Leon, Harry Low and his wife Norah Low. All five were also the directors of the company. The ladies each held one share. The rest of the issued capital (over $726,000.00) belonged to the three men in equal shares. The old company had banking accounts with the bank at the latter's London (Ontario) and Windsor (Ontario) branches. By an agreement dated June 14, 1927, the old company sold its undertaking and assets to a company called Carling Breweries, Ltd., which may be conveniently referred to as the new company. At that time a claim was pending against the old company by the Dominion Government in respect of certain taxes under the Special War Revenue Act, 1915. The new company was protected against liability in respect of this claim by the old company's depositing $400,000 Dominion of Canada Victory Loan bonds with the bank to meet any judgment which might be obtained against the old company with respect to the taxes. The bonds were lodged with the bank, and the terms upon which it held them are shown in a letter of Oct. 26, 1927, from the old company to the bank's head office in Toronto, which runs thus:

> Messrs. Roadhouse and McTague have handed you to-day $400,000 of Dominion of Canada Victory Loan 5½ per cent. bonds, due Nov. 1, 1934. These are to be held by you to meet any final judgment that may be obtained by the Dominion Government against Carling Export Brewing & Malting Co., Ltd., in respect to action now pending with reference to sales and gallonage tax on export sales. In view of the fact that this company and Messrs. Low, Leon and Burns have agreed to indemnify Carling Breweries, Ltd., in respect to such arrears of gallonage and sales tax, we would ask you to write a letter to Carling Breweries, Ltd., advising them that you hold the sum of $400,000 to meet any judgment that may be obtained against this company with respect to such taxes. It is understood that you are to hold said bonds until any action by the Government with respect to sales and gallonage tax on export is finally disposed of by judicial decision or settlement. The coupons on the bonds are to be clipped by you and cheque for interest payments is to be remitted to this company from time to time during the period the bonds are held by you.

As from the date of the sale to the new company, the old company ceased to carry on any business; its only assets consisted of shares in the new company, cash produced by sales of such shares, and its interest in the Victory Loan bonds. In May, 1928, the bank, being duly authorised in that behalf, sold $300,000 worth of the said bonds, and credited the proceeds ($313,250.69) to a special savings account in the name of the old company. The bank continued to hold the remaining $100,000 worth of the said bonds.

In addition to their interests as shareholders in and directors of the old company, Messrs. Burns, Leon and Low carried on other activities in partnership together. With prohibition prevailing in the United States of America, they carried on in partnership a business (referred to in the judgments as the boot-legging business) of exporting beer and spirits to the United States, the beer being in large measure, if not wholly, purchased by them from the old company while the old company was still carrying on business, the spirits being purchased elsewhere. They also embarked upon a real estate business, making large purchases of land in Windsor, Toronto and Montreal. They each had separate personal accounts with the bank at different branches, and also an account in their joint names, all separate and distinct from the accounts of the old company. On July 3, 1928, the bank made an advance to Messrs. Burns, Leon and Low of $1,500,000, in connection with certain land which they had purchased in Dominion Square, Montreal, taking as security (among other securities) a hypothecation by the old company A of 59,500 shares of the capital stock of the new company which stood in the name of the old company. This hypothecation was the subject of a resolution of the old company, passed at a general meeting of the old company, at which all the shareholders were present in person or by proxy, in the following terms:

B

> That resolution respecting hypothecation of 59,500 shares of the stock of Carling Breweries, Ltd., held by this company to the Dominion Bank as set forth in resolution passed at a meeting of the directors this date, be, and the same is hereby approved, ratified and confirmed. Carried unanimously.

At that date, there was apparently a sixth shareholder, Mrs. Burns, but C she died shortly afterwards. This loan was to be repaid by the three partners as to $500,000 by Dec. 21, 1928, and as to $1,000,000 by June 21, 1929. The old company had no concern or interest in the Dominion Square venture. It is, however, true to say that large sums had at different times, after the sale to the new company, been paid out of the D old company's assets to each of the three partners, no doubt (though erroneously) upon the footing that, so long as sufficient assets remained undistributed to answer the paid up capital, those who held substantially all the shares might properly take payments on account of the moneys which would ultimately be receivable by them on a winding up. The E moneys so received by Messrs. Burns, Low and Leon respectively were no doubt applied in whole or in part in financing their partnership venture in real estate.

The partners failed to pay off the bank's loan, and, on July 12, 1929, a meeting took place at the head office of the bank of Toronto, at which F there were present the three partners, Mr. MacAgy (the bank's chief inspector), Mr. Milliken (the bank's solicitor), and Mr. Ashforth (a supervisor at the bank's head office). There is some dispute whether a Mr. Springsteen (who is said to be a solicitor who acted for the partners, or for the old company, or for both) was present or not, but, in their Lord-G ships' view, it matters not whether he was present or absent. The object of the meeting was to discuss the position in regard to the debt which was due by the three partners to the bank, and for which the bank held the securities above referred to. The partners (as appears from a letter of July 8, 1929, from the bank's Windsor branch to the head H office) had already agreed to give further security by mortgaging to the bank certain properties (described as border cities properties) which they owned in Windsor and in Toronto. Two mortgages had in fact been prepared by the bank's solicitors in Windsor, and were actually dated June 20, 1929, although they had not then been executed by any of the persons made parties thereto, viz. the three partners, Mrs. Leon and

Mrs. Low, the ladies joining to bar their dower. On the occasion of the meeting of July 12, 1929, according to the evidence, the two mortgages were signed by the three partners, but the bank, desiring security, required that it should be given a charge on the old company's interest in the moneys and bonds held by the bank to answer the Government's claim against the old company. A document was accordingly prepared by A Mr. Milliken upon information given to him by Mr. MacAgy. It was signed by the three partners, and was taken away by Mr. Burns for the purpose of having the seal of the old company affixed thereto. This is the document which has given rise to the present litigation, the old company denying and the bank asserting that it is an effective security B binding upon the old company. In this connection, it is important to observe that the evidence establishes that the bank made no stipulation that the execution of the document should be approved by a resolution either of the directors or of the shareholders of the old company, and made no inquiry as to the authority for its execution by the old company. C The terms of the document must now be indicated. It recites the indebtedness of the partners to the bank, and that they owned the total issued capital stock of the old company; it recites the facts as to the deposit of the bonds, the sale of same, and the deposit of the cash proceeds. It then proceeds as follows: D

> And whereas the said bank has required from the undersigned individuals further security for the payment of the said indebtedness of the said individuals to the bank, as the consideration for which the bank will refrain from immediately taking proceedings against the said undersigned individuals to recover the said indebtedness.
>
> Now therefore in consideration of the premises, the undersigned company and individuals do and each of them doth hereby assign, transfer and set over unto the E said the Dominion Bank all the right, title and interest of them and each of them of in and to the said hereinbefore-mentioned bonds and proceeds thereof, subject, however, to the payment thereout of the amount of any final judgment that may be obtained by the Dominion Government against the undersigned company in respect to the action above mentioned.
>
> It is understood and agreed that the said bank shall hold the said bonds and proceeds thereof to the extent to which the same are hereby assigned to the said bank as further continuing additional security for the payment of the joint and F several indebtedness from time to time of the undersigned individuals to the said bank and interest thereon, and that in connection with the said bonds and proceeds thereof hereby assigned to the said bank it shall have all the powers, rights and privileges contained in a certain agreement of even date herewith executed by the undersigned company and individuals.
>
> Dated at Toronto, July 12, 1929.

In addition to the signatures of the three partners, there appears G upon the document the old company's seal, accompanied by the signature of the president, Charles Burns, and that of Marco Leon, as secretary. This is in conformity with no. 10 of the old company's bye-laws, which provides that the president:

H

> may execute bonds, mortgages and other contracts on behalf of the company and affix the corporate seal to any instrument requiring the same, and the seal when so affixed and attested by this signature and the signature of the secretary shall be valid and binding on the company.

No resolution was ever passed, either by the company or by the directors, authorising the creation of a charge upon the old company's interest in the said bonds and cash to secure the indebtedness to the bank of the three partners: but, at some time shortly after July 12, 1929, the old company's seal was in fact affixed to the document of charge. At that time, the position of the litigation between the Dominion Government and the old company was as follows: By a judgment of the Exchequer A Court, on Apr. 29, 1929, the Crown had obtained judgment for a sum equal to about 17 per cent. of its claim. An appeal by the Crown and a cross-appeal by the old company to the Supreme Court of Canada were pending. These eventually resulted in a judgment, on Feb. 4, 1930, in favour of the Crown for the full amount claimed.

B The rest of the story is soon told. In Dec., 1930, the bank sold the balance of the $100,000 bonds for $103,904, and, after crediting the old company with the premium, carried the cash balance, $100,000, to the special savings account. In Feb., 1931, the Judicial Committee advised His Majesty that the judgment of the Exchequer Court should be restored. C On June 3, 1931, the old company's solicitors wrote to the bank requesting it to pay the amount due to the Government, and to return the balance to the old company. In reply, the bank claimed that the balance was hypothecated to the bank, and, on June 30, wrote a letter to the old company, stating that it had paid the Government's claim, and had D applied the balance in reduction of the indebtedness to the bank, for which it had been given as security. The old company then commenced the present action (the writ being issued on Oct. 21, 1931), claiming the balance of the cash proceeds of the bonds remaining in the bank's hands after payment of the Government's claim. The action was tried by E KELLY, J., who held that the bank was entitled to apply the balance of the cash proceeds of the bonds in satisfaction of the indebtedness of Messrs. Burns, Leon and Low and made an order accordingly. The old company's appeal from this judgment was dismissed with costs. It is, however, to be observed that the views expressed by the various judges F as the basis of their decisions differ widely, and are not in all respects consistent. Their Lordships feel some uncertainty as to what was the real basis of the decision of the trial judge. He held that the three partners:

> were the owners of all of the shares of the capital stock of the plaintiff, but two of G the said shares were held one each by two other parties as qualifying shares.

By this he seems to mean that the beneficial interest in the two shares was not in the two ladies, but in the partners, or some of them, so that the three partners were the only persons beneficially interested in the stock of the old company. All that can be said as to this is that such a H view is founded upon no evidence in the case, and is irreconcilable with the fact that the ladies were directors, and with sect. 103 of R.S.C., 1927, c. 27, which provides that no person shall be elected as a director, or appointed as a director, to fill any vacancy, unless he is a shareholder owning stock absolutely in his own right. Moreover, the bank was aware of the true position, for Mr. MacAgy, in his evidence, stated that the bank's information was that the "wives owned the qualifying shares." The matter is of importance in connection with the judgment of Kelly, J., because the greater part thereof rests upon the foundation that the three partners were the sole owners of all the shares in the old company. He came to the conclusion that the business of manufacturing beer carried on by the old company, and the "boot-legging" business A carried on by the three partners, constituted one business carried on for the benefit of the three individuals. This is what their Lordships understand the judge to mean when he used the following language:

> Is it not a reasonable inference that these three persons were the sole owners of the shares of the plaintiff company's capital stock, and carrying on business in B connection with the company in a sort of partnership or association in a common business enterprise, no longer needed, or in any event deemed they no longer needed, to keep a share register, no one but themselves being concerned therein. This appears to me to be one of the significant indications that there was a community of interest between, and of operation in the business carried on by, plaintiff and by Low, Leon and Burns the benefit resulting from each accruing to these three persons, whether carried on in the name of or by the plaintiff, or in the name of or by these C three.

Having arrived at this conclusion, he then proceeded to consider the position as he considered it existed on July 12, 1929. He states it thus:

> The benefit of any surplus of the bonds or the money so held by the defendant in excess of what would be necessary to pay this final judgment when delivered D would enure to the plaintiff, and through it to these three persons who owned all the capital stock of the plaintiff, with which they were so intimately associated in the business in which they were both engaged.

The judge, however, seems to have overlooked the all important facts, (i) that, even if it were the fact (of which their Lordships can find no evidence) that the old company was concerned in the "boot-legging" E business of the three partners, that concern must have ceased when the old company had ceased to manufacture beer in 1927, and (ii) that the evidence clearly established that the old company had never been in any way concerned in the only business of the partners which was relevant to the transaction of July 12, 1929, viz., the real estate business. Their F Lordships feel unable to support the decision of the trial judge if, and in so far as, it is based upon the view that the old company's business and the business of the three partners were one business, the assets of which could be disposed of at the will of the three individuals. That appears to them to be a view which cannot be supported, either in law or upon G the evidence in the case. Towards the end of his judgment, the judge appears to base his decision upon another, and a different, ground, for he says:

> On the facts as I see them and on the authorities, my opinion is that the document attacked by the plaintiff was not *ultra vires.* H

By that their Lordships understand him to mean that the transaction was within the powers of the old company, and also within the powers of the directors to carry out on their own initiative, without the specific authority of the old company, conferred by a resolution of a general meeting. If this be the true ground of the decision, the previous consideration of the inter-relation of the businesses of the old company and the three partners would appear to be unnecessary and irrelevant. Their Lordships, however, for reasons which will appear later, feel unable to support the judgment upon this ground either. The judge refers also to the fact that the impeached document is correctly executed by the old company in accordance with the provisions of the old company's bye-laws; but their Lordships do not understand him to hold that, by reason of that fact alone, the document must be binding on the old company, or to mean more than that the formalities required for the execution, by the old company, of a document, which in other respects was a proper act of the old company, had been duly observed.

In the Court of Appeal, divergent views were expressed. RIDDELL, J.A., would, their Lordships think, have allowed the appeal, but for the fact that he thought from the evidence:

> that the company was a sham simulacrum or cloak and that its business must be regarded as the business of these three [the three partners].

He thought that the true position was that the old company, although a separate legal entity, was acting as the agent of the three partners, and was carrying on as such agent, not the business of the old company, but the business of the three partners. If this view were correct in fact or in law, the result would undoubtedly be clear; the business and its assets (including the bonds) would belong to the three partners, who could charge them to secure their indebtedness. Indeed, no execution of the charge by the old company would be required at all, for the purpose of passing the beneficial title to the bonds. But such a view (although RIDDELL, J.A., seems to have thought otherwise) is directly opposed both to the evidence in the case and to the principles and decision in *Salomon* v. *Salomon & Co.* (1). It was never suggested, nor could it, on the facts of this case, ever have been suggested, that the business of brewing beer, which was carried on by the old company, and which, in 1927, was sold by the old company to the new company, belonged to the three partners, or was carried on by the old company as their agent. In point of fact, at the crucial date (July, 1929), the old company was not carrying on any business at all. Neither was it ever suggested, nor could it, on the facts of this case, ever have been suggested, that the bonds were not in fact and in law the assets of the legal entity the old company, but were the assets of the three individuals who constituted three out of the five shareholders of the old company. So to suggest, or so to hold, would be directly contrary to the views expressed in *Salomon* v. *Salomon & Co.* (1). Many citations from the speeches in that case might usefully be made. For the present, one will suffice. LORD HALSBURY, L.C., puts his view in the form of a dilemma, thus, at p. 31:

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

In truth, RIDDELL, J.A., appears to have been misled by certain words used by SIR H. H. COZENS-HARDY, M.R., in the *Gramophone* case (2), at p. 96, in which he states:

> I do not doubt that a person in that position [i.e., who owns all the shares in a company] may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the business, and thereupon the business will become for all taxing purposes, his business.

But this can mean only that, on the facts of a case, it may appear that the legal entity has not become the owner of a business, but is merely carrying on, as agent for another person, a business which is the property of that other person; just as, on the facts of a case, it might appear that an individual who was carrying on a business was not the owner thereof, but was carrying it on as agent for another person who was the owner thereof. SIR H. H. COZENS-HARDY, M.R., did not mean, and, in the face of the *Salomon* case (1), could not mean, that, notwithstanding that a business is in fact and in law the property of a separate legal entity, a limited company, it could be held, for taxation purposes, that the business was the property of some other person, and that the company was carrying on the business as agent for that other person. That this is so is made clear in another taxation case, *Inland Revenue Comrs.* v. *Sansom* (3). In that case, all the shares in a limited company save one were owned by one man, Mr. Sansom, who (as the phrase goes) had turned his timber business into a company. The company never distributed any dividends, but it made loans to Mr. Sansom at different times, without security and without interest. The company went into voluntary liquidation. The loans were not repaid, but were taken into account when Mr. Sansom received his share of the assets in the liquidation. It was sought to charge Mr. Sansom with super-tax on the loans. The special commissioners, in the case which they stated, found that the company was a properly constituted legal entity, that it had power to make loans to such persons, and on such terms, as it should think fit, and that it did make such loans to Mr. Sansom. They discharged the assessment. ROWLATT, J., made an order remitting the case to the commissioners to determine (*a*) whether the company in point of truth and fact carried on the business, or whether Mr. Sansom carried it on, and (*b*) whether, if the company carried on the business, it did so as agent for Mr. Sansom, or on its own behalf for the benefit of the corporators. On appeal, this order was discharged, and the decision of the commissioners was affirmed, on the ground that the existing findings of the commissioners involved the view that the business was the property of the company, and, therefore, negatived the possibility that the company was carrying on, as agent for Mr. Sansom, a business which belonged to Mr. Sansom.

Their Lordships are unable to support the decision in favour of the bank upon the grounds suggested by RIDDELL, J.A. They believe it to be of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand. MASTEN, J.A. (whose judgment was concurred in by LATCHFORD, C.J.A., and FISHER, J.A.), was of opinion that the company was not a sham or cloak for the three partners, and did not act as agent for them. He drew attention (and rightly, as their Lordships think) to the grave risk of introducing confusion into the settled principles of company law. He held, however, that the impeached transaction was *intra vires* the company upon the following grounds: that, under its letters patent and the Dominion Companies Act, the company had power to join with the three partners as co-adventurers; that the evidence established that the company and the three partners were co-adventurers in the "boot-legging" business; and that:

> In my opinion the co-adventure of Low, Burns, and Leon with the plaintiff company still continued when exhibit 11 [the impeached document] was executed, and that document was executed and delivered as a part of the winding up of the co-adventure and was within the powers of the plaintiff company.

Their Lordships find it difficult to justify the view of the facts upon which this decision is based. As already stated, there is no evidence that the old company was concerned in the "boot-legging" business; the old company had sold its business of manufacturing beer in 1927 (not in 1929 as the judge mistakenly thought); the old company had no kind of interest in the real estate business of the three partners; the impeached document was executed in relation to *that* business, and in no wise in relation to the liquor export business of the three partners. It seems impossible to support the foundation upon which the judge based his opinion that the transaction was *intra vires* the old company. Upon the assumption, however, that the transaction was *intra vires* the old company, MASTEN, J.A., proceeded to consider the objection that the transaction could not stand as being beyond the powers of the directors to apply the old company's assets for their personal benefit, without the sanction of the company in general meeting duly obtained. He held that the transaction could stand, because it was a transaction which was "entirely proper and warrantable in the interests of the company itself." He held it to be in the interests of the old company, on the ground that, if the document had not been executed, the bank could have taken in execution the shares in the old company owned by the three partners, and could then have proceeded to wind up the old company, a proceeding which, he said, it was desirable to avoid, in order that the old company might dispute its liability to the Dominion Government, if necessary, by appeal to His Majesty in Council; and he pointed out that that appeal "proceeded to the Privy Council to the great advantage of the company." These last words ring strangely, for, upon the footing that the judgment which contains them is correct, it is difficult to see that anyone derived advantage from the result of the appeal except the bank and the three partners whose personal indebtedness to the bank was *pro tanto* discharged. Their Lordships are unable to appreciate how the company, by depriving itself of its main asset, could be helped in its litigation with the Dominion Government, and they are of opinion that the benefit to the company, upon which Masten, J.A., based this part of his judgment, is not only incapable of bearing the weight assigned to it but is in fact non-existent. But, apart from this consideration, the judgment cannot be sustained on its second ground, because, as will be pointed out later, if directors misuse their powers as directors for their own advantage, the transaction is as against the company of no effect, and the court will not inquire whether the company derived any benefit from the transaction.

Davis, J.A., held that the transaction was *intra vires* the old company in view of :

> the wide specific powers set out in the letters patent together with the ancillary statutory powers possessed by it under the Act.

Upon the question whether it was *ultra vires* the directors as an improper use of their powers, he was of opinion (i) that the bank was entitled to rely upon the statement, which the old company was precluded from disputing, in the document, that Low, Leon and Burns owned the total issued capital stock of the old company ; (ii) that a meeting of the shareholders to ratify the transaction was a mere formality ; (iii) that a company is bound in a matter *intra vires* the company, by the unanimous agreement of all its incorporators and (upon the authority of *Parker & Cooper, Ltd.* v. *Reading* (4)) is so bound without any resolution of the company in general meeting ; and (iv) that the plaintiff had not shown that the old company had not derived benefit from the transaction. He therefore held that the appeal should be dismissed. Their Lordships understand this judgment to be based upon an estoppel which reduced the number of shareholders in the old company to the three partners, whose unanimous agreement, without any resolution in general meeting, operated as a ratification by the old company of the disposal of its property for the benefit of some of its directors. Their Lordships find it unnecessary to express any view as to the correctness of the decision in *Parker & Cooper, Ltd.* v. *Reading* (4), or as to the view that the unanimous agreement of all the shareholders of a company, ascertained otherwise than in general meeting, is capable of operating in law as a ratification by the company, because, in their opinion, no ground exists for the alleged estoppel. The statement as to the ownership of the stock which is contained in the document was, as has already been pointed out, not only untrue but was known by the bank to be untrue. With the disappearance of the estoppel, the foundation of this judgment fails.

In the argument before their Lordships' Board, the case for the bank was argued in one respect on lines somewhat different from those indicated by the judgments in the Ontario courts. So far as concerns the question whether the impeached transaction was one which was *intra vires* or *ultra vires* the old company, their Lordships had the privilege of listening to close and careful arguments from each side. They do not, however, feel called upon to decide this point, because, without in any way expressing a view that such a transaction as is here in question A was *intra vires* the old company, they are prepared to tender their advice to His Majesty upon the assumption in favour of the bank that the transaction was one within the powers of the old company.

That leaves for consideration the question whether the transaction was one which it was within the powers of the directors to carry out, B and, if not, whether their unauthorised act had in some way been ratified, so as to become binding upon the old company. Counsel for the bank did not suggest that the old company was in any sense a sham. His argument was that the hypothecation by the old company of its property to secure the debt of its directors was an act done by the old company C in its own interest, in order to protect its shareholding in the new company, which, by resolution of the shareholders in general meeting, had already been given to the bank as security for that debt, and that any defect occasioned by the incapacity of the three interested directors to be the means through which the old company acted in the matter D was cured by the fact that all the shareholders approved and authorised the transaction. The bank, he added, had no notice that anything out of the ordinary was involved. In these circumstances, he contended that the document was binding on the old company. Their Lordships cannot accede to this argument. In the first place, it would seem that E this suggestion that the motive which influenced the hypothecation by the old company was a desire to protect its shareholding in the new company was advanced for the first time before their Lordships' Board; there is no trace of it in any of the Ontario judgments. That, however, need not be a fatal objection to the argument. What is fatal is the fact F that the evidence points all the other way. The old company's shares in the new company were in no way protected; these remained in the same jeopardy. W. C. MacAgy's evidence is to the following effect:

Q. Was any promise made to anyone upon the faith of this document exhibit 11, or in consideration of its being given, was any promise or undertaking given by the G bank to anyone?—*A.* I think the understanding was that we agreed not to unduly press for repayment of our advance at once if they gave us this security.

Q. From whom?—*A.* From Low, Leon and Burns.

Q. Have you any recollection of anything being said about it?—*A.* No, I have not.

Q. Was there at any time any arrangement or agreement—I do not mean necessarily in writing, but an agreement binding the bank—

H Mr. Tilley: There are two things there.

His Lordship: Leave out the binding of the bank part of it.

Mr. Robertson: Very well.

Q. Was there any agreement or arrangement that the bank would give any extension of time?—*A.* No, I do not think so.

Q. Was there any inquiry made by you or anyone on behalf of the bank as to the authority of anyone to give this document on behalf of the company?—*A.* No.

Q. Were any representatons made as to the authority of anyone to give this document on behalf of the company?—*A.* No.

Q. Was there any request that the bank should pass bye-laws in connection with it ?—*A.* No.

Q. Was there any request that a meeting, either of directors or shareholders, should be held in connection with it ?—*A.* No.

Q. Was any information given to the bank as to whether a meeting of shareholders or a meeting of directors was held in connection with it ?—*A.* No.

Q. Had the transaction, that is the giving of this document exhibit 11, any other purpose than to further secure the bank in respect of the indebtedness of Low, Leon and Burns ?—*A.* No, I do not think so. A

Nor was any attempt made, in the cross-examination on behalf of the bank of this friendly witness, to show that the question of protecting the old company's shareholding in the new company had ever entered the mind of anyone. Nor can it, in their Lordships' opinion, be truthfully B said that all the shareholders approved or authorised the transaction, even assuming that such approval or authorisation not given in general meeting would constitute the equivalent of a ratification by the old company. As already indicated, their Lordships cannot, in the face of sect. 103 of the Dominion Companies Act, and of the fact that Mrs. Leon C and Mrs. Low were directors, accept the view that these ladies were not the beneficial owners of the shares which they held. Neither the pleadings nor the evidence establishes that they were not such beneficial owners, or that they approved or authorised the transaction in question. Nor should any such inferences be drawn in a case in which the corporators D could have been *subpœnœd* to give evidence, but have not been called. But, further, their Lordships are of opinion that it is impossible by the application of any proper test to affirm that this transaction was for the old company's advantage or benefit. Its interest in the bonds was its principal, if not its only, free asset, available for the purpose of raising E funds which would enable it to conduct to its end the litigation with the Crown. The suggestion that it was beneficial to the old company, to deprive itself of its means of securing to itself the surplus value of that asset, in order that that surplus value should be applied for the purpose of discharging the private debts of its directors, is a suggestion to which F their Lordships cannot accede. They view the transaction as one wholly detrimental to the interests of the old company. Moreover, even if (contrary to their Lordships' opinion) some benefit did accrue to the old company from the transaction, the overriding fact remains that the old company (acting through its directors, and not by its shareholders in G general meeting) purported to apply its property for the benefit of those directors. In such a case, it is well settled that the court will treat the transaction as unenforceable, and refuse even to inquire whether the company has derived any benefit from it and that on the ground that the company has not received the protection to which it is entitled. H In *Aberdeen Ry. Co.* v. *Blaikie Brothers* (5), Lord Cranworth, L.C., at pp. 471 and 472, used the following language, which seems appropriate to the present case :

This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner. The directors are a body to whom is dele-

> gated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagments in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is A allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still so B inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

Their Lordships are conscious that, in the result, the bank will be deprived of a security which will revert to the old company, and that the bank will benefit from the old company's success against the Dominion C Government in its appeal to His Majesty in Council only to the extent to which the interests of the three partners in the old company can be made available in execution proceedings or otherwise for the purpose of liquidating their indebtedness to the bank. For this, they have only to thank themselves, for taking as security for the personal indebtedness D of three directors of a limited company a charge on property of that company, without any inquiry, and without satisfying themselves that the seal of the company had been affixed to the security in such circumstances as to make the security a charge binding on the company. This was not a case, as was suggested in argument, in which the bank had no E notice of anything extraordinary being done. It was a plain case of directors using their powers as directors to cause a limited company to apply its property for the benefit of those directors as debtors to the bank. The language used by ATKIN, L.J., in *Underwood (A. L.), Ltd.* v. *Bank of Liverpool* (6), at pp. 795 and 796, may well be cited in this connection:

> F The first question is: Had Underwood actual authority to deal with the cheques as he did? . . . He was using the proceeds of the cheques in question to pay his own private debts. Under ordinary circumstances actual authority appears to be clearly negatived. Nevertheless it was contended that the fact that Underwood was the sole director, and practically the sole shareholder, gave him, in pursuance of the articles, actual authority. He was entrusted with all the powers of the company, the company can only act through its directors, and the directors, or director G if only one, could do what they willed with the company's assets. If this means anything it means that a board of directors acting as such have actual authority to defraud the company by using the company's assets to pay debts due to butchers or moneylenders by the individual directors. Such an act is quite outside the class of acts—management of the company's business—authorised to be done by the board. The directors, whether collectively or singly, have not actual authority to steal the company's goods.

H In the circumstances of this case, the bank was not entitled to rely upon the document as one sealed by the old company in the presence of its proper officers, and as such binding upon the old company.

Their Lordships think it right to add that, although no other registered shareholders were shown to exist beyond the three partners and Mrs. Leon and Mrs. Low, the evidence did establish that other persons were equitably interested in, and had acquired share of, the old company. For some reason, the trial judge refused to accept the evidence that certain other persons, though not shown to have been registered shareholders, had acquired or become owners of shares. The evidence, if accepted, however, seems clear. To take as one instance the case of the witness Magid. He claimed to have been given in 1929 two blocks of shares (both common and preferred) in the old company, registered in the name of Burns, as security for liabilities to him by Burns, and to have received two certificates in the name of Burns, indorsed in blank. He produce a letter of Jan. 23, 1929, written to him by Burns confirming the transaction, and enclosing the two certificates indorsed in blank, one for 7,543 preferred shares, and the other for 16,666 common shares. He produced further correspondence relating to the matter and consistent with his evidence. Throughout his cross-examination, no suggestion was made that these letters were not genuine letters, written at their respective dates, and containing truthful statements. Their Lordships find it difficult to understand how, in the absence of even a suggestion against the authenticity of the letters, it was possible to reach a conclusion on the evidence that the witness Magid had not in 1929 (though not a registered shareholder) acquired shares in the old company. The matter, however, is of importance only as indicating that in fact other beneficial interests were at stake, which were capable of being affected by the improper disposition of the old company's assets for the benefit of its directors, which took place in July, 1929.

In the result, their Lordships are of opinion that this appeal should succeed, and that the bank should account to the old company for the balance of cash which remained to the credit of the old company on the "savings account" at the Toronto branch on June 30, 1931, after payment thereout on that date to the Receiver-General of the sum of $88,073.17. It would appear that the said balance of cash was applied (i) in satisfying an indebtedness of the old company to the bank at the London branch amounting to $8,807.98, and (ii) in satisfying three sums due to the bank by the three partners, amounting in all to a total sum of $323,156.69. If the figures on this account are accepted by the parties, judgment should be entered for the old company for this last-mentioned sum, with interest thereon at the proper commercial rate from June 30, 1931, until judgment. If the figures are not agreed, it must be referred to the master to take an account to ascertain the amount of cash standing to the credit of the "savings account" on June 30, 1931, after the said payment to the Receiver-General had been made, and the bank must be ordered to pay the amount so found, with interest thereon at the proper commercial rate until payment. The order of the Court of Appeal will be discharged, and the judgment of KELLY, J., of Jan. 4, 1934, varied by striking out paras. 2 and 4, by inserting therein either judgment for the old company, as above mentioned, or (as the case may be) an order for an account and payment as above mentioned, by ordering the bank

to pay the old company's costs of the action, and by omitting the numbers attached to the different paragraphs. If the judgment is varied by including therein an order for an account and payment as above mentioned, then para. 6 must be varied by substituting the word "references" for the word "reference," and the word "reports" for the word
A "report." Their Lordships will humbly advise His Majesty accordingly. The bank will pay the old company's costs of the appeals to the Court of Appeal and to His Majesty in Council.

Appeal allowed with costs.

Solicitors: *Blake & Redden* (for the appellant company); *Lawrence*
B *Jones & Co.* (for the respondent bank).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

C

TAYLOR *v.* TAYLOR.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **July 8, 9, 12, 1937.]**

Husband and Wife—Separation agreement—Annuity payable in weekly instalments—Payments without deduction of income tax—Arrears—Arrears exceeded by income tax which could have been deducted—Set-off—Income
D *Tax Act,* 1918 (c. 40), *All Schedules Rules, r.* 19.

In an action by a wife for the recovery of money alleged to be due to her under a separation agreement, the husband contended that the aggregate of the payments made exceeded the amount payable under the agreement after income tax, which he was entitled to deduct, had been deducted, and that he had, therefore, overpaid his wife, and that nothing
E was due to her. In fact, the husband, when making payments under the agreement, never purported to deduct income tax, and never gave to the wife any statement or certificate of deduction. Since Aug., 1932, the husband had always been in arrears with his payments:—

HELD: (i) for purposes of the Income Tax Act, 1918, All Schedules Rules, r. 19, these payments, although made weekly, were an annual payment.

F (ii) for the period prior to Aug., 1932, the husband, having omitted to make any deductions, was not entitled to make them now, because as to that period payment had been made in full.

(iii) for the period subsequent to Aug., 1932, the husband was entitled to deduct income tax from the payments, because the tax may be deducted from any instalment or part of an annual payment.

Order of MACKINNON, J., [1937] 1 All E.R. 464, *varied.*

G

[EDITORIAL NOTE. The question upon this appeal is as to the deduction of tax from an annual payment in the nature of an annuity, the annuity not being paid in one sum but in equal or unequal instalments. In such a case the tax may be deducted from any instalment payable during the tax-year, so that so long as any part of yearly sum in respect of the annuity is in arrear the payer may deduct
H the income tax for the year. The deduction may, therefore, be made some years after the arrears actually accrued due, subject, of course, to the effect of the Statute of Limitations.

AS TO DEDUCTION OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 237, para. 477; and FOR CASES, see DIGEST, Vol. 28, pp. 72, 73, Nos. 381-391.]

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529; 12 Digest 483, *3961*.

(2) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696; 12 Digest 489, *4000;* 49 L.J.Ch. 415; 42 L.T. 421.

(3) *Smith* v. *Smith,* [1923] P. 191; 28 Digest 68, *361;* 92 L.J.P. 132; 130 L.T. 8.

(4) *Re Hatch, Hatch* v. *Hatch,* [1919] 1 Ch. 351; 28 Digest 68, *362;* 88 L.J.Ch. 147; 120 L.T. 694.

(5) *Crane* v. *Kilpin* (1868), L.R. 6 Eq. 334; 28 Digest 70, *371;* 37 L.J.Ch. 913; 18 L.T. 350.

(6) *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (1906), 23 T.L.R. 100; 28 Digest 72, *387; subsequent proceedings* (1907), 23 T.L.R. 224; 23 T.L.R. 277.

(7) *Re Wooldridge, Wooldridge* v. *Coe,* [1920] W. N. 78; 28 Digest 73, *391.*

(8) *Fletcher* v. *Young,* [1936] S.L.T. 572.

(9) *Cory Brothers & Co.* v. *Mecca, Turkish S.S.* (*Owners*), *The Mecca,* [1897] A.C. 286; 12 Digest 478, *3905;* 66 L.J.P. 86; 76 L.T. 579.

(10) *Re Janes' Settlement, Wasmuth* v. *Janes,* [1918] 2 Ch. 54; 28 Digest 66, *343;* 87 L.J.Ch. 454; 119 L.T. 114.

(11) *Goslings & Sharpe* v. *Blake* (1889), 23 Q.B.D. 324; 28 Digest 71, *375;* 58 L.J.Q.B. 446; 61 L.T. 311; 2 Tax Cas. 450.

(12) *Galashiels Provident Building Society* v. *Newlands* (1893), 20 R. (Ct. of Sess.) 821; 28 Digest 70, case *f*.

APPEAL from a decision of MACKINNON, J., dated Jan. 22, 1937, and reported [1937] 1 All E.R. 464.

The facts are set out in the judgments; but the following statement upon the actual figures is probably required to explain the calculations. Under the agreement the wife was to receive £2 per week, which was to be increased to £3 per week if the husband's income amounted to £25 per month. The husband admitted that his income had exceeded that amount for a period of 7 months. For the purposes of the calculation this was taken as 28 weeks and entitled the wife to an additional £28. Upon the £2 per week basis, the payments made by the husband over the whole period were £128 10*s*. short of what he should have paid, and this with the £28 makes the sum of £156 10*s*. referred to in the judgments herein. For reasons stated in the judgment these arrears are referable to a period beginning in 1932. It is this sum of £156 10*s*. for which judgment is given subject to deduction of income tax. The writ was issued on May 3, 1935, and no question arises upon the Statute of Limitations.

Cyril King, K.C., and *H. H. Maddocks* for the appellant.

I. H. Jacob for the respondent.

King, K.C.: The appellant would have discharged his obligation under the contract by paying the amount due less tax. This was an annuity, and it is immaterial that it was paid in a number of instalments: *Smith* v. *Smith* (3). The right of deduction of tax is lost by payment in full: *Re Hatch, Hatch* v. *Hatch* (4). But, on payment of arrears, tax may be deducted: *Crane* v. *Kilpin* (5). An annual payment is not complete until the last instalment has been paid: *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (6). The tax need not be deducted from each instalment, but may be deducted as one amount in respect of several instalments: *Re Wooldridge, Wooldridge* v. *Coe* (7). This court is not

bound by *Fletcher* v. *Young* (8). There was no account kept between the plaintiff and the defendant; the rule in *Clayton's Case* (1) applies to such an account only, and then only in the absence of evidence of another intention: here there is evidence of a different way of dealing with the situation. There had been no appropriation by the plaintiff at the
A date of the trial. [Counsel referred to *The Mecca* (9).] The plaintiff was not in any way prejudiced, because, if the tax was paid by the defendant, she would not have to pay it.

Maddocks: The only amount the defendant could have been called upon to pay under this agreement was £2 per week less tax; he has paid
B more than that. It is clearly decided that a husband can deduct income tax from any payment he makes.

Jacob: The words "such payment," in r. 19, mean "such annual payment." It is submitted that, even if these payments constitute an annual payment, sums paid on account are paid outright, and from
C moneys so paid no tax can be deducted at a future time; *Fletcher* v. *Young* (8). Here there was an obligation to pay £2 per week; where there is an obligation to pay, not yearly, but at stated periods, income tax can be deducted only at the end of each of those periods: *Smith* v. *Smith* (3). This is a case under the Income Tax Act, 1918, Sched.
D D, Case III (1) (*a*). [Counsel referred to *Re Janes' Settlement* (10), *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (6), and *Goslings & Sharpe* v. *Blake* (11).] If part of a sum is paid, and no tax deducted, then tax on that part cannot be deducted from a further payment. Deduction must be made at the time provided by the contract, and not at the end
E of the year: *Galashiels Provident Building Society* v. *Newlands* (12).

King, K.C., in reply.

GREER, L.J.: In this case, the plaintiff was a wife separated from the defendant, her husband, and the action concerns an agreement
F under which she was entitled in some circumstances to £3 a week, and in other circumstances to only £2 a week. During the early periods, the amount was £2 a week and not £3 a week, as was suggested on her behalf by the pleadings which were put in in the action. We have come to the conclusion that, as appears from the figures, in the year 1926/27 the
G husband underpaid by the sum of £36; during the year 1927/28 he underpaid by the amount of £28; and, on the other hand, in the three years following, dealing with the payments from August to August, which they would be under the terms of the separation deed, he overpaid in 1928/29 £18, in 1929/30 £34, and in 1930/31 £7. The effect of those
H overpayments was, in my judgment, that they could have been made by the husband for no purpose except that of reducing his indebtedness under the earlier payments, which were short of the amount he ought to have paid. The judge found that he had not in his head the least idea about deducting tax, and what he was making the overpayments for was to pay in full the agreed sum which was payable under the deed

to his wife. In those circumstances, a sum of £5 was left as still in arrear when the last of the overpayments was made, and, therefore, in dealing with subsequent years, one has to take the fact that there was £5 still due in respect of the last of the earlier years, and that then there were short payments in respect of the next two years. The net result, taking the right figures which the judge has taken with regard to the amount A
payable in different years, is that there was an underpayment by the husband to the wife of a sum of £156 10*s.*; but, inasmuch as there was (to use the words of All Schedules Rules, r. 19) a residue to be made up by him, which he had not yet made up until the date of the judgment, he was then entitled from that residue to deduct the amount B
of the income tax which, if he had realised his rights before the time he did, he would have been entitled to deduct from the payments to his wife under the separation deed. We have, therefore, come to the conclusion that he was entitled, at the date of the writ, as against the £156 10*s.*, which he had underpaid, to deduct income tax for the years in question. It C
does not seem to me to matter whether or not the amounts were payable weekly, or whether they were payable yearly, because the intention would be the same, whether he covenanted to pay weekly or to pay yearly. I am inclined to think that, for the purpose of income tax, we must, under r. 19, treat it as a payment of a yearly amount, and not as the D
payment of a weekly amount. Whichever way it was, we are satisfied that the overpayments could have been intended only in respect of the debit that is said to be due for the years before the overpayment or the weeks before the overpayment. In those circumstances, something ought to have been deducted in respect of income tax on the £156 10*s.* E
We think that the calculation made by Mr. Jacob is reasonably within the mark, and it is not worth while that any further expense should be incurred by anyone in doing a sum in arithmetic to arrive at a result more exact than that obtained by accepting Mr. Jacob's figure.

The result will be that the judgment will be reduced from £156 to F
£116, and to that extent, though the appeal in effect succeeds by a reduction of the amount, it fails with regard to the main question, and, as soon as my brethren have given judgment, we will deal with the question of costs.

G

SLESSER, L.J.: I agree. In so far as I have the misfortune in this case to differ in part from the reasoning of the judge below in his conclusions, I think it right to state my reasons. Under the Income Tax Act, 1918, All Schedules Rules, r. 19 (1), there is a certain obligation placed upon the payer of an annuity or other annual payment paying the same H
by virtue of a deed. It is there provided that:

> Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods),

> is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same. . . .

In accordance with that r. 19, the husband, who has been paying, not A always in complete satisfaction of the agreement, but paying weekly, certain sums to his wife in accordance with the memorandum of agreement dated Aug. 3, 1926, has suffered tax on the whole of his profits, including that part which he had subsequently paid to his wife, and thereupon he became entitled, under the latter limb of r. 19, to deduct B and retain thereout—that is, out of the moneys which he had paid his wife under the agreement—the amount of tax thereon, at the rate of tax in force during the period during which the said payment was accruing due on making such payment.

Now, in fact, as the judge has found, the husband was ignorant of the C provisions of r. 19 altogether, and he proceeded to make his payments, whether in full or deficient payment, without any reference at all to the Income Tax Acts, and there is no doubt that, from Aug., 1926, to Aug., 1932, in the earlier years being in arrear and in the later years overpaying, he did, having no other suggested intention in view in making D the overpayments, desire that those overpayments should be appropriated to the deficiencies in the earlier payments under the agreement. References have been made in the course of this case, either from the bar or from the bench, to *Clayton's Case* (1), but it is not necessary, for the purposes of the present case, to consider the difficult question whether E there was or was not here what has been called a current account. As JESSEL, M.R., said, in *Re Hallett's Estate* (2), at p. 728, commenting upon *Clayton's Case* (1):

> [It is] a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a F contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other considerations.

In my opinion, in the present case it is not necessary to draw any presumption of law. I think that the proper inference of fact, and the only inference, is that this gentleman, it not being suggested that he paid G more than he need to his wife through philanthropy, must be taken to have paid it to discharge the arrears which were formerly due. The result, attributing these payments to the agreement in satisfaction of the arrears, is that we arrive at this result. By Aug., 1932, the whole of the weekly payments up to that date had been made. The right under H r. 19 in the husband is to be entitled, on making such payments to deduct and retain the amount of the tax. In my opinion, up to Aug., 1932, he had made such payments, and he had omitted to make any deductions, and it is not open to him now, therefore, under the wording of the rule, to make a deduction on making such payments; because, in Aug., 1932, there were no payments in arrear, and the only payments had all been completely made, and his right of deduction had gone. But the position thereafter is, in my opinion, different; after Aug., 1932, he was at all times in arrear with his payments, and at no time after that date can it be said that he had made his payments so as to prevent his availing himself of the right which he has of making the deductions under r. 19. A

Now, the effect in figures is really not in dispute. As Greer, L.J., has said, it covers a period of two years, adjusting the August payments to the April income tax. Under the memorandum of agreement he was required to pay his wife £1 a week in addition to the £2 provided in cl. 2 of the agreement. That is, £3 a week. He owed, I think, in all, £156, B of which he had not made complete payment. The income tax on that amount would be, at 4*s*. 9*d*. in the £ (averaging 4*s*. 6*d*. and 5*s*., because it fluctuated during the period), £40; and so one arrives at the figure mentioned by Greer, L.J., of £116.

I would add, in answer to the argument addressed to us by Mr. Jacob, C only that, in my view, it is not right, in dealing with r. 19, to have regard to the fact that the payments were made actually week by week. The basis upon which this could be taken to be an annual payment is to be found in the authorities to the effect that it is an annuity, because it provides for payment for more than one year, and the mere fact that it D is paid in periods of less than a year seems to me to be expressly reserved in the language of r. 19 itself, where, giving the right of deduction, the rule says:

> whether payable half-yearly or at any shorter or more distant periods.

E

In my opinion, whenever the payment for the whole year under consideration has not been made, it is still open to the person making such payment to deduct and retain thereout a sum representing the amount of tax thereon, notwithstanding that, for some particular weeks during that period, the payments had been made in full. The rule points, in my F opinion, to the year as the standard to be considered, and not the week, the half-year, or any shorter period, and, therefore, I think that Mr. Jacob's argument on that point is ill-founded; but, on the general question, I think that the judge was wrong in not coming to the conclusion that the payments up to Aug., 1932, had been completely made. G

Scott, L.J.: I agree.

Appeal allowed. No order as to costs.

Solicitors: *Montagu's & Cox & Cardale* (for the appellant); *Jacques, Asquith & Jacques* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*] H

A/S RENDAL *v.* ARCOS, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Maugham), **June 14, 15, 17, July 19, 1937.**]

Shipping—Charterparty—Ice clause—Vessel damaged by ice—Notice of claim clause—Sufficiency of notice—Agency.

A steamship was chartered by Arcos, Ltd., of London, "for Exportles, Moscow," in terms of a Chamber of Shipping "Baltwood" charterparty, which contained a clause binding the charterers to supply the steamer with continuous ice-breaker assistance, and a provision that notice of claims must be given within twelve months of the date of the vessel's arrival at final port of discharge. As a result of breach of the ice clause by the charterers, the steamer was damaged. The owners intimated a claim for demurrage arising out of the delay caused by the ice, and the claim was dealt with by the Russian Trade Delegation at Oslo, as agents for Exportles, Moscow. The owners also intimated that they reserved their right to claim for compensation in respect of ice damage, but no further notice of claim was given within the twelve months:—

HELD: (i) the reservation by the owners of their right to claim in respect of the ice damage was a sufficient notice of claim within the charterparty.

(ii) adequate notice was given to the charterers through the agency of the Russian Trade Delegation at Oslo.

(iii) such a notice was in effect a notice to Exportles.

Decision of Court of Appeal, [1936] 1 All E.R. 623, *reversed. Order of* GODDARD, J., *restored.*

[EDITORIAL NOTE. The Court of Appeal, drawing a distinction between a notice of intention to claim and a notice of claim, thought the document in the present case was not a sufficiently definite claim. Their Lordships have decided that the document is a sufficiently definite claim within the ice clause of the charterparty, since it indicates a specific head of damage under which a claim is to be made, and does not state that a claim "may or may not be made." As to the inference from the proved facts as to agency, the House also differs from the Court of Appeal, and considers that where a mercantile agent receives a document for his principal, there is a strong presumption that he will forward it to the principal, unless there is evidence that the agent is intending to act fraudulently. It is only necessary for the plaintiff to establish a *prima facie* case of agency, and then, if the matter is disputed, the defendant must disprove the agency.

AS TO THE ICE CLAUSE, see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 132, para. 216; and FOR CASES, see DIGEST, Vol. 41, pp. 435, 436, Nos. 2733-2737.]

Cases referred to:

(1) *Ugleexport Charkow* v. *Anastasia S.S. Owners* (1934), 151 L.T. 261; Digest Supp.

(2) *Thompson* v. *Cartwright* (1863), 33 Beav. 178; 35 Digest 472, *2071*; 33 L.J. Ch. 234; 9 L.T. 138; *affd. on app.,* 2 De G. J. & Sm. 10.

(3) *Sharpe* v. *Foy* (1868), 4 Ch. App. 35; 35 Digest 471, *2062*; 19 L.T. 541.

(4) *Cave* v. *Cave* (1880), 15 Ch. D. 639; 35 Digest 452, *1927*; 49 L.J. Ch. 505; 42 L.T. 730.

(5) *Davis* v. *Garrett* (1830), 6 Bing. 716; 41 Digest 488, *3188*; 8 L.J.O.S.C.P. 253.

(6) *Morrison (James) & Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.,* [1916] 2 K.B. 783; 41 Digest 486, *3176*; 86 L.J.K.B. 97; 115 L.T. 508.

(7) *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.,* [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177.

(8) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 3 Digest 77, *163*; 51 L.J.Q.B. 310; 44 L.T. 814.
(9) *Gibaud* v. *Great Eastern Ry. Co.*, [1921] 2 K.B. 426; Digest Supp.; 90 L.J.K.B. 535; 125 L.T. 76.
(10) *The Cap Palos*, [1921] P. 458; 41 Digest 683, *5126*; 91 L.J.P. 11; 126 L.T. 82.
(11) *Lucas* v. *Novofilieski* (1795), 1 Esp. 296; 12 Digest 497, *4060*.
(12) *Hetherington* v. *Kemp* (1815), 4 Camp. 193; 22 Digest 75, *440*.
(13) *Macgregor* v. *Keily* (1849), 3 Exch. 794; 42 Digest 143, *1400*; 18 L.J. Ex. 391; 13 L.T.O.S. 120.

Appeal from an order of the Court of Appeal (Slesser, Greene and Scott, L.JJ.), dated Mar. 20, 1936, and reported in [1936] 1 All E.R. 623, in an action in which the appellants were plaintiffs and the respondents were defendants, reversing a decision of Goddard, J., and setting aside a judgment dated Oct. 7, 1935, in favour of the appellants, and directing judgment to be entered for the respondents. The facts and the arguments are set out in the judgment.

C. T. Le Quesne, K.C., *Cyril Miller*, and *Richard Hurst* for the appellants.

D. N. Pritt, K.C., and *Harry Atkins* for the respondents.

Lord Atkin: My Lords, I have had the opportunity of seeing the opinions which are about to be delivered by my noble and learned friends, Lord Wright and Lord Maugham. The facts and the law are so fully considered in those opinions, and I am in such complete agreement with them, that, although we are differing from the Court of Appeal, I am satisfied with saying nothing more than that I agree with the opinions which are about to be delivered.

Lord Macmillan: My Lords, I also have had the advantage of perusing in print the opinions about to be read by my noble and learned friends, and I agree with them entirely.

Lord Atkin: My Lords, I am asked by my noble and learned friend, Lord Thankerton, to say that he also agrees.

Lord Wright: My Lords, this appeal raises questions of some general importance on the construction of a common clause in charterparties, and also on what is sufficient evidence to found the inference that notice to an agent is notice to the principal. The respondents also claimed in the alternative to uphold the judgment of the Court of Appeal as to some part of the damage.

The questions arise on a charterparty dated Dec. 3, 1930, expressed to be between the appellants, as owners of the Norwegian steamship "Rendal," and the respondents, Arcos, Ltd. (for Exportles, Moscow), of London, as charterers. The charterparty, which was in the common form described as the Chamber of Shipping Baltic Wood Charter, 1926, was for the carriage of a cargo of pulpwood from Leningrad to Sarpsborg

(Norway). It is not necessary to refer to more than a few of the clauses of the contract. By cl. 2, the master or owners were to telegraph to the shippers of the cargo (described as Exportles, Moscow) giving at least seven days notice of the probable date of arrival at loading port. For delay in loading or discharging, demurrage was payable at £30 a day. There was the usual cesser clause, and the usual lien clause for freight, dead freight, demurrage, lighterage at port of discharge and average. Clause 35 was the clause known as the ice clause, under which the charterers were to supply steamer with ice-breaker assistance, if required, to enable her to enter and/or leave the port of loading free of all expenses to owners. Clause 24 must be set out in full. It runs:

> Notice of any claim under this charter or under any bill of lading given hereunder must be given within 12 months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived.

The vessel loaded her cargo and arrived at Sarpsborg on Feb. 27, 1931. Thereupon the owners' agents, the Nordisk Skibsrederforening (referred to hereafter as the Nordisk) gave notice to the U.S.S.R. or Russian Trade Delegation in Norway (referred to as the Delegation), who were acting, at least in some respects, as agents at Oslo for Exportles, the principals of the respondents in regard to the charter, that they claimed £1,532 for 39 days 1½ hours loss of time at £30 a day, and extra coal consumption 200 tons, and £100 for extra call at Reval to replenish the bunkers, which had been depleted by the delay in the ice. At that time, the true effect of the ice clause had not been decided by the courts, but was in dispute. It was agreed between Nordisk and the Delegation that the latter should deposit with a Norwegian bank in joint names £1,532, the amount claimed, to abide the decision of the Norwegian court in a suit between the appellants and the Delegation brought to decide the question. This action was finally decided by the Norwegian Supreme Court on Feb. 9, 1933, in the appellants' favour. But the appellants also claimed, as further elements of damage for the same breach of the ice clause, the cost of repairing the damage alleged to have been sustained by the steamer through being delayed in the ice for want of proper ice-breaker assistance. There was delay in commencing the action for these claims until the construction of the ice clause had been decided, as it was, by the House of Lords, in *Ugleexport Charkow* v. *Anastasia S.S. Owners* (1). This decision was in favour of the shipowners, and, so far as principle goes, covered the claims of the appellants in this case in respect of ship damage The main defence raised in this action, apart from questions of amount, was that notice of the claim was not given in accordance with the requirements of cl. 24. GODDARD, J., who tried the case in the commercial court, held that this objection failed, but the Court of Appeal, reversing the judge, have held that it ought to prevail It will accordingly be necessary to examine the matter in some detail. The counter-objections of the respondents as to part of the damage I shall consider later.

The issues principally debated on the appeal are two. There is, first, the dispute as to the true construction of cl. 24. Then there is the question as to whether notice, if proper notice was given, was given to the proper parties. It might appear strange that, in an ordinary shipping transaction of this nature, there should be any difficulty on a simple question of fact such as this latter question. But the respondents have called no evidence and given no discovery as to documents or correspondence or interviews between the three parties concerned on their side, the Trade Delegation, the respondents and Exportles. The matter is left to be decided on the communications between Nordisk, the Trade Delegation, and the respondents. It is therefore necessary to examine this scanty material, to see if it is sufficient to establish the appellants' case. The onus is on the appellants to show compliance with cl. 24, but, if they show a *prima facie* case, there is no rebutting evidence to displace it. It is convenient first to state how I construe cl. 24. That clause requires "notice of claim." That, in my opinion, does not mean a precisely formulated claim, with full details, but it must be such a notice as will enable the party to whom it is given to take steps to meet the claim, by preparing and obtaining appropriate evidence for that purpose. Thus, in the present case, there was a general claim for damages for breach of the ice clause, with particulars so far as damages were claimed in respect of delay and consequent expenses. The further claim for damage to the ship herself was a claim in respect of the same cause of action, that is, breach of the ice clause, but it involved different issues of fact, estimates of damage, ship surveys, repair accounts, and so forth. I think, therefore, that cl. 24 requires a separate notice in respect of such a claim, if the purpose of cl. 24 is to be fulfilled. It is to be observed that cl. 24 is what is called a mutual clause, that is, it is for the benefit both of the shipowner and of the charterers or bill of lading holders. Before Goddard, J., it was argued on behalf of the appellants that it was analogous to an exception clause for the benefit of the shipowners only, but Goddard, J., rightly rejected that contention, and it was not persisted in either before the Court of Appeal or before this House. The clause does not specify to whom notice is to be given. That must obviously depend on circumstances. The shipowner might have claims against the charterers or bill of lading holders or shippers, and the notice would have to be given accordingly. Or conversely charterers, bill of lading holders, or shippers might have claims against the shipowner. The person to whom notice is to be given must, I think, be the person against whom the claim is to be made, or, if he is an agent, his principal, or the person ultimately liable and capable of acting upon the notice. In the present case, the actual principal charterer is admittedly Exportles, which is disclosed in the charterparty as the person for whom the respondents were acting. It is true that the respondents may alternatively be made liable on the charterparty, as, indeed, is not contested. But Exportles are conceded to be the party ultimately concerned, and it is not contested that notice to them, if established, is sufficient, as was assumed in the Court of Appeal. It is, however, urged that what is relied on as being notice to Exportles is not notice of a claim, and, secondly, that, while it was given to the Delegation, there is no evidence, or no sufficient evidence, that the Delegation either had authority to receive the notice or ever passed it on to Exportles. On the first point, I am of opinion, with all respect to the Lords Justices who have held the contrary, that there was a notice of claim within cl. 24. This point is barely touched by GODDARD, J., and does not seem to have been seriously taken before him on behalf of the respondents. As I have already stated, Nordisk had formulated an itemised claim for delay, loss of time and consequent expenses in regard to bunkers. Nordisk, in summarising the position which they say was agreed upon, then go on to write:

> As a matter of regularity we beg to observe that the owners also reserve their right to claim compensation for the damage to the ship caused by the fact that the ship was left by the icebreaker in the ice. The owners have not yet had the ship dry-docked and therefore cannot say what damage has been done to the ship in this way and as you yourselves are of course only responsible under the charterparty within the frame of the deposit this question only concerns you in case the above-mentioned claim should for some reason or another be reduced.

The Delegation, writing in reply to Nordisk on Mar. 21, 1931, after stating that all claims for alleged demurrage arisen during navigation through the ice 1930-31 had to be settled through Derutra Hamburg, say:

> We will, however, already to-day point out to you that . . . we are not obliged to cover any expenses for "extra coal consumption" or even less ice damage. That kind of claims we must strictly repudiate on behalf of the charterers, as they are not justified by the charterparty.

They also repudiate claims for delay except for a limited period. Nordisk, in replying, on Mar. 28, 1931, suggested, by way of compromise, that they might get the owner to consent to accept payment of £1,170 3*s.* 9*d.*, if made by Apr. 10, and say:

> we will attempt to persuade the owners to waive the claim in respect of extra coal consumption through the call at Reval and the repairs of the ice damage which in this case we understand is not very considerable.

These well-meant efforts failed, and, on June 20, 1931, Nordisk wrote again to the Delegation, saying that the matter of the claim for £1,532 12*s.* must go before the court at Oslo, adding:

> The claim for compensation in respect of damage which the ship has suffered in the ice, we shall probably have to take up with Arcos in London as the amount deposited does not cover this damage.

The proceedings in Oslo which were against the Delegation on their agreement were limited to the amount deposited in the joint names. The Court of Appeal have held that these communications are not a notice of claim for damage to the ship, but merely a problematical or tentative intimation that, at some future time, they may consider whether such a claim may be made, and perhaps decide to advance it. Notice of claim, it is said, means notice of an actual present claim, not

the reservation of a mere possibility of claiming in the future. I do not so read the letters. They amount, I think, to a clear notice that the ship has been damaged in the ice, and that the appellants have a claim for that damage. The claim is reserved for two reasons, (i) in March and April the ship had not been surveyed, so that the claim could not be quantified; (ii) the claim was in another sense being reserved out of the agreement A
which was being made for the joint deposit; it was reserved "for regularity's sake," that is, to prevent any misunderstanding or any idea that the matters discussed in relation to the joint deposit completely covered all the damages consequent on the breach of the ice clause. While, in March and April, the claim for ship damage could not be B
quantified, it may be that it could have been quantified in June, 1931, but liability for these matters had been repudiated by the charterers, and there was no need to formulate a precise claim until the writ was issued. That was done as soon as the construction of the ice clause was determined by this House, in 1934. But the notice originally given C
was categorical, both that the ship had been damaged and that the appellants had a right to claim for that damage under the ice clause. The Delegation repudiated any such claim, and thereby waived further particularisation of the claim, but they had all the notice necessary for them to demand to take part in joint surveys, or to survey the ship D
themselves, and otherwise prepare to meet the claim. All that cl. 24 requires is notice of the claim, and, in my opinion, reading this correspondence in the ordinary way, I think that the notice was sufficient in form to meet requirements of the clause.

The second question is whether the notice given to the Delegation E
was a notice to Exportles, notice to them being, in this case, admitted to be sufficient. The Court of Appeal have held there was no evidence of notice to Exportles, that is, no evidence that the Delegation were agents to receive the notice, and no evidence on which it can be found that the notice was passed on to Exportles. I am again unable, with all respect, F
to agree with the Court of Appeal. If evidence is scanty, that is the affair of the respondents, who could have attempted, by evidence or correspondence, to have negatived the existence of the alleged agency. No doubt they were not bound to do so. The onus is on the appellants to prove their case. But, if they have produced material which, fairly G
considered in the light of all the proved circumstances, justifies the inference of agency, and if the respondents do not seek to displace that inference by the evidence, which, if it existed, could be produced only by them, by which I mean evidence of the precise internal connection between the Delegation, Exportles and the respondents, then, according H
to the general rule applicable in such circumstances, the appellants have established their case. I think that some complication and confusion have been introduced by the suggestion that the court can take, or ought to take, judicial notice of what is said to be an aspect of the Constitution of the Soviet Republic, viz., that all trade is a monopoly of the Soviet

Government, and that all Russian trading bodies are organs of the Soviet Government, so that any one such body may be an agent of the other, and so that notice to one body may be notice to any other body concerned in the same transaction. The Court of Appeal has rejected the idea of any such judicial knowledge. I think rightly so. But Mr. Le A Quesne did not base his case on any such idea, and GODDARD, J., did not rest his judgment solely on this conception of the position of the Soviet Government in relation to trade, though he was prepared, in view of certain *dicta* in earlier cases in the Court of Appeal, to take the conception as one of the grounds of his judgment. If, or in so far as, B he did, I think he was wrong. I do not think that the court can derive from its inner consciousness or general experience any such conception, but must act, as in other matters of foreign law, on express evidence, of which none is produced in this case,

What, then, are the relevant facts, as they appear in the documents? C On the steamer's arrival at Sarpsborg, on Mar. 27, 1931, Nordisk cabled to Exportles that bills of lading had not been presented, and the steamer was lying at charterer's account. Exportles replied, at a late hour on Mar. 28, that the bills of lading had been presented to the buyers through the Christiania Bank, adding "Please apply Trade Representative D [which means the Delegation] Oslo." This clearly nominated the Delegation as the agents of Exportles in regard to some matters relating to the discharge of the ship at Sarpsborg, which is near Oslo, and the completion of the charterparty. But, earlier on the same day, by telephone, Nordisk and the Delegation had arranged the joint deposit of £1,532, E obviously to prevent any delay in discharging the cargo, or delay due to the exercise of an actual or assumed right of lien. But the Delegation proceeded, as already explained, to act as charterers' agents, as if with full authority to deal with all matters arising at the port of discharge under the charterparty. They repudiated liability for certain claims. F They put up a deposit of £1,532. They agreed that the deposit should be subject to the decision of the Oslo court. They took part in the action, which was then in due course defended and decided. It is true that, in many cases, assumption of authority by one who purports to be an agent is no evidence that he possesses the authority he professes G to have. By inadvertence or by intention he may be claiming to exercise an authority which he does not possess. But, in a case like this, it was essential that Exportles should be represented by agents at Oslo, to attend to the settlement of the matters which had to be dealt with on the spot, on the termination of the adventure and the separation of ship H and cargo. It is incredible that Exportles did not have such agents at Oslo. In fact, Exportles expressly instructed Nordisk to apply to the Delegation; that authority was said to be limited to the matter of the bills of lading, but I see no reason so to limit the language of the cable, which is not in terms limited at all. I read it as meaning that the Delegation were to be treated as representing Exportles *quoad* the

"Rendal" at Oslo. Then I cannot conceive that the Delegation would put up the sum of £1,532 on their own responsibility, and out of their own moneys. I can only infer that they did so on the authority of Exportles. I may add that the Delegation also acted as agents at Oslo on behalf of charterers in respect of another vessel, the "Oddvar," chartered by or on account of Exportles, which arrived at Sarpsborg on or about Feb. 27, A 1931. When the Nordisk made their proposal in regard to the "Rendal," they simply stated that they did so on the same basis as set out in their letter to the Delegation of Feb. 27, 1931. This letter, addressed to the Delegation by Nordisk was unfortunately not before the Court of Appeal, but it was, by consent of the parties, put before this House. B It is so significant of the actual position that I venture to quote in full the translation, which, omitting formal points, is as follows:

No. 42631*S.*, *s.s.* "*Oddvar.*"

As stated to you to-day over the telephone this steamer has now arrived Sarpsborg and cannot commence discharging of her cargo because the bills of lading have not been presented. We therefore to-day took the liberty, on behalf of the owners C to inform Exportles in Moscow telegraphically about this and that the vessel is lying for the charterers' account. As stated to you over the telephone the owners demand compensation for 45 days' loss of time on account of the vessel having had to wait for icebreaker. The charterparty's demurrage rate is £30 per day and the claim thus amounts to £1,350. As far as we understood you over the telephone, you will see that this amount is deposited in a first-class bank here in Oslo so it will not be necessary for the owners to take a lien on the cargo for the claim. The D depositing should be so arranged that the owners could have opportunity of taking legal action against a person or a firm here in Norway for payment of the amount. It could for example be arranged that the amount was deposited in the owners' and your joint names and that you at the same time give a statement that action can be taken against you here *re* the owners' claim against Exportles according to this charterparty. If not it can be arranged that the amount be deposited in the owners' and Exportles' joint names and that we are informed that Exportles will agree to be represented in the case at a Norwegian court. Finally it could E also be arranged so that the owners were given a right to demand the amount paid if the charterers within a certain period have not entered legal action here in Norway. This period could then be made so ample that one had time to examine the case beforehand. The last is probably the most practical arrangement.

Thus it is seen that the Trade Delegation were being asked to accept a position of full representation for Exportles in respect of two separate F Norwegian vessels, and accepted that position. Nordisk, the Norwegian Shipowners' Protection Club, must be taken to have known with whom they were dealing. As I have observed, these proposals were carried through in substance.

But the matter does not rest merely on inference, because there is the G express statement or admission of the respondents identifying the Delegation and Exportles in regard to the proceedings in respect of the joint deposit. When a letter was written on behalf of the appellants before writ, the respondents replied by letter of Jan. 14, 1935, saying, *inter alia*: "The owners are well aware that Exportles are charterers as H the owners themselves have already taken proceedings in Oslo against Exportles." This refers to the proceedings at Oslo in regard to the joint deposit; these proceedings were in form against the Delegation, but the respondents are saying that in truth they were against Exportles, which means, as I think, that, in the transaction, the Delegation represented

Exportles. This statement made by the respondents is evidence against them, and seems to me to confirm the inference otherwise arising that the authority, which undoubtedly, to some extent, the Delegation possessed, as agents at Oslo on behalf of Exportles, extended to all the business in relation to cargo at Oslo. Someone had to represent Exportles A there. The Delegation purported to do so. Their conduct has never been repudiated by Exportles or by the respondents. There must have been communications and settlements between the Delegation and Exportles. The respondents do not produce them, nor do Exportles. I think that the court is bound to draw the only inference which is con- B sistent with the admitted facts. So far as concerns the limited matter of authority to receive notice of a claim under cl. 24, I observe that, in respect of all the other claims covered by the agreement for the joint deposit and by the Oslo action and judgment, notice to the Delegation was obviously treated as good. It is clear, from the record of the C Norwegian court, that no point that cl. 24 was not complied with was raised by Exportles, who, as the respondents say or imply, were the real, though not normal, parties in the proceedings. If they had authority to receive notice of those claims, I do not see why it should be held that they had no authority to receive notice of the claim for ice-damage to D ship. If it is said that the true view is that the Delegation were agents for some purposes for Exportles, and, as such, were capable of receiving a notice, but merely as a sort of postman, to pass on to Exportles, with the result that the notice had no effect till actually communicated to Exportles, and that there is no evidence that the Delegation ever did E communicate it to Exportles, I think that the court is entitled to draw the inference, on the facts of this case, that the notice was passed on, and that the communication was made. The *prima facie* inference in such a case is that a responsible agent does what duty to his principal may seem to require. I do not put this as a rule of law, but as a pre- F sumption of fact. The presumption can no doubt be rebutted by evidence of failure so to act on the part of the agent, but no such evidence is here produced. I think the principle is similar to that laid down by Courts of Equity in cases where a solicitor, not authorised to accept a notice, is presumed to have passed to his client a notice which he has received. G The rule is stated in *Thompson* v. *Cartwright* (2), at p. 185, by SIR JOHN ROMILLY, M.R.:

> I take the rule to be generally that the client must be treated as having had notice of all the facts which, in the same transaction, have come to the knowledge of the solicitor, and that the burden of proof lies on him (the client) to show that there is a probability, amounting to a moral certainty, that the solicitor would not have com- H municated that fact to his client.

The presumption is rebuttable, and in *Thompson's* case (2) was rebutted. The same general rule was again reiterated in *Sharpe* v. *Foy* (3), and in *Cave* v. *Cave* (4). In both these cases, the application of the rule was excluded by the special facts; in the latter case, the solicitor was fraudulent, a circumstance which was held to rebut the presumption.

In my opinion, a similar principle should be held to apply in commercial transactions, in this sense, that, in the absence of sufficient evidence to the contrary, an agent, acting for his principal in a transaction, but not authorised to accept for his principal a notice in regard to matters appertaining to the same transaction, should be presumed to have acted in the usual way of business by passing on the notice to his principal. It follows, from all these considerations, that, in my opinion, the judgment of the Court of Appeal cannot be sustained on the ground on which it is based. But the respondents are entitled to support the judgment in their favour on any fit and proper grounds, even though those grounds are other than those on which they succeeded in the Court of Appeal, and to do so either as to the whole of the claim or as to any part of it. They have accordingly put forward an alternative case, that they are not to be held liable in any event for more than £1,650, and are entitled, on this appeal, to succeed in respect of the difference between that sum and £2,495 19*s*., the amount for which judgment was entered by GODDARD, J. To examine this contention, it is necessary to refer briefly to the findings of the special referee as to the damage sustained by the "Rendal" while in the ice, and to the circumstances in which the damage was sustained.

The claim was based on the breach of contract by the respondents, in that icebreaker assistance was not duly supplied as required by the ice clause, with the result that the "Rendal" was delayed in getting out into open water. She did not reach open water until Feb. 20, 1934, whereas it has been found that, with proper icebreaker assistance, she could have reached open water by Jan. 17, 1934. GODDARD, J., found, not only that the ship had suffered damage by reason of the failure on the part of the respondents to provide icebreaker assistance, but also that the respondents had failed to show that the same damage would have been sustained by the ship even if they had provided icebreaker assistance. He had found, in the case of the "Oddvar," which it was agreed was on all fours with the case of the "Rendal," that ice conditions were getting steadily worse after the earlier part of January. In fact, in the period up to Jan. 17, no icebreaker assistance was supplied to the "Rendal" between Jan. 9 and Jan. 17; up to and on Jan. 9, it had been supplied for a few hours only. None was supplied from Jan. 18 to Feb. 1, or from Feb. 7 to Feb. 16, and at other periods up to Feb. 20 only at intermittent times. The special referee distinguished between pressure or screwing damage, suffered while the ship was being held in the ice, and forward damage, caused while she was moving ahead. As she was bound to move ahead anyhow, it was argued that she would have sustained the same damage in any event, because, even if she was delayed by the absence of icebreakers, still she had to proceed forward in order to get out of the ice. The respondents accordingly contended that there was no evidence on which it could be found that the cost of repairing the forward damage and the consequential loss and expense constituted damage caused by the breach of contract. The special referee was not satisfied, as I read his report, that, had the vessel received proper icebreaker assistance, any of this damage would have been sustained. The judge accordingly entered judgment for the whole amount. As the Court of Appeal rejected the whole claim on the preliminary points, A they did not find it necessary to consider this matter, and your Lordships have not the benefit of their assistance. But I think the judge was right in the course he took. In my opinion, the respondents cannot escape liability for any part of the damage unless they can show affirmatively that the same damage must have occurred if there had been no breach B of contract. There is nothing to show that any ice damage would have been suffered by the " Rendal " if she had been clear of the ice, as she ought to have been, by Jan. 17. As from that time, the breach of contract was in full force and effect, and the delay in the transit was in constant operation. Ice conditions were steadily getting worse, and the " Rendal " C was exposed to these conditions. Even if she had to traverse anyhow the same course, she did so at different times, under different weather conditions, with thicker ice floes, and had to pass over a wider area of frozen water as the severe frost continued. In my opinion, in these circumstances, all the ice damage, without distinction (except for trifling D damage sustained on her inward journey), is properly attributable to the breach of contract, since, so far as appears, it was all caused while the breach was operating, as it necessarily operated from the time when the delay commenced. I apply here the judge's finding in the similar case of the " Oddvar," that:

> E the vessel would have had quite a good passage for a winter passage if she had been got out and helped in the earlier part of January.

The contract here is in many respects different from contracts of carriage by sea under which shipowners have been held liable for unjustified deviation or delay. Such a case was *Davis* v. *Garrett* (5), where, F at p. 724, TINDAL, C.J., lays down a general principle:

> But we think . . . no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done.

G He adds that it might be different if it were shown that the same loss not only might have happened, but must have happened, if the breach had not been committed. Among modern statements of the same principle, I may refer to *Morrison (James) & Co., Ltd.* v. *Shaw, Savill & Albion Co., Ltd.* (6), at pp. 795, 800, and *Hain S.S. Co., Ltd.* v. *Tate &* H *Lyle, Ltd.* (7), where it was said that the casualty must be deemed to have been caused by the deviation, since it is impossible to say that the casualty would have occurred if there had been no deviation. The deviation had resulted in delay. On the same principle, in the case of bailments on land, the bailee, who has unjustifiably shifted the place of bailment, is held liable for the loss of the goods while in the unauthorised

place, even though he would have had a defence if the goods had been lost by a similar peril while in the place where, under the contract, they should have been: *Lilley* v. *Doubleday* (8) and *Gibaud* v. *Great Eastern Railway Co.* (9). The principle is not limited to cases where the defendant is a bailee, nor has it merely the effect of depriving the defendant of the benefit of contractual exceptions, which it is held cannot be A
applied to a manner of performance not contemplated by the contract. The essence of the principle is that damage has been sustained under conditions involving danger other than, and, therefore, different from, the conditions which would have operated if the contract had been fulfilled; for the consequences of such conditions the defendant is held B
liable. The principle thus applies whenever the breach of contract has the consequence of exposing the subject-matter to conditions of risk different from those which would have operated if the contract had not been broken. The thing exposed to the risks in this case was a ship, which, it is true, was in the possession and control of the shipowner. C
The charterparty exposed the ship necessarily to certain sea perils, including perils of ice, but the respondents' breach of their obligation reasonably to furnish the means necessary for the ship to pass through the ice needlessly increased the hazards, so that, in such a case, when damage ensues after such a breach, the onus of proof is shifted. The D
defendant must show (if he can) that there must have been the same damage if the contract had not been broken. A somewhat analogous case is afforded by breach of a contract to tow a ship. This again is an instance of a maritime adventure, in which, as in all maritime adventures, from their nature, there are involved sea perils, liable to be aggravated E
by the breach. Such a case was *The Cap Palos* (10). There the contract was to provide means of propulsion; here it is to remove obstacles to progression. To these and similar cases the principle applies. But, as is shown by the land bailment cases, the mere fact that the risk is changed will be enough to shift the onus on to the defendant. It is, of course, not F
implied that every breach of a fundamental condition of any contract from which damage is said to follow necessarily throws this onus on the contract-breaker.

In my opinion, the objections of the respondents fail. There is no ground for apportioning the damages which GODDARD, J., has awarded. G
I think that the appeal should be allowed, that the judgment of GODDARD, J., should be restored, and that the appellants should have their costs of their appeal to this House and in the courts below.

LORD MAUGHAM: My Lords, this case raises questions of difficulty H
and importance on which your Lordships have found yourselves unable to agree with the Court of Appeal, who reversed the decision of GODDARD, J. I have had the advantage of reading the elaborate opinion of my noble and learned friend LORD WRIGHT, with which I entirely concur, and, but for the respect I bear to the Lords Justices, I should have been

content to be silent. As it is, I shall endeavour to state briefly, in my own language, the reasons which have led me to think that the appeal should be allowed.

My Lords, it is needless to restate the facts, which, if I may say so, are most clearly set out in the opinion to which I have referred. There A are two main points on which the respondents rely. First, they contend that the letter of Mar. 19, 1931, is not a claim in respect of the matters which are the subject-matter of the present action. Secondly, relying on cl. 24 of the charterparty, they say that the letter was not addressed to or received by any person having authority from the charterers to B receive notice of such a claim, and, as a corollary, they assert that there is no evidence that notice of such a claim was in fact received by the charterers, or by any person on their behalf. My Lords, on the first point the Court of Appeal has held that the letter was not a definite notice of claim. For my part, I am in agreement with this view, if it C means that the letter lacks definiteness. But cl. 24 of the charterparty uses no adjective indicating precision as to details or amounts. It is, I think, a sufficient claim under the clause if the shipowner, or the charterer, as the case may be, indicates that there will be a claim in respect of an indicated head of damage arising from a breach of a clause in the D charterparty. With all respect to the Lords Justices, I do not read the letter as saying "we may or may not make a claim." The letter uses the words "the damage to the ship *caused* by the fact that the ship was left by the icebreaker in the ice." The phrase indicates, I think, to a commercial man, as well as to a lawyer, that damage has in fact been actually E occasioned, owing to a breach of the charterparty by the charterers, and the default in the letter is clearly alleged to be a breach of the ice clause in the charterparty. The letter is dealing solely with the charterparty, and the liability of the charterers under it. It must be read in the light of the fact that the writer refers, in the letter, to the terms of the charter- F party, and in all probability has it before him. He must be taken to be well aware of cl. 24. What meaning, then, should be attached to the sentence:

> as a matter of regularity . . . the owners . . . reserve their right to claim compensation for the damage to the ship caused by [an alleged breach of the ice clause G by the charterers].

The difficulty I have is to see what the sentence means if it is not a reservation of a claim based on a legal right under sect. 24, and a reservation of a claim seems *ex necessitate rei* to be a notice of that claim. The letter is a strictly business-like letter, from the first word to the last, H and one would not expect to find in it a piece of chatty information, of little interest to the recipient and of no commercial effect. The circumstance that the agents of the charterers (agents for at least some purposes) treated the letter as a claim is not, I think, strictly relevant to the present question; but I confess to a certain satisfaction in finding that these business people, taking the same view as that above expressed, treated the letter as a claim under the charterparty, and thought it wise at once to repudiate the claim on behalf of the charterers, as not being a claim justified under the charterparty.

The second point amounts to this, that the body describing itself in its letters as "the U.S.S.R.'s Trade Delegation in Norway (Chartering Department)" had no authority from the charterers to receive a notice under cl. 24. The charterers were certainly Exportles, Moscow, and the respondents, Arcos, Ltd., are liable only as their agents under a charterparty made in London for charterers residing abroad, a liability which was admitted by the respondents and as to which no question arises. The judges in the Court of Appeal assumed that a notice given to Exportles or to its authorised agent would be a sufficient notice under cl. 24, and I see no reason for questioning this view. They then went on to consider whether "the person to whom the notice was given was duly authorised by the party concerned to receive the notice." To quote from the judgment of Greene, L.J., he says:

> When I say "duly authorised," I mean, of course, authorised in accordance with the ordinary principles of the law of agency. The authority may be express, or it may be general, provided it is sufficiently wide to cover the receipt of notice, or it may be an authority which is to be imputed under the doctrine of "holding out."

My Lords, with the greatest respect for Greene, L.J., it seems to me that, where one is dealing with a question as to whether a notice handed to a person who is in some respects an agent for a principal has reached the principal, there is yet another possibility. In such a case, it may well be that there is a presumption that the agent has in fact handed on the notice to the principal, or, in other words, that the handing of the document to the agent is evidence for the jury or the judge from which they or he may properly infer that the document has reached the principal. This presumption of fact or this evidence is rebuttable. The principal can give evidence that the document never reached him, and, if believed, the notice—on the hypothesis that it was not given to a person authorised to receive it on behalf of the principal—would be treated as ineffective. But, if, as in the present case, the principal prefers not to call evidence on the point, I think that there is every reason for maintaining, in a case where the probabilities are all one way, that the document or the notice has reached the principal.

My Lords, the first question to be considered is whether the available evidence is such that the court ought not to infer that it was within the general scope of the authority of the Trade Delegation in Norway to receive the notice under cl. 24. I will not take up your Lordships' time by repeating the various considerations which have led the noble Lord to the conclusion that the inference suggested is justified by the facts. Exportles expressly instructed Nordisk to apply to the Delegation — in reference to a claim arising under the charterparty. The Delegation proceeded to act as charterers' agents at Oslo, and to contest in the Norwegian courts a claim for demurrage under the charterparty. I should like to add that the acts of an agent may properly be looked at when the question at issue is as to the scope of his authority, provided his agency is one of a well known and continuous character; and *a fortiori* is this the case if the principal does not intervene and repudiate the agent's authority in the course of a lengthy transaction, although A circumstances are such that there must be constant communications between the agent and the principal. I must therefore agree with my noble and learned friend on this question of the authority of the Trade Delegation, and with the reasons he has given in support of his view.

I will venture to add some observations on a question of considerable B general importance, namely, the alternative view that, assuming there was no authority to receive the notice, there is, nevertheless, evidence from which the court may infer that it was transmitted in the usual and regular course of business to Exportles. It may be worth noting that modern business is conducted on the faith of a strong probability that the C general course of business, and the usual practice in its conduct, will be followed. The principle that there is a presumption of fact to the same effect is one which is constantly applied in our law of evidence. The most common illustration is that connected with the posting of letters; but many illustrations could be given to show that the principle is not D confined to official acts and is often applied in other cases. The cases of *Lucas* v. *Novofilieski* (11) and *Hetherington* v. *Kemp* (12) are early instances. Other cases are those relating to the due execution of deeds and wills. That there is a like presumption of fact that a mercantile agent will send or hand on a notice intended for his principal received in the E ordinary course of business—unless there is some special reason, such as that the agent was intending some fraud in the matter, and therefore would not be likely to send on the notice—is, in my opinion, not open to doubt. The circumstance that there is a certain paucity of authority directly in point is due, I think, mainly to the fact that it is generally F impossible for the principal in a modern case, where there is adequate discovery of documents, to deny the receipt of the notice. I may, however, add to the authorities referred to by my noble and learned friend LORD WRIGHT the case of *Macgregor* v. *Keily* (13). It is true that it relates to a case, not of a mercantile agent, but of a servant, but the G distinction is not important for the present purpose. The action was on an attorney's bill for fees due and payable by a client, and it was necessary to prove delivery of the bill to the defendant before suit. At the trial, it was proved by a witness that he went to the house where the defendant then lived, saw a manservant at the door and delivered to H him the plaintiff's bill. The trial judge, POLLOCK, C.B., overruled the objection that this was no proof of a delivery to the defendant. A verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a verdict for him if the court should be of opinion that the mode of delivery did not support the issue. PARKE, B., who delivered the leading judgment, a judge of great eminence, who was not at all averse to a purely technical point, stated that he was at first of a different opinion from that at which he had arrived. The material part of his judgment was in the following terms (pp. 797, 798):

> In this case, the bill was left with a manservant at the door of the defendant's residence, therefore, presumably, the family was in town, and the leaving of the bill with the servant affords a presumption of its having reached the master. The fact of putting it in the servant's hands is sufficient to constitute the servant the agent of the plaintiff for the delivery of the bill. But then, upon this issue the defendant might call the servant to prove that he never did deliver the bill to his master, in which case the plaintiff would fail in showing that the servant was the agent of his master for the purpose of receiving the bill. I own I do not think that a domestic servant is an agent for that purpose; but the question is, whether the fact of delivery to the servant may not be used as evidence of a delivery to the master. So, by sending the bill by post, the plaintiff would in the same way run the risk of the servant being called to say that he never received it. For these reasons I think the verdict was right.

My Lords, even if we assume, for the present purpose, that the Trade Delegation in Norway was not the duly authorised agent of Exportles to receive a notice under cl. 24, I think that the circumstances detailed by my noble friend are amply sufficient to justify the finding that the sending of the letter of Mar. 19, 1931, to the Trade Delegation in Norway was evidence from which the court might infer that Exportles received the notice. It is reasonably plain that, if the Trade Delegation had no authority to accept such a notice, and did not intend to forward it, they ought, according to the ordinary standards of commercial dealing, to have so informed the writers of the letter. The correspondence and the events show that they must have been in constant communication with Exportles, and that they were purporting to have authority to repudiate (amongst others) the claim for ice-damage. Their letter of Mar. 21, 1931, could be regarded as grossly misleading, if not actually dishonest, only if we are to assume, (i) that they were not authorised to accept the notice, and (ii) that they did not intend to forward it to Exportles. Nor would they be performing their obvious duty to the latter if they so acted; for no mercantile firm could properly take the responsibility of refusing to transmit such a notice to Exportles, since they could not know that the notice would not bind Exportles, and it is almost incredible that they would take the risk of greatly prejudicing Exportles if and when the question of ice-damage to hull should come before a legal tribunal. I am, therefore, unable to make the strange conjectures which, in my view, are necessary in order that the conclusion may be arrived at that Exportles did not receive the notice.

My Lords, I do not feel that I can usefully add anything to what has fallen from my noble and learned friend on the question of quantum of damage. I agree with the opinion that the appeal should be allowed, and that the judgment of Goddard, J., should be restored.

Appeal allowed. Order of Goddard, J., *restored.*

Solicitors: *Sinclair, Roche & Temperley* (for the appellants); *Middleton, Lewis & Clarke* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

COLTNESS IRON CO., LTD. *v.* SHARP.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **June 4, July 19, 1937.**]

Mines—Coal mine—Statutory duty—Fencing of machinery—Breach—Not reasonably practicable to avoid or prevent breach—Coal Mines Act, 1911 A (*c.* 50), *ss.* 55, 102 (8).

The respondent, whilst employed underground in the appellant company's colliery, sustained serious injuries to his right hand, when it was caught in certain machinery. In an action for damages based upon a breach by the appellant company of its duty under the Coal Mines Act, 1911, s. 55, to keep securely fenced dangerous parts of the B machinery used in or about the mine, the appellant company contended that, as the cover which fenced the machinery in question had necessarily to be removed for a short time to enable the company's engineer to inspect the machinery when it was being tested after repair, and as absolute compliance with sect. 55 was therefore impossible, the appellant company was protected by sect. 102 (8) of the Act of 1911:—

HELD: as it was not, in the circumstances, reasonably practicable C to avoid or to prevent the breach of statutory duty, the appellant company was protected by the Coal Mines Act, 1911, s. 102 (8).

Decision of First Division of the Court of Session in Scotland reversed.

[EDITORIAL NOTE. For the purpose of testing dangerous machinery, it is sometimes necessary to remove the fencing. Where this is done for a short time, D the avoidance or prevention of the breach of the statutory duty to fence is not reasonably practicable, and there is no breach of statutory duty.

AS TO BREACH OF DUTY TO FENCE, see HALSBURY, Hailsham Edn., Vol. 22, p. 800, para. 1650; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

APPEAL from an interlocutor of the First Division of the Court of E Session in Scotland (LORD NORMAND, Lord President, LORD FLEMING, and LORD MONCRIEFF, LORD MORISON dissenting), affirming an interlocutor of LORD WARK awarding the respondent the sum of £500 as damages. The facts and the arguments are set out in the judgments.

A. G. Erskine Hill, K.C., and *T. B. Simpson* for the appellant company.

F *Robert Gibson, K.C.*, and *T. J. D. Connolly* for the respondent.

LORD ATKIN: My Lords, I have had the opportunity of reading the opinions about to be delivered by my noble and learned friends LORD THANKERTON and LORD MACMILLAN, and, as I agree with the result at G which they have arrived, I find it unnecessary to say more than a few words. In the facts of this case, where the dangerous machinery was exposed for only a few minutes, as the only means of effecting necessary repairs in a part of the mine where it was unlikely that any workman, other than the engineer engaged in the work of repair, would be exposed H to risk of contact with the machine, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of sect. 55. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the defence is proved. This seems to me to be all that need be decided. I am myself not prepared to go the length of saying that, if dangerous machinery has to be exposed in motion for a considerable time, for the purpose of effecting or testing repairs, sect. 102 (8) would afford a defence in cases where workmen in the mine would inevitably pass and be exposed to risk, and where it would be reasonably practicable by screens or otherwise to avoid the risk. I think that it is at least possible reasonably to contend that one does fence the dangerous parts of a machine by fencing the whole, and that "fence" may mean no more than adopt physical means for keeping persons away from dangerous parts. I do not think that this question arises for decision in the facts of this case, and I prefer to keep it open. I agree that the appeal should be allowed.

LORD THANKERTON: My Lords, I have had the opportunity of considering the opinion about to be delivered by my noble and learned friend LORD MACMILLAN, in which the circumstances in which the present question arises are fully set out, and it is unnecessary for me to repeat them. I agree with the opinion of my noble and learned friend, but, as it involves a reversal of the conclusions of the majority of the judges of the First Division of the Court of Session and of the Lord Ordinary, I desire to add some observations.

The respondent's case is founded solely on a breach of the statutory duty imposed by the Coal Mines Act, 1911, s. 55, which provides that "every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced." The breach of sect. 55 is admitted, but the appellant company claims to have established the statutory defence provided by sect. 102 (8) "that it was not reasonably practicable to avoid or prevent the breach." This was on the ground that it was impossible for the engineer to test the loader under ordinary working conditions without removal of the guard which, when in place, admittedly protected the dangerous parts of the machine. All the judges have accepted the impossibility of so testing the loader without removal of that guard. But the majority of the judges and the Lord Ordinary have held that the breach could have been avoided or prevented by adopting the suggestion made by an expert witness at the proof. LORD NORMAND, Lord President, says:

> In my opinion, when the ordinary cover was removed from the sprocket gear it became the duty of the defenders under the Act to consider what could be done so as to fence the sprocket gear as securely as the circumstances allowed. No doubt it was impossible to devise a fence which would exclude the engineer; and it may not have been possible to devise a fence which, so far as other workmen were concerned, was as secure as the cover which had been removed. But it by no means followed that the sprocket gear could not be kept securely fenced so as to protect workmen other than the engineer; and I think that if such a fence had been erected, breach of sect. 55 would have been avoided.

The other judges of the majority and the Lord Ordinary expressed a similar view.

My Lords, sect. 55 imposes an absolute obligation to keep the dangerous parts of a machine fenced. The obligation is not qualified by any such words as " so far as practicable in the circumstances." In the first place, fencing the access to a machine is not fencing the parts of a machine. There can be no doubt that the purpose of sect. 55 is mainly to protect those who are operating the machine, but, when no operator requires access to the machine while in motion, a complete exclusion of access, A while the machine was in motion, might be held to be in compliance with the section. I express no opinion on that, but I have some doubt as to whether anything short of complete exclusion of everyone would be in compliance with the statutory obligation. In the second place, it seems clear to me that, if the suggested partial exclusion of access would B not have been sufficient compliance with sect. 55 as an initial installation, it cannot come in as a sort of second-best, *faute de mieux*, when the proper guard requires to be removed, for the temporary purpose of testing the running machine. There is no such provision to be found either in sect. 55 or in sect. 102 (8).

C I am therefore of opinion that the proposed partial exclusion of access would not have been in compliance with sect. 55, and that, accordingly, it would not have avoided or prevented the breach caused by the removal of the proper guard. I would add only that I agree with the clear and well-reasoned opinion of LORD MORISON. The question of any D duty to take reasonable care imposed on the owners by the common law does not arise in the present case.

I concur in the motion about to be proposed by my noble and learned friend, LORD MACMILLAN.

E **LORD MACMILLAN**: My Lords, by the Coal Mines Act, 1911, s. 55, it is provided that " every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced." On the morning of Aug. 20, 1935, the respondent, who was employed by the appellant company in one of its collieries in Lanarkshire, F sustained injuries by coming in contact with an exposed and dangerous part of the machinery used in the mine, which is admitted not to have been at the time securely fenced. Founding on this breach of statutory duty on the part of the appellant company, the respondent raised the present action of damages against it. The only defence which your G Lordships have to consider is furnished to the appellant company by sect. 102 (8), which enacts that:

> the owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach,

H

The appellant company accepted the burden of proving that, on the occasion in question, it was not reasonably practicable to avoid or prevent its breach of the statutory duty imposed on it by sect. 55, and it maintains that it has discharged this burden. Both the Lord Ordinary and the First Division of the Court of Session (LORD MORISON dissenting) held that the appellant company had failed to do so. Your Lordships have now to review that decision. What is "reasonably practicable" is obviously a question of the circumstances of the particular case, and it therefore becomes necessary to set out the relevant facts. It appears that, in one of the main roadways of the pit, there is a loading plant near the coal face at the end of the road. The coal is fed to the loader A by a conveyor, and delivered by the loader into hutches. The plant is worked by an electric motor, from which the power is transmitted to the loader by means of a sprocket gearing, that is, by toothed wheels and a chain. The wheels and chain, when in motion, are dangerous, and were provided with a guard, which kept them securely fenced. The B loader was placed 2 ft. or 3 ft. from the building on the left-hand side of the road, and about 7 ft. from the right-hand side of the road. On the loader being examined, on the day before the accident, by a mechanical engineer employed at the colliery, it was found that the chain was slipping. A new chain was fitted that afternoon, and, on running the C machine, it proved necessary to adjust a jockey pulley, whose purpose is to assist in keeping the chain on the sprockets. The engineer took this pulley with him to the surface for the necessary adjustment, and, on returning to the loader next morning, at the beginning of the day shift, he proceeded to fix the pulley in position. To enable him to do so, D he had to stop the machine, and remove the guard protecting the chain and sprocket gearing. Having fixed the pulley, he set the machine in motion to test its running, and, in order that he might observe its action, he did not replace the guard. Meantime, the respondent, who was employed to attend to the conveyor close by, which brought coal from E the face to the loader, had, as it was his duty to do, stopped the conveyor when the loader was stopped. He came over to the loader to see what the engineer was doing to it, and stood watching behind him in the narrow passage-way 2 ft. or 3 ft. wide between the machine and the building on the left hand. When the engineer had placed the jockey pulley in F position, and set the machine in motion for a trial run, the respondent started to hurry back to his place beside the conveyor. Unfortunately, as he was passing alongside the loader, he slipped on the pavement, and his right hand, which he put out to save himself, was caught in the unprotected sprocket gearing, and seriously injured. G

Such being the facts, the question is whether the appellant company is, in the circumstances, entitled to say that it was not reasonably practicable to avoid or prevent the breach of statutory duty which it undoubtedly committed in not having the gear of the loading machine securely fenced at the time of the accident to the respondent. I am of H opinion that it is. It was obviously necessary to remove the guard from the gear in order to fix the jockey pulley in position. This was done while the machine was not in motion, and, consequently, without creating any danger. Then the engineer required to test the running of the machine, and to see whether the appliance which he had just

fitted was working properly and safely. He could not have done this if he had replaced the guard before starting the machine, for, in that case, the gear would have been hidden from observation. The gear can have been unfenced for only a very brief time after the machine was started and before the accident occurred, and certainly not longer than
A was necessary for the observation of its working after the repair. As the engineer says, "it was a quick job." Doubtless the engineer would have replaced the guard whenever he was satisfied by observation that the machine was running satisfactorily. Unhappily, the respondent happened to be there, and to stumble just at the moment when the gear
B was temporarily unprotected. In my opinion, it is difficult to conceive of a case to which the statutory excuse ought to be held to apply, if it does not apply to this case. I asked counsel who appeared for the respondent to instance circumstances which would render it not reasonably practicable to keep the gearing securely fenced, but I received no
C satisfactory answer. It was not only not reasonably practicable to keep the gearing securely fenced when it had to be observed on the test run, but it would have been impossible to have observed its working if it had been protected by the guard.

It has been held by the majority of the judges in the Court of Session
D that the appellant company has not established its defence, because it would have been reasonably practicable to have fenced off each end of the narrow passage-way between the loader and the building at the side of the road, and so have prevented access by the respondent to the dangerous gearing. This might, no doubt, have avoided or prevented
E the accident, but it would not have avoided or prevented a breach of the statutory duty to keep the gearing securely fenced. The gearing would have remained unprotected, and a danger to the engineer or to anyone else who had to be beside the machine inside the fenced-off passage-way. It is one thing to fence off access to a machine and another
F thing to fence securely a dangerous part of the machine. If you prevent anyone from going near a machine, then, of course, you prevent the possibility of anyone being injured by it. But employees must have access to machines to attend to them, and the statute requires any dangerous parts to be guarded for the very purpose of protecting from
G injury those who have access to them. I find myself in entire agreement with LORD MORISON when he says:

> Cutting off access to a machine is, in my opinion, quite a different operation from fencing the dangerous parts of a machine within the meaning of sect. 55.

I desire to emphasise that the present action is laid solely on the
H breach by the appellant company of its statutory duty under sect. 55 of the Act of 1911, which breach it has shown that it was not reasonably practicable for it to have avoided or prevented. I reserve my opinion on the question whether, apart from the statute, the appellant company had any duty, while the machine was in a dangerously unfenced state, to take such precautions as are suggested in the judgment under review,

to prevent access to it by employees other than those who had a duty to attend it. I move your Lordships to allow the appeal, to reverse the interlocutors of the Lord Ordinary and the First Division of the Court of Session, to direct that the appellant be assoilzied from the conclusions of the summons, and to find the appellant company entitled to its costs of the appeal, and to its expenses in the Court of Session. A

Lord Wright: My Lords, I agree, and have nothing to add.

Lord Maugham: My Lords, I concur in the proposed motion.

Appeal allowed, with costs. B

Solicitors: *Beveridge & Co.*, agents for *W. & J. Burness*, W.S., Edinburgh, and *J. A. McAra*, Glasgow (for the appellant company); *Herbert Z. Deane & Co.*, agents for *I. H. Irvine-Jones*, S.S.C., Edinburgh; and *William Philp*, Kirkcaldy (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*] C

GALLAGHER *v.* LYNN.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Maugham), **June 10, 11, July 19, 1937.**] D

Constitutional Law—Northern Ireland—Legislation—Restrictions on sale of milk—Validity—Government of Ireland Act, 1920 (c. 67), *s.* 4 (1) (7)—*Milk and Milk Products Act (Northern Ireland),* 1934 (c. 16), *ss.* 1 (1) (c), 2 (2).

Food and Drugs—Milk—Licence to sell—Sale by producer—Milk produced outside but sold inside jurisdiction. E

The appellant was convicted for selling milk in the city of Londonderry otherwise than under and in accordance with the Milk and Milk Products Act (Northern Ireland), 1934, and without the licences required under that Act, in contravention of the provisions of sect. 1 (1) (c) thereof. On appeal, the conviction was affirmed by the General Court of Quarter Sessions, and by the Court of Appeal in Northern Ireland. Thereupon, this appeal was brought, and it was contended (*a*) that, as the appellant's dairy-farm, at which the milk was produced, was outside Northern Ireland, and he was, therefore, unable to obtain a licence for the sale of such milk under the Act of 1934, no licence was required by him for the sale of such milk in Northern Ireland, and (*b*) that, in the alternative, the Act of 1934 was *ultra vires*, as being an undue interference with trade, and in violation of the provisions of the Government of Ireland Act, 1920, s. 4 (1) (7):— F G

Held: (i) the Act of 1934 must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory.

(ii) as the principal object of the Act of 1934 was not to interfere with trade, but to protect the health of the inhabitants of Northern Ireland, that Act was not subject to the limitation imposed by the Government of Ireland Act, 1920, s. 4 (1) (7). H

Decision of Court of Appeal of Northern Ireland affirmed.

[EDITORIAL NOTE. In this appeal the Milk and Milk Products Act (Northern Ireland), 1934, is attacked as unduly interfering with trade. Their Lordships, however, took the view that the Act was passed for the benefit of the health of the inhabitants, and, that being its main object, it could not be attacked under the Government of Ireland Act, 1920.

As to Milk Licences, see HALSBURY, Hailsham Edn., Vol. 15, pp. 220-222, paras. 412-417; and for Cases, see DIGEST, Vol. 25, pp. 126, 127, Nos. 474-476.]

Case referred to:

(1) *Russell* v. *R.* (1882), 7 App. Cas. 829; 17 Digest 429, *101*; 51 L.J.P.C. 77; 46 L.T. 889.

Appeal from an order of the Court of Appeal of Northern Ireland, dated Dec. 13, 1935, affirming an order made by the Recorder of Londonderry on Sept. 30, 1935, dismissing the appeal of the appellant from an order made by the justices of the county of city of Londonderry whereby the appellant was convicted for selling milk in the city of Londonderry otherwise than under and in accordance with the Milk and Milk Products Act (Northern Ireland), 1934, and the licence required under that Act, in contravention of sect. 1 (1) (*c*) of that Act. The facts and the arguments are set out in the judgment of Lord Atkin.

The Milk and Milk Products Act (Northern Ireland), 1934, provides:

> 1. (1) A person shall not, either by himself or by any servant or agent . . . (*c*) sell or offer or expose for sale any milk except under and in accordance with this Act and such licence, if any, as may be required under this Act.
>
> 2. (1) A person shall not sell milk . . . unless he holds a licence under this section, being either (*a*) a producer's licence, that is to say, a licence for the production and sale of milk; or (*b*) a distributor's licence, that is to say, a licence for the purchase and resale of milk, whether by wholesale or retail;
>
> (2) The Ministry of Agriculture shall, on application being made in the prescribed manner, and on payment of the appropriate fee specified in this section, grant to any person upon the prescribed conditions a licence under this section.

J. M. Whitaker, K.C., and *Cyril A. Nicholson* for the appellant.

The Attorney-General for Northern Ireland (*Sir A. B. Babington, K.C.*), *The Solicitor-General for Northern Ireland* (*J. C. MacDermott, K.C.*) and *Gerald Dougherty* for the respondent.

Lord Atkin: My Lords, this is an appeal by the appellant from an order of the Court of Appeal of Northern Ireland dismissing an appeal from the Recorder of Londonderry, who on appeal affirmed a conviction of the appellant by the justices for the county of city of Londonderry for selling milk in the city of Londonderry without a licence in contravention of the Milk and Milk Products Act (Northern Ireland), 1934, s. 1 (1) (*c*). The appeal to the Court of Appeal was brought under the Government of Ireland Act, 1920, s. 50, and was brought in this House by leave of the House. The case involves questions as to the construction and validity of the Milk and Milk Products Act passed by the legislature of Northern Ireland in 1934. I need not set out *verbatim* the material provisions of the Act. They provide that a person shall not sell milk except under and in accordance with the Act (sect. 1 (1) (*c*)); that a person shall not sell milk of grade A, B, or C (defined by the Act) unless he holds either a producer's or a distributor's licence (sect. 2 (1)); that the Ministry of Agriculture shall, on application made in the prescribed manner, grant to any person upon the prescribed conditions a licence, and that the holder of a licence shall keep milk-records, and furnish such returns as the Ministry may require, and permit the records to be inspected by an authorised officer (sect. 2 (2) (*b*)). The Act further provided that an authorised officer should have power to enter and inspect at any reasonable time any part of the land or possessions occupied by the holder of a licence in connection with his business, and examine milk found there and take samples (sect. 8 (1)). Power to make regulations is given to the Minister by sect. 9 (1). Regulations governing the production and sale of milk of grade C quality were made by the Minister on Aug. 24, 1934 (S. R. & O., Northern Ireland, 1934, No. 71). They provide that a producer shall permit any authorised officer at any reasonable time to inspect the herd, and examine all premises and equipment used by the producer in connection with the production or sale of milk (r. 5), and contain other provisions as to things to be done and powers to be exercised on the premises (rr. 6, 7, 8, 9). There is also a regulation that the Minister, before granting a producer's licence, shall satisfy himself that the applicant's arrangements for dealing with milk, *i.e.*, arrangements for the production, handling, storage, treatment, and distribution of milk, are such as will enable him to comply with the provisions of the Act and regulations (r. 22 (1), (4)). The appellant is one of several farmers whose farms are situate in the county of Donegal, outside the territory of Northern Ireland but within a few miles of the boundary. For a considerable time before 1934 they had been in the habit of selling their milk in the city of Londonderry, which appears to have been their natural market. In 1935, Mr. Alexander, a solicitor practising in Londonderry, having also a dairy-farm in county Donegal, asked for a producer's licence, and, on being refused, applied for a mandamus to the Minister to grant him a licence. The rule was discharged by the King's Bench Division, and this decision was affirmed by the Court of Appeal. The ground taken by the Minister and upheld by the courts was that it was impossible to apply the Act to producers whose premises were outside Northern Ireland territory, and that such persons were not entitled to a licence under the Act. It was open to the appellant to dispute this decision before this House. It was but faintly argued, and seeing that the appellant was represented by Mr. Whitaker, it is fairly obvious that the point did not arouse much enthusiasm. Your Lordships were all agreed that the decision of the courts of Northern Ireland was right, for the reason given, and I need say no more about it. It was also suggested before your Lordships that, if this Act did not permit a farmer whose farm was outside Northern Ireland to obtain a licence, it did not apply to him at all, and, therefore, he could sell without any restrictions. I think that the Act must be construed as imposing control over every person who within Northern Ireland sells or exposes for sale milk, whether the milk is produced within or without Northern Ireland territory. This point also fails.

The questions as to construction of the Act are thus disposed of, and there remains the important issue as to the constitutional validity of this Act. This is attacked by reference to the terms of the Government of Ireland Act, 1920, s. 4, of which the provisions relating to Northern Ireland remain in force :

A

> (1) Subject to the provisions of this Act, . . . the Parliament of Northern Ireland shall . . . have power to make laws for the peace, order and good government of . . . Northern Ireland with the following limitations, namely, that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction, or some part thereof, and (without prejudice to that general limitation) that they shall not have power to make laws in respect of the following matters in particular, namely : . . . (7) Trade with any B place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said Parliament, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud [bounties, etc.].

C It is said that the provisions of the Milk Act interfere with, indeed put an end to, the trade in milk between the farmers of Donegal and customers in Derry, and that, therefore, they offend against the express limitations imposed by sect. 4 (7). My Lords, the short answer to this is that this Milk Act is not a law " in respect of " trade, but is a law for the peace, D order, and good government of Northern Ireland " in respect of " precautions taken to secure the health of the inhabitants of Northern Ireland, by protecting them from the dangers of an unregulated supply of milk. These questions affecting limitation on the legislative powers of subordinate parliaments, or the distribution of powers between parlia- E ments in a federal system, are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian parliaments. It is well established, by *Russell* v. *R.* (1), that you are to look at the " true nature and character of the legislation . . . the pith and substance of the legislation." If, F on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorised field. The legislation must not, under the guise of dealing with one matter, in fact encroach upon the forbidden field. Nor are you to look only G at the object of the legislator. An Act may have a perfectly lawful object, *e.g.*, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, *e.g.*, by a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed " in respect H of " the forbidden subject. In the present case, any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, are that it is an Act to protect the health of the inhabitants of Northern Ireland, and, in those circumstances, though it may incidentally affect trade with county Donegal, it is not passed "in respect of" trade, and is therefore not subject to attack on that ground. I am of opinion, therefore, that this appeal should be dismissed with costs.

LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT and LORD MAUGHAM concurred. A

Appeal dismissed with costs.

Solicitors: *Radford, Frankland & Mercer*, agents for *Ralph S. Neilson*, Belfast, and *Joseph Alexander*, Londonderry (for the appellant); *Linklaters & Paines*, agents for *Chief Crown Solicitor for Northern Ireland* (for the respondent). B

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Applied. PEARSON *v.* LAMBETH B.C. [1950] 1 All E.R. 682.

COATES AND ANOTHER *v.* RAWTENSTALL BOROUGH COUNCIL. C

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **July 12, 13, 1937.**]

Negligence—Licensee—Infant—Recreation ground.

The defendant council maintained a children's recreation ground, upon which were devices for the amusement of children, and, *inter alia*, a chute or children's slide. The infant plaintiff, aged $3\frac{1}{4}$, and a boy aged 14, while sliding on the chute, collided with a chain, which had improperly been fixed across the chute by another child, the plaintiff receiving serious injuries. The chain was used, with others, to prevent the use of the chute on Sundays, and was kept padlocked to a pole at the recreation ground. It was found that the recreation ground attendant had negligently failed to secure the chain to the pole, whereby a child had been able to remove it. In an action for damages, the defendant council contended that the recreation ground was provided for children of school-age only, and that the plaintiff was a trespasser:— D E

HELD: (i) the plaintiff was accompanied by a competent guardian, and was, therefore, a licensee.

(ii) the injuries were caused by a danger which was known to the defendant council. F

(iii) the damages in the present case ought to be increased from £1,300 to £3,000.

Decision of MR. COMMISSIONER PROCTER, [1937] 1 All E.R. 333, *varied as to damages only.*

Ellis v. *Fulham Borough Council*, p. 454 *ante*, *followed.* G

[**EDITORIAL NOTE.** The recent decision in *Ellis* v. *Fulham Borough Council* (2) is here followed, it being held, as the judge held below, that the boy of 14, who was with the young child, was a sufficient guardian for him. The case has to be treated, therefore, as one of licensor and licensee, and, again, the statement as to the duty of a licensor given by LORD HAILSHAM in *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (4), at p. 365, is treated as having included the words "or ought to be known" by inadvertence. H

AS TO POSITION OF LICENSEE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 610-612, paras. 860-863; and FOR CASES, see DIGEST, Vol. 36, pp. 46-49, Nos. 288-306.

AS TO DUTY TO CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 69-71, Nos. 442-462.]

Cases referred to:

(1) *Purkis* v. *Walthamstow Borough Council* (1934), 151 L.T. 30; Digest Supp.
(2) *Ellis* v. *Fulham Borough Council*, [1937] 3 All E.R. 454; Digest Supp.
(3) *Latham* v. *Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, *223*; 82 L.J.K.B. 258; 108 L.T. 4.
(4) *Addie, R. & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.;
A 98 L.J.P.C. 119; 140 L.T. 650.
(5) *Glasgow Corpn.* v. *Taylor*, [1922] 1 A.C. 44; 36 Digest 70, *453*; 91 L.J.P.C. 49; 126 L.T. 262.
(6) *Liddle* v. *North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202.
(7) *Hardy* v. *Central London Ry. Co.*, [1920] 3 K.B. 459; 36 Digest 71, *457*;
B 89 L.J.K.B. 1187; 124 L.T. 136.
(8) *Schofield* v. *Bolton Corpn.* (1910), 26 T.L.R. 230; 36 Digest 68, *435*.
(9) *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746; 36 Digest 41, *246*; 94 L.J.K.B. 113; 132 L.T. 83.
(10) *Donovan* v. *Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; Digest Supp.; 102 L.J.K.B. 270; 148 L.T. 333.
C (11) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; 36 Digest 24, *118*; 10 L.J.Q.B. 73.

APPEAL by the Rawtenstall Borough Council and cross-appeal by the infant defendant from a decision of His Honour JUDGE PROCTER, sitting as a commissioner at the Manchester Michaelmas Assizes, dated
D Dec. 21, 1936, and reported in [1937] 1 All E.R. 333.

Wilfrid Clothier, K.C., and *Hartley Shawcross* for the appellant council.

William Gorman, K.C., and *Edgar Lustgarten* for the respondents.

Clothier, K.C.: This child was so young that he would not have been allured by the chute. He could not have got up the steps leading
E to it without help. No person could reasonably be expected to foresee that an infant licensee would put a child on his knee. [Counsel referred to *Ellis* v. *Fulham Borough Council* (2), *Glasgow Corporation* v. *Taylor* (5), and *Liddle* v. *North Riding of Yorkshire County Council* (6).] Children of tender years should not be allowed in this place without a guardian;
F this child was a trespasser. If a child strays from his nurse, he becomes a trespasser. If a child is too young to understand danger, the licence ought not to be held to extend to him unless there is a competent guardian: *Latham* v. *Johnson (R.) & Nephew, Ltd.* (3). The child cannot be in a better position than is his guardian: *Hardy* v. *Central London*
G *Ry. Co.* (7). The child is still a trespasser, even if the guardian fails to appreciate the danger to the child. If the child is a licensee subject to a condition, and that condition is not fulfilled, then he becomes a trespasser: *Schofield* v. *Bolton Corpn.* (8). The knowledge of the guardian must be imputed to the child. But, assuming that this child was a
H licensee, the defendant council's duty to him is laid down in *Sutcliffe* v. *Clients Investment Co.* (9). The defendant council was under no duty to provide an attendant; it cannot be liable because it did provide one who failed to notice something that it was not bound to notice. There is no case where the owner of land has been held responsible for injury caused through an innocuous article such as a chain—which is not

inherently dangerous. [Counsel referred to *Donovan* v. *Union Cartage Co., Ltd.* (10).] In *Lynch* v. *Nurdin* (11) there was the combination of a horse and a cart, which together could be dangerous. There is no case where the owner of land has been held responsible merely because he had put it into the hands of a third party to create a trap.

Gorman, K.C., was not called on by the court as regards the issue of liability.

GREER, L.J.: This is an appeal with reference to, first of all, the question of liability for the accident which happened to this unfortunate child, and, secondly, by cross-appeal, with reference to the estimate made by the commissioner as to the damages. The facts of the case as found by the judge are quite clear.

With regard to the question of liability, I have come to the conclusion that the plaintiffs established a case of liability, within the law as it now stands, having regard to the decision in *Purkis* v. *Walthamstow Borough Council* (1) and that in the recent case of *Ellis* v. *Fulham Borough Council* (2). In stating what I conceived to be the law with regard to licensees in the case of *Purkis* v. *Walthamstow Borough Council* (1), I used these words, which I think accord with the decisions on the question of liability to licensees:

> On the other hand, I think, on the admitted facts of the case, he was a licensee, and the only duty on the defendants was their duty to him as such licensee; that is to say, they would be liable if there were a danger which was known to them and was not known to the boy, and which the boy could not be expected to avoid.

Now we have listened to an argument by Mr. Clothier, to the effect that this child was not a licensee but a trespasser, and, accordingly, the defendant council could be liable only if it intentionally laid a trap for him. It did not intentionally lay a trap for him, but the question as to whether he was a licensee or a trespasser depends upon the facts which were proved in this case, namely, that he was accompanied by a competent guardian; and, in those circumstances, the observations to which our attention has been called in *Latham* v. *Johnson (R.) & Nephew, Ltd.* (3) have no application, in my judgment, to this case, because FARWELL, L.J., in giving judgment, referred to the case as subject to the exception of his being accompanied by a proper guardian.

The judge came to the conclusion that the boy of fourteen, who was with him and took him on to the slide, was an intelligent boy, quite capable of appreciating the risks that would be run by taking this child on his knees at the top of the slide and letting him slide down. There was no evidence and no plea which justified an allegation that that in itself, for a competent guardian to take a boy on his knee and slide down in that position, was taking an unnecessary risk, and that this accident happened in consequence of taking that unnecessary risk. In those circumstances, we have the case of a servant of the council, whose duty it was to visit the neighbourhood of the chute in this ground, at 8 p.m.

and 10 p.m. every evening, to see whether everything was all right; and the judge came to the conclusion that everything was not all right: that there was a danger such as was appreciated by the attendant, from the fact that there was, in the neighbourhood of this chute, a chain, which mischievous or unauthorised boys would be likely to use for the purpose of imitating what he had done from time to time at week-ends, namely, place a chain around the chute. That is what happened. There was evidence which satisfied the judge that one of the boys, who had no right to be influenced by what he had seen, created this danger by putting the chain near the bottom of the chute, round the chute, that that was not observed by the youth who was in charge of the infant plaintiff, and that, in the result, there would have been no accident if the chain had not been there. A very grievous accident happened to the boy in consequence of the presence of that chain. The accident happened through the boy's leg becoming involved in the chain, and serious injuries were sustained in consequence.

I am satisfied, using the words in *Purkis's* case (1), that the danger created by one of these children doing what he did was a danger which was known to the attendant; not merely a danger which he ought to have known, but a danger which he did, in fact, know. Looking at the decision of the Court of Appeal in *Ellis* v. *Fulham Borough Council* (2), I have come to the conclusion that this case is indistinguishable from the *ratio decidendi* of *Ellis* v. *Fulham Borough Council* (2). In that case, I came to the conclusion that it was unnecessary to decide whether the boy, who met with the accident by slipping on a piece of glass, was or was not an invitee, and I treated him as a licensee; but that would not relieve the council from liability, if it knew of a danger which licensees were liable to meet with and did not take adequate precautions, by warning or otherwise, to prevent that danger from happening. It is clear that in that case the superintendent did not know that there was a piece of glass there, but what he did know was that there was a grave danger to the licensed boys that they might meet with the piece of glass, and that the council had not done anything whatever to protect the licensees from that danger. I think that that applies absolutely to the present case. There was a danger which, according to the judge, was known to the attendant, and no steps had been taken by him to remove the dangerous articles, nor was there any notice or warning that the chain was not to be used for the purpose of being put round the chute. In those circumstances, I find myself unable to distinguish this case from the decision in *Ellis* v. *Fulham Borough Council* (2); and, that being so, it is sufficient to dispose of the question of liability. An argument was pressed upon us that we ought to consider that this boy was a trespasser. I find in the evidence nothing whatever to indicate that that would be a proper conclusion to be drawn from the evidence given in the case. The entrance to the playground was left open; it was left open with the intention that the children should go there, either with or without their proper guardians; it was certainly left open in order that they might come there accompanied by a proper guardian; and the judge has held that this child was accompanied by an intelligent and proper guardian. Therefore, it seems to me that the result of this case must be that we uphold the judge's finding as to the liability of the defendant council. Unfortunately, he was led, by some statement A which was made by Lord Hailsham, L.C., in *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck* (4), to state once or twice a principle which was inapplicable to this case, because it seems to allege that the case of the licensee depends upon the same basis as does the case of an invitee. That was a slip on the part of Lord Hailsham, L.C., and one was not surprised that the B commissioner should have made the same slip as Lord Hailsham, L.C., made, but, be that as it may, it does not affect his conclusion of fact with regard to the question as to whether there was or was not, in fact, a danger, known to the defendant council's representative, against which he failed to take any precautions, so far as I know. For these reasons, C I think the judgment of the commissioner should be upheld.

There is a cross-appeal with reference to damages. As regards that, we have to deal with the findings of the commissioner. One of his findings was that this poor unfortunate child was lamed for life, and that he had infantile paralysis, as one result from the accident from which D he suffered. I have come to the conclusion that, in the circumstances, it would be right to say that the judge, though he took into his consideration all the factors he was entitled and bound to consider, still came to an erroneous conclusion as to what the damages ought to be, and we have agreed amongst ourselves that the appropriate figure E for the damages that ought to have been given (though it is a very difficult sum for us to estimate, and one does not welcome, too frequently, the duty on this court of reversing a judge on a question of damages) should have been £3,000, in lieu of the amount of £1,300 which was awarded to the child. The judgment will remain as it is, so far as the F amount payable to his father is concerned.

Slesser, L.J.: In this case, the judge has come to the conclusion that the plaintiff, who was an infant of tender years, was a licensee. I am of the same opinion. Mr. Clothier has argued that this child was G a trespasser, and the right view, as I look at the facts of the case, is that, if the child were a trespasser, then the obligation is a little different, being only not to do a wilful act in reckless disregard of humanity towards him. That is a duty not to injure him wilfully, to use the language of Hamilton, L.J., in *Latham* v. *Johnson* (*R.*) *& Nephew, Ltd.* (3). There H is no evidence here that there was such an intentional design to injure the infant plaintiff, but, in my view, it is not possible in this case to hold that the child was a trespasser. I think it is equally not possible, having regard more particularly to the decision of the majority of this court in the case of *Ellis* v. *Fulham Borough Council* (2), to hold that

this child was an invitee. I think the proper view is that this child was there with the leave and licence of the defendant council. But what is said by Mr. Clothier is this: he says that, while it may be true, and he does not dispute it, that the child had licence generally to enter upon this field, to which there were no gates and no restrictions, yet,
A so far as regards the particular instrument, the chute which was erected on the field, this child was too young to know and understand the danger, and the licence ought not to be held to extend to him to mount that chute and descend on the inclined way. Now, I find a passage in *Latham* v. *Johnson (R.) & Nephew, Ltd.* (3), to which my Lord has
B referred, where FARWELL, L.J., says this, at p. 407:

> If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian.

Now, in this case, the child was accompanied by a competent guardian: he was in the care, as is stated in the judge's judgment, of his cousin,
C Rex Booth, a very intelligent boy of fourteen years of age. I see no reason to form the conclusion that this very intelligent boy of fourteen was not, for the purpose of mounting and descending this chute, a competent guardian. For this purpose, the chute must be assumed to have been in normal condition, and not in that state in which it was, a danger
D and a trap, with a chain placed on its lower end. There is no evidence in this case that there was anything dangerous in the act of the boy, Rex Booth, in mounting these stairs with the infant plaintiff, or in descending the inclined plane; no plea that there was any negligence on the part of Rex Booth; and no suggestion was ever made that the
E cause of this accident was not the chain, but the negligence of Rex Booth in taking the child up this chute. Indeed, as GREER, L.J., pointed out during the argument of Mr. Clothier, the only objection in the nature of a plea of contributory negligence is directed, in the defence, against a third party, and yet the negligence is stated to be the wrong placing
F of the chain on the chute. Therefore, we must assume that this boy, Booth, according to the finding of the judge, was a competent guardian: there is no evidence to establish the contrary; unless it is to be said that he was incompetent in not anticipating that someone else would have put a chain across the chute. It is impossible, even applying the
G language of FARWELL, L.J., to its full extent, to show that there was any evidence here that this infant plaintiff was not accompanied by a competent guardian. Therefore, being a licensee, the duty to him has been pointed out. Though some confusion may have arisen through the language of LORD HAILSHAM, L.C., in *Addie (R.) & Sons (Collieries)* v.
H *Dumbreck* (4), the duty is quite clear. As was pointed out by GREER, L.J., in *Purkis* v. *Walthamstow Borough Council* (1), the liability could arise only if there were a danger known to it, that is, to the defendant council, and not known to the plaintiff, which he could not be expected to avoid.

Now, the evidence here goes to show that this danger was known to the council through its agent, the attendant. He is asked, in his evidence, whether he was not surprised that boys, seeing how he fastened it (that is, the chain to the chute) in the way he did, at week-ends, to prevent people using the chute in that way, would do the same thing ? His answer was : " Well, no." On that, the judge found that the attendant said that he knew that, if he left chains lying about, boys would play with them, and he was not surprised that boys should fasten the chain round the chute, after seeing him do it at week-ends. Now, in addition to that finding of the judge, that this man failed to make these chains secure, he does not believe his evidence that he padlocked the chain. I have, therefore : first, knowledge on the part of the defendant council that these chains were likely to be put to the dangerous use to which they were put by boys ; evidence that he left the chain lying about, and did not properly secure it from the boys ; and, finally, evidence that the particular boys did put the chain round the chute. Those were all the ingredients of knowledge on the part of the attendant, who is the agent of the council, to keep the chain safe from interference. In those circumstances, I think the result is that the defendant council failed to fulfil its duty to the infant plaintiff as licensee.

With regard to damages, I have nothing to add.

SCOTT, L.J. : I agree with the judgments that have been delivered, and have nothing to add.

Appeal dismissed, with costs.

Solicitors : *Oddie & Roebuck*, Blackburn (for the appellant council) ; *Procter & Son*, Burnley (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* POOLE CORPORATION.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, JJ.), **July 9, 1937.**]

Open Spaces—Conveyance—Restrictive covenant—Private Act—Building on open space—Caretaker's lodge—Calculation of area withdrawn from public purposes—Open Spaces Act, 1887 (c. 32), *s.* 7—*Open Spaces Act*, 1906 (*c.* 25), *ss.* 10, 20—*Poole Corporation Act*, 1919 (*c.* xliv), *ss.* 39, 40, 41, 88.

A local authority acquired land in fee simple to be used as an open space and covenanted to preserve the land as an open space and take all necessary steps to maintain the land as such. By a private Act the corporation was permitted to erect on the land so conveyed bathing and other huts and similar structures, tents, booths, and stalls and construct and maintain bathing pools, baths, shelters, pavilions and conveniences ; but by a later section it was not to exercise these powers except within an area not exceeding 4 acres, and no erection was to be more than 14 ft. in height. The corporation executed extensive works upon the land including a promenade, lavatories, pavilion, café, car park, putting green, and enclosed a portion of the land and laid it out as a garden. The extent of all these works was in fact more than 4 acres. The corporation then desired to build a bungalow for the occupation of a resident caretaker. The building did not infringe any of the restrictions other than the extent of the land upon which structures might be placed under the Act. It was contended, on the one hand that the corporation had by these acts withdrawn more than 4 acres from public use and, on the other hand, that as the land actually covered with buildings was approximately ½ acre, the corporation, if acting under the powers given by the private Act, was acting well within its powers; but it was contended that the bungalow was not being erected under or in pursuance of any power given by the private Act. The covenantee, party to the conveyance of the land, raised no objection to the proposed use, and it was found as a fact that the corporation was acting honestly in the best interests of the public in requiring a bungalow for a resident caretaker:—

HELD: (i) the conveyance in fee simple being a deed *inter partes*, the covenant therein could only be enforced by the covenantee, and as the covenantee was not a party to the action, no question on the covenant could arise.

(ii) the corporation had power under the Open Spaces Act, 1906, to erect a caretaker's house if it thought it necessary for the proper maintenance of the open space, provided that not more than $\frac{1}{20}$ of the open space was covered with buildings, which would not be the case here.

(iii) as the powers given by the private Act were in addition to and not in derogation of those given by the public Acts, and there was no express prohibition in the private Act of what was intended to be done, the proposed erection was in order.

Decision of FARWELL, J., [1936] 3 All E.R. 852, *affirmed on different grounds.*

[**EDITORIAL NOTE.** This case upon the withdrawal of land given for use as an open space from public use by the erection of buildings thereon proceeded in the court below upon the assumption that the matter was governed by the Public Health Acts, but upon consideration the Court of Appeal have held that the relevant statutes are the Open Spaces Acts. Apart from this different approach to the subject the result reached in the court below is affirmed, and subject to the buildings being necessary for the proper maintenance of the open space one twentieth of the area may be built upon.

AS TO BUILDINGS ON OPEN SPACES, see HALSBURY, Hailsham Edn., Vol. 24, p. 123, 124, para. 214; and FOR CASES, see DIGEST, Vol. 36, pp. 251, 252, Nos. 33-42.]

APPEAL from a decision of FARWELL, J., dated Nov. 26, 1936, and reported in [1936] 3 All E.R. 852. The facts are set out in the judgment of SIR WILFRID GREENE, M.R.

Roland Burrows, K.C., and *B. B. Stenham* for the appellant.

H. B. Vaisey, K.C., and *C. R. R. Romer, K.C.*, for the respondent corporation.

SIR WILFRID GREENE, M.R.: This is an appeal by the plaintiff in the action, who is the Attorney-General, suing at the relation of a number of individuals interested, against a judgment of FARWELL, J., who dismissed the action with costs. The object of the action was to obtain an injunction restraining the defendant corporation from erecting, on a piece of land known as Sandbanks, near the entrance to Poole Harbour, a certain building which it was proposing to erect as a residence for a permanent caretaker of that piece of land known as Sandbanks. The history of the matter is this: That piece of land known as Sandbanks was acquired by the trustees of Poole Harbour, acting under certain statutory powers which enabled them, for the purposes of the works authorised by an order which was confirmed in the usual way by an Act of Parliament, to acquire it, and the order contained the usual power of sale of any portion not required for the purposes of the authorised works. The commissioners of Poole Harbour succeeded to the rights of A the trustees, and they in their turn, on Apr. 28, 1905, sold to the Poole Corporation, which is the defendant in this action, a part of Sandbanks containing 12 acres, 2 roods, 17 perches. That conveyance was expressed to be made in consideration of certain covenants on the part of the corporation. It was not a conveyance on sale, no money passed, and B the only consideration moving from the corporation consisted of certain covenants. The land was expressed to be conveyed to the corporation to hold:

> in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use. C If any part of the said land shall not be required for the purpose aforesaid the same may by the direction or with the sanction of the Local Government Board be used for any other purpose for which the council are or shall hereafter be authorised by statute to acquire land except that no part of the said land shall be used for any purpose or in any manner which may be a nuisance or annoyance to the commissioners or their assigns as owner or owners of any property adjoining or near thereto without their or his consent in writing. D

Then there is a covenant by the corporation with the commissioner with regard to dedicating a road, and also this covenant:

> That the council will at all times hereafter subject as aforesaid preserve the land hereby conveyed as an open space or as a pleasure or recreation ground for the use of the public and will take all necessary steps to maintain the land as such. E

Then there is a covenant to reserve a portion of the land for a bathing station, and to erect a sanitary convenience, and beyond that there is nothing of any importance in the document. Now, the first thing to notice about that is that this is a document *inter partes*, in respect of which the covenantees would be the proper persons to sue. It is faintly F suggested in this case that, in the circumstances, with which I shall presently deal, the Attorney-General is in some way entitled to enforce the provisions of this deed against the council. I am unable to see how that comes about, and, speaking for myself, with all respect to the judge (who appears, but without giving any reason, to have formed a different G view), I am unable to see, and no argument has been put forward which suggests to me an acceptable reason, why anybody but the covenantees, namely, the commissioners, has got power to enforce the covenants in this document. Be that as it may, I can get that document out of the way by saying that, in any event, I am in entire agreement with the H construction which the judge put upon it. He put upon it a construction which would enable the particular building with which we have to deal here to be placed upon the land as being a thing reasonably ancillary to the use of the land for the purposes stated, and, if the document, contrary to my view, be of any relevance in this case, I agree with the judge that there is nothing in it which would assist the plaintiff or enable the harbour commissioners, the covenantees, to complain of what is being done.

I now come to matters which are of more importance in this case: at the date when the conveyance of Apr. 28, 1905, was executed, there A was in force the Open Spaces Act, 1887. That Act contained in sect. 7 power to any corporation (other than certain corporations mentioned) which has power to sell land (which would include the harbour commissioners, who, it will be remembered, had power to sell surplus lands) for valuable or nominal consideration or by way of gift, to convey land B to any urban or rural authority:

> for the purpose of the same being preserved as an open space for the enjoyment of the public, and may so convey the same with or without conditions, and the urban or rural authority may accept such open space, and, if conditions are imposed, subject to such conditions, and such open space shall be deemed to be an open space within the meaning of the principal Acts and this Act.

C I should say here that this Act followed upon certain other Acts, notably the Metropolitan Open Spaces Act, 1881, which applied to the metropolis only, and this Act extended to the whole of the country the powers, in effect, which had previously been confined to the metropolis. The effect of that section, of course, was to give to the harbour commissioners a D power which they had not got before, namely, to give away their land for the purposes specified, and it also empowered the corporation to accept it.

I should also refer to the definition, which is imported into the Act of 1887 from sect. 1 of the Act of 1881, of an open space:

E

> "Open space" means any land (whether inclosed or uninclosed) which is not built on, and which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied; but shall not include any inclosed land which has not a public road or footpath completely round the same.

There is one other important provision in that Act which I shall read in a F moment, but before I come to it I should say this. It is said by Mr. Roland Burrows in this case that the relevant Acts of Parliament are the Open Spaces Acts, those being the only Acts under which the grantors, the Poole Harbour Commissioners, were entitled to grant, and the grantee, the corporation, was entitled to accept, the land on the conditions G specified and for the purposes specified. The judge took the view that the corporation at any rate had power under the relevant sections of the Public Health Acts to accept the property for the purposes specified and upon the conditions specified. It would appear that before FARWELL, J., the Open Spaces Acts were not seriously discussed, and, accordingly, H he did not have the advantage of having the relevant provisions of those Acts called to his attention in the way in which they have been called to our attention here. It appears to me that the Open Spaces Acts are the relevant Acts to look at in this case, being the Acts under which the powers to grant and to accept, which were exercised in this case, seem to me to have been given. At any rate, that is the way in which the case has been argued before this court, and I propose to confine myself to that argument. I should, perhaps, add this, that, if the sections of the Public Health Act to which the judge referred as containing the powers and obligations of the council in respect of this land were the relevant ones, I should have formed the same opinion as that which he formed, namely, that, under those provisions, the corporation of Poole has got power to do what it is proposing to do. I shall, however, now say no more about the Public Health Acts, but confine myself to an examination of the argument on the Open Spaces Acts.

Now, the other section to which I said I would refer is sect. 5 of the Act of 1881, which describes the duties and powers of a local authority acquiring land as an open space. That section is imported, like the other section, into the Act of 1887, and it provides that the authority may take and hold any open space, and then it says this:

> Any estate or interest in or control over any open space . . . acquired . . . under the provisions of this Act, shall be held and administered by such board or vestry [now extended to other authorities] in trust to allow, and with a view to, the enjoyment by the public of such open space . . . in an open condition, free from buildings and under proper control and regulation, and for no other purpose . . . and the board or vestry shall maintain and keep the same in a good and decent state, and may inclose or keep the same inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, seat, and otherwise improve the same, and do all such works and things, and employ such officers and servants, as may be requisite for the purposes aforesaid, or any of them.

Now, if what I have said is right, the Poole Corporation, when it accepted this conveyance, became subject to the statutory duties, and entitled to exercise the statutory powers, laid down in that section of the Act of 1881, and the main question turns on the true construction and effect of that section, or, rather, the section which has now replaced it in the consolidating and amending Act. That Act is the Open Spaces Act, 1906, and it consolidates and amends the existing law, but the only matters to which I need call attention in it are two: First of all, the definition of " open space " is altered, and now reads as follows:

> In this Act, unless the context otherwise requires, the expression " open space " means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied.

Accordingly, a space may now be an open space within the meaning of the Act provided that not more than $\frac{1}{20}$ part of it is covered with buildings, and in spite of the existence of such buildings. That is the first alteration. The other alteration of importance is this, that, in sect. 10 (which is the section corresponding to that part of sect. 5 of the Act of 1881 which lays down the duties and gives the powers of the acquiring authority), the obligation to maintain in an open condition, free from buildings, disappeared, and the duty now reads as follows:

> (*a*) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and (*b*) maintain and keep the open space or burial ground in a good and decent state.

Then follow the powers to enclose, improve, drain, and so forth, "and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them," as in the Act of 1881.

The actual condition of the piece of land with which we are concerned is this, that a portion of Sandbanks has been laid out as a recreation or sports ground, with a bathing-establishment, and so forth, and a number of bathing-huts, a bathing-pavilion, grass-paths, flower-beds, trees and shrubs, a café, some asphalt walks, a car-park, and a putting-green. The portion of the total area at present actually built upon, we were told, is .542 of an acre. That .542 of an acre is about $\frac{1}{22}$ of the whole, and that figure, as I understand it, would include the built-upon portion if and when this new building is built. Accordingly, if this new building is constructed, taking the land as a whole as it was acquired, less than $\frac{1}{20}$ will be covered with buildings, and it will accordingly remain an open space within the definition clause, so far as that clause carries us.

Before I come to a closer examination of the section, I should complete the history by referring to another matter. There was passed in 1919 a local Act of Parliament, the Poole Corporation Act, 1919, which empowered the corporation to effect certain improvements, and to purchase certain foreshore and certain other land. In sect. 39 it was empowered to set apart as pleasure grounds those lands so acquired, and to erect and maintain thereon, and upon the lands at Sandbanks known as the Sandbanks recreation ground, being the land which the corporation acquired in 1905, "bathing and other huts and similar structures, tents, booths and stalls." Then there is a power to let them, and then, in sect. 40, there is a power to erect on the new lands that it was going to purchase, and upon the Sandbanks recreation ground, "bathing-pools, bathing-shelters, pavilions and conveniences," and to take rent. Then comes sect. 41. For the protection of the neighbouring owners on the promontory on which this land is situate, there is a provision that the corporation is not to exercise upon the Sandbanks recreation ground, except within an area of four acres, the powers conferred by sects. 39, 40. I may say that many of the things described put upon the land were put there in exercise of the powers conferred by this Act, and also that the land on which they have been placed does not exceed the four acres, which is the limit permitted under this protecting clause. Then there is another limitation, that no erection is to be placed within 150 ft. of the western boundary, or within 180 ft. of the eastern boundary. That has been complied with. Then there is a provision that:

> No erection placed under the powers of this Act upon the Sandbanks recreation ground shall exceed in height 14 ft.

That is not a section which concerns the present building, because the present building is not being erected under the powers of that private

Act of 1919. Then there is sect. 88, which is a saving section. It says this :

> All powers rights and remedies given to the corporation by this Act shall (except where otherwise expressly provided) be deemed to be in addition to and not in derogation of any other powers rights or remedies conferred on them or on any committee appointed by them by Act of Parliament charter law or custom.

Then it empowers the corporation to exercise such powers as if the Act had not been passed.

Now, turning back to the section round which the controversy really turns, namely, the Open Spaces Act, 1906, s. 10, the argument which is presented on behalf of the appellant is to this effect : It is said that the section imposes upon a local authority which has acquired an open space an obligation to keep that space as an open space, in this sense, that nothing must be done with regard to any portion of it which would prevent the public from freely having access to such portion, because it is said that, once you prevent the public setting foot on a part of such a space, it is no longer open : it is the opposite of open : it is closed. It is said that that is the governing object and purpose of the section, and the powers with regard to maintenance, the powers to do works and things necessary "for the purposes aforesaid," must be read subject to that over-riding obligation to keep the land open. It seems to me that there is more than one answer to that argument. First of all, it is to be observed that the obligation is an obligation to :

> hold and administer the open space . . . in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act.

Now, "an open space within the meaning of this Act" still remains an open space, notwithstanding that $\frac{1}{20}$ of it may be covered with buildings, and the reason why that definition of "open space" was put there seems the pretty obvious one that, as the law stood before, the definition, coupled with the prohibition, in sect. 5 of the Act of 1881, of the erection of buildings, would have made it impossible to erect upon any open space any building which might be necessary or desirable for properly looking after an open space or adding in some way to its amenities as such. It seems to me, therefore, that the erection of a building—not any sort of building, but a building which is connected with and ancillary to the enjoyment of the land as an open space—does not contravene the provisions of sect. 10, at any rate in a case where the result is still to leave $\frac{19}{20}$ at least open and uncovered by buildings. I myself attach considerable importance to the circumstance that the legislature, when it passed the Act of 1906, deliberately omitted the words "in an open condition free from buildings." By so doing, it appears to me to cut the ground from under the argument presented to us, that the obligation to maintain as an open space must be construed as an obligation not to put upon it anything which would prevent the public having access to every portion of the open space.

Quite apart from those considerations, there seems to me to be another answer to the argument, and it is this : In an Act of Parliament framed for the purposes for which this Act is framed, and having regard to the language of sect. 10 read as a whole, it appears to me that the language used must include a power to do anything which is properly and reasonably necessary to enable the public to enjoy the land as an open space, and, if the doing of something is reasonably necessary or reasonably A desirable for that purpose, it appears to me that the power to hold the land with a view to the enjoyment by the public as an open space would include the power to do that thing. But, however that may be, the matter, I think, is put beyond any possibility of doubt by the express language of the section, because, having imposed upon the corporation B the duty of keeping the open space under proper control and regulation, and given power to plan, and so forth, and improve it, express power was given to:

> do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

C That, in my judgment, gives power to erect a building, provided its erection is a thing which is requisite for any of the purposes, among others the maintaining of the land as an open space for the enjoyment of the public and keeping it under proper control and regulation. The section must be read reasonably as a whole, and, on its true construc- D tion, it appears to me that the language is really beyond question in that respect. The contrary view would lead to the most extraordinary results. It is said in this case that, if it is necessary to have a caretaker on the premises, he can live off the premises and patrol the place at night, if his presence is there required. I put in argument this case. E I said: Suppose that it was necessary, or it was thought necessary, for the men employed on the place to have a mess-room, in which during the day they could have their meals; the erection of such a building, which would be private to the men, would undoubtedly remove from access by the public the piece of ground which it occupied. It seems F to me impossible to argue that a thing of that kind, assuming that it is requisite—and that is a question of fact in each case—would not be a work "requisite for the purposes aforesaid," and to read the obligation to maintain as an open space as excluding the power to erect a thing of that sort appears to me to be putting upon the section a hopelessly G strained construction.

That brings me to the question of fact: Is the building here "requisite for the purposes aforesaid," for the proper control and regulation, and so forth? Upon that, there is a certain amount of evidence, which I do not propose to deal with in detail, but the evidence leaves no doubt H in my mind that the proper conclusion of fact is that the erection of this building, in the circumstances, and having regard to all the facts of the case, is "requisite for the purposes aforesaid," or some of them. Putting the matter quite concisely, it is found necessary—or, at any rate, if not necessary (because nothing is really necessary), necessary from the practical point of view—to have upon the premises permanently by day and by night a responsible supervisor, to see that nothing is done which ought not to be done. Various things may happen during the night; fires may break out, or persons unauthorised may find their way in and conduct themselves in ways in which they should not, whether by injuring property or doing other things, and the corporation took the view and, in the circumstances, reasonably and properly took the view, that the proper way of protecting this place from things of that sort was to have there a permanent caretaker, to see that everything was done properly. In those circumstances, it appears to me that the erection of this house for those purposes is a proper exercise of the powers of the corporation. If it were to build a house for some other purpose, to let it to a visitor, or something of that kind, of course it would be right outside the section, but, on the facts of this case, it appears to me quite clear that the matter comes within the section, and that the corporation is acting within its statutory powers.

The result is (although on grounds different from those adopted by the judge, who had not had his attention directed to the argument which we have had presented to us here) that I am of opinion that this appeal fails, and should be dismissed with costs.

Romer, L.J.: I agree. It is, I think, quite plain that no one but the covenantees who were parties to the deed of Apr. 28, 1905, can enforce the covenants that were then entered into by the Poole Corporation. I am certain that Farwell, J., did not intend to decide anything to the contrary. He considered the question, no doubt, whether what the Poole Corporation is now doing was a breach of the covenants, and, having come to the conclusion that they were not acts in breach of those covenants he said this:

> If that which the corporation is proposing to do, by erecting this house for the caretaker, is a breach of the covenant in the conveyance, then the corporation may be prevented from proceeding with that erection.

I think that, when he used those words, he was momentarily forgetting that the plaintiff in the action was not a covenantee in the deed. It being quite unnecessary, therefore, to consider the covenants contained in that deed, it is plain that, if the plaintiff is to succeed in this action, it must be because he can show that what the defendant corporation is doing is in breach of its statutory obligations imposed upon it by the Open Spaces Act, 1906, s. 10. That section provides, applying it to the present case, that the Poole Corporation shall (*a*) hold and administer the Sandbanks recreation ground:

> in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and (*b*) maintain and keep the open space or burial ground in a good and decent state.

The section ends with these words:

> and may . . . do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

Now, the way in which a section of the public will use an open space, if wholly uncontrolled, is painfully well known to each of us. If that section were allowed to roam over Sandbanks at all hours of the day and night uncontrolled, I am quite sure that, if other members of the public went there at all, it certainly could not be said of them, within the words of this section, that they were enjoying the place as an open space. Further, it is perfectly plain that it would not be possible to say of Sandbanks that it was kept in a good and decent state. The corporation, realising that, has come to the conclusion that there should at all times be upon Sandbanks somebody who can exercise the necessary control over the public, and it is plain that, if a person is to be there at all times to exercise that control, he must be provided with somewhere where he can live. The corporation accordingly is proposing to erect a small bungalow, on a very small portion of this land, and, in my opinion, is perfectly entitled so to do. I will add only this : Of course, in exercising the power conferred by the last words of sect. 10, the corporation must do so consistently with the preservation of Sandbanks as an open space within the meaning of the Act, that is to say, must not cover more than $\frac{1}{20}$ of the area of Sandbanks with buildings.

I agree that this appeal fails, and should be dismissed with costs.

MACKINNON, L.J. : I agree.

Appeal dismissed, with costs.

Solicitors : *Arthur S. Joseph & Co.* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *Wilson Kenyon*, Town Clerk, Poole (for the respondent corporation).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

HAGEN *v.* NATIONAL PROVINCIAL BANK, LTD.

[COURT OF APPEAL (Greer, Slesser, and Scott, L.JJ.), **July 19, 1937.**]

Practice—City of London special jury—Non-commercial cause—Application to master.

The defendants in an action for slander applied to the master for a City of London special jury. The master refused the application, considering that he was bound by the decision in *Barnes* v. *Lawson* (1), and the rule of practice founded thereon, to the effect that, in cases to be heard before a City of London jury, interlocutory applications are made to the judge in charge of the commercial list and not to a master. The defendants then applied to the judge in charge of the commercial list to have the case transferred to the commercial list and tried by a City of London special jury. The judge refused on the ground that the case was not a commercial case. The defendants appealed to the Court of Appeal :—

HELD : (i) there is nothing to prevent a master or a judge from ordering that a non-commercial case be tried by a City of London special jury.

(ii) the practice of putting a non-commercial cause into the commercial list is to be deprecated.

(iii) in view of the practice which had arisen, the master had not been able to exercise an unfettered discretion, and in the circumstances the time for appealing from his decision ought to be extended.

Barnes v. *Lawson* (1911), 16 Com. Cas. 74, *overruled.*

[**EDITORIAL NOTE.** Under the decision of Scrutton, J., in *Barnes* v. *Lawson* (1) the practice in non-commercial cases has been for applications for a special jury of the City of London to be made to the commercial judge. This practice is here tested in the Court of Appeal for the first time, and is disapproved. Such an application must be made to the master in the ordinary way and the order to be made thereunder is in his discretion.

As to City of London Special Juries, see HALSBURY, Hailsham Edn., Vol. 19, pp. 318-320, paras. 661-667; and for Cases, see DIGEST, Vol. 30, p. 261, Nos. 643, 644. For the Practice, see YEARLY SUPREME COURT PRACTICE, 1937, p. 582.]

Case referred to:

(1) *Barnes* v. *Lawson* (1911), 16 Com. Cas. 74; 30 Digest 261, *644*.

Appeal from a decision of Porter, J., dated June 11, 1937.

P. B. Morle for the appellant company.

H. J. Wallington, K.C., and *Cyril Salmon* for the respondent.

Morle: Since the decision in *Barnes* v. *Lawson* (1) in 1911 it has been considered that where there is a non-commercial cause to be tried by a City of London jury, interlocutory applications should be made to the judge in charge of the commercial list and not to a master. There is nothing in the Rules of the Supreme Court to prevent the master making the order sought, but he considered he was bound by *Barnes* v. *Lawson* (1).

Wallington, K.C.: If the appellant company wished to raise this point, the proper method was to appeal against the master's decision. They did not do that.

Morle in reply.

Greer, L.J.: In this case the appellant company appeals against an interlocutory order made by the judge who was taking the commercial list, Porter, J., who felt that having regard to what had taken place he was not bound to order the transfer of the case to the commercial list merely for the purpose of providing a special jury of the City of London, the case being, in his judgment, not a commercial case at all, as it obviously was not, being an action for damages for slander. In those circumstances, the question is: What ought we to do? I am satisfied that there is nothing in the Judicature Acts or in the rules made thereunder, which prohibits the master, or the judge on appeal from him, from making an order that the venue shall be London, and the action shall be tried by a City of London special jury. The master probably thought that, having regard to the practice which has arisen, he ought not to exercise the powers which we think he had, and that he ought to follow the practice which was laid down by Scrutton, J., in *Barnes* v. *Lawson* (1), to the effect that in all actions where notice was given for a London special jury, there ought to be a formal application

for transfer to the commercial list, after which an interlocutory application should be made to the judge in charge of the list. In my judgment there was nothing in the Judicature Act and nothing in the rules made under the Judicature Act which justified the decision of SCRUTTON, J., after consultation with LORD ALVERSTONE in that particular case, be-
A cause under the rules the judge sitting to take the commercial list has special rules of practice applicable to him which are not applicable in an ordinary case; that is to say, all interlocutory applications have to be made to the judge himself instead of going through the usual practice of applying first to a master, on appeal to a judge, and then, if the
B judge does not satisfy the party against whom the order is made, an appeal to this court. In those circumstances, the master, who could not have been ignorant of the practice because he is the author of one of the books of practice, made an order for a jury of the county of Middlesex, and that order may be determined on appeal to the judge in chambers
C to have been the proper order to make in this case. The only difficulty is that having regard to the doubt created by reason of the practice which has grown up since *Barnes* v. *Lawson* (1), the master may have felt that he ought not to make the order which he was asked to make, for a London special jury. In these circumstances we think the proper order to make
D is that the time be extended for 7 days from to-day for the appellant to appeal from the master's order to the judge, with the intimation that this court considers that the judge, notwithstanding the practice, has power to make the order for the venue to be London and for the trial to be by a London special jury; that is notwithstanding the practice
E which has grown up and notwithstanding the fact that an application has not been made in accordance with that practice. In the result, we think that, so far as the costs of this appeal are concerned, they ought to be costs in the cause.

F SLESSER, L.J.: I agree.

SCOTT, L.J.: I agree, but desire to add one or two words. As I understand it, before the master the defendant company recognised the force of what appears in the ANNUAL PRACTICE and the YEARLY
G SUPREME COURT PRACTICE, as to cases in which parties desire trial by a London special jury, but which are not commercial causes. That practice, as appearing in the practice books, is that a formal application should be made to the judge in charge of the commercial list to call the cause a commercial cause and transfer it to the commercial list with the special
H object of ordering trial with a City of London special jury. Consequently, in my view, the master never exercised his discretion on the question as to whether or not the action was one which was suitable for trial by a London special jury. PORTER, J., having considered that practice, evidently came to the conclusion that it was not founded on anything in the Judicature Acts or the rules, or upon the practice in relation

to the constitution of the commercial court, and that it would be wrong to put a case into the commercial list which was not a commercial cause at all, and consequently rejected this application. In doing so, I think he was right. In the circumstances I entirely agree that the proper course is that the matter should be considered *de novo* by the proper tribunal under the rules, and the proper tribunal under the rules in the circumstances, I think, is the judge on appeal from Master Ball, who ordered trial by a Middlesex special jury, ordering it, not in the exercise of a discretion—thinking a Middlesex special jury better than a London special jury—but because he thought he could not order a London special jury on account of these supposed rules of practice. When the matter comes before the judge pursuant to our order, the judge will himself exercise a discretion, knowing that the master has not exercised any discretion, and himself decide what is the appropriate special jury for the trial of this case.

Solicitors: *Wilde, Sapte & Co.* (for the appellant company); *Woolfe & Woolfe* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

J. & E. HALL, LTD. *v.* BARCLAY.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **July 7, 8, 1937.**]

Trover and Conversion—Conversion—Damages—Materials used in experimental work left in bailee's possession sold as scrap—Measure of damages.

The respondent company did work for the appellant in erecting and testing a pair of experimental davits. The davits and testing apparatus were then dismantled and kept by the respondent company for several years. A dispute arose over the non-payment of part of the appellant's account for work done, and a writ was issued. The appellant counterclaimed for damages for detinue or conversion of his davits and testing apparatus, which it transpired that the respondent company had sold as scrap. The judge awarded the appellant the scrap value of these articles as damages. On appeal:—

Held: the appellant was entitled to the value of the articles converted, which was ordinarily the price of similar articles in the market. As there was no market in the articles concerned, the measure of damages was the cost of replacement.

[EDITORIAL NOTE. This appeal is reported only upon the question of the measure of damages. The right to recover the cost of replacement for the conversion of an article for which there is no market does not seem to have been so clearly stated before, though no doubt the position has been generally accepted as the law on the point.

As to Damages for Conversion, see HALSBURY, Hailsham Edn., Vol. 10, pp. 138-140, para. 178; and for Cases, see DIGEST, Vol. 43, pp. 519-521, Nos. 574-594.]

Cases referred to:

(1) *Banco de Portugal* v. *Waterlow & Sons, Ltd.*, [1932] A.C. 452; Digest Supp.; 101 L.J.K.B. 417; 147 L.T. 101.

(2) *Mediana* (*Owners*) v. *Comet* (*Owners, etc.*), *The Mediana*, [1900] A.C. 113; 17 Digest 79, *9*; 69 L.J.P. 35; 82 L.T. 95.

(3) *Clayton* v. *Le Roy*, [1911] 2 K.B. 1031; 1 Digest 22, *176*; 81 L.J.K.B. 49; 105 L.T. 430.

(4) *Gibbon* v. *Pease*, [1905] 1 K.B. 810; 7 Digest 436, *417*; 74 L.J.K.B. 502; 92 L.T. 433.

(5) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 3 Digest 64, *75*.

(6) *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199; 17 Digest 78, *6*; 40 L.J.Q.B. 121.

A

APPEAL from a decision of MACKINNON, L.J., dated Jan. 13, 1937.

The following statement of facts is taken from the judgment of SCOTT, L.J.

In the year 1928, the appellant apparently was the inventor, or at B any rate the maker according to a patent, of the particular davits which are the subject-matter of the action, a new kind of davit. In order to operate his invention or his rights as patentee, he had to get an experimental set of two davits made for him by manufacturers, for the purpose of getting the davit passed by the Board of Trade for use C on ships.

He made arrangements by an oral contract with the respondent company, J. & E. Hall, Ltd., to carry out the necessary work, doing the labour and supplying the material as might be required. The total cost of the work that the company did under that oral contract was D some £900. The respondent company delivered invoices for the work done and materials supplied by it, in which it put all the work and all the materials concerned into one single invoice. In that invoice there is a description of the subject-matter of its manufacturers' contract as "gravity davits." As a matter of fact, there were two davits proper, E consisting of three parts, namely, the davits, the runway, and the "A" pieces, steel erections supporting the runway. In addition, for the purpose of the experiment which was to be the subject of the test for Board of Trade purposes, there had to be manufactured and put together an erection called a cradle, in order that the test might be carried out.

F In the invoice, the materials for the test, and the work and labour for the test, are treated under the heading of "gravity davits," and lumped together in one general invoice, with small sub-headings, "testing apparatus" and so on. In the correspondence between the parties, the phrase "gravity davits" was treated as the general heading for the G whole of the work and labour done by the respondent company.

The work was done, the davits were made, the apparatus was set up, the test took place, and, by June, 1929, the Board of Trade had approved the davits. Then the larger part of the account of the respondent company was paid by the appellant, nearly £800, and then the slump in H shipping supervened, and for a long time, from the story told by the appellant before the judge, it obviously became practically impossible in a commercial sense, to do anything further with this invention. Naturally enough, the actual davits and the material of the testing apparatus were all left in the possession of the respondent company. The first time that there was any chance of realising the invention was about June, 1935, when shipping began to pick up, and then the appellant succeeded in selling certain sets of these davits to shipowners, and he had them manufactured by a firm of the name of Wild & Co., Ltd., who made some 50 sets, according to the evidence of Mr. Small, a director of Wild & Co., Ltd., who gave evidence.

That being so, the appellant then again had to deal with the question of testing for his own purposes of sale, and he then wanted his old davits, which had been made in 1929 by the respondent company, and the experimental plant, for the purpose of experimental tests. It then became apparent that, in the meantime, the whole of the material had been scrapped. There was a small portion of the original bill owing, some £100 odd, and there was a dispute upon that, which is immaterial for the purpose of this counterclaim; but finally the writ was issued against the appellant for that balance by the respondent company. The question of the Statute of Limitations was set up, and the judge found against the appellant on that head, but, in the action, he counterclaimed alternatively in conversion and detinue for the davits and the testing material that had remained in the possession of the respondent company.

The first question in the action was whether or not there was a right of action for either conversion or detinue, and that involved the question as to whether or not the davits and the materials for testing purposes had become the property of the appellant, so as to entitle him to sue in either detinue or conversion. Upon that question the correspondence and invoices were held to be quite conclusive that, in both cases, both the davits and the testing material, the property in the whole of the material, steel, timber, rope, and everything else, passed to the appellant and were his property, so that he was entitled to sue for it.

P. E. Sandlands, K.C., and *H. C. Marks* for the appellant.

H. U. Willink, K.C., and *R. E. Manningham-Buller* for the respondent company.

Sandlands, K.C.: The judge applied an entirely wrong test; he said that because no use was made of these articles from 1929 to 1934 they were therefore of no value except as scrap. That is wrong: *The Mediana* (2). They could not be used until 1935. The proper measure of damages is the value of the goods plus damages for detention; the value of the goods is the amount necessary to replace them; the appellant is not claiming the cost value, which is higher. [Counsel referred to *Clayton* v. *Le Roy* (3), and *Gibbon* v. *Pease* (4).]

Willink, K.C.: The judge was entitled to form his own view of the value of these articles, and was right to exclude the cost of replacement. They were experimental specimens, which had been left with the respondent company for years, and had value simply as materials. The property in the testing apparatus was never intended by the parties to pass to the appellant. The value to be considered is the market value, not the cost of replacement: *Banco de Portugal* v. *Waterlow & Sons*, *Ltd.* (1). The time to be considered is the time when the conversion took place. If the goods could not have been sold then, they were of no value except for scrap. In *Armory* v. *Delamirie* (5) the tortfeasor would not assist the court as to the value of the jewel, so it was presumed against him to be of the highest value. There is no single authority A that the replacement cost is the value to be considered. Once the testing apparatus had been used for the purpose required, it had no appreciable value, and the damages in that respect can be only the scrap value. Where there was a contract to sell the goods detained, then those goods had a special value to the plaintiff: *France* v. *Gaudet* (6); but the B courts will never consider the special value to a plaintiff except if special damage is being considered.

Manningham-Buller: The only evidence that these articles had more than scrap value was that given by the appellant; the judge did not accept this.

C The following judgments are reported only upon the question of the measure of damages.

Greer, L.J.: With regard to the davits, the only question is, what is the right measure of damages to be applied in reference to a D claim for conversion of property which has been found by the judge to have been converted by the respondent company on Jan. 6, 1936. In my judgment, it is an undoubted fact that there are two rules with which we begin in ascertaining how the damage should be ascertained. The first is this: A plaintiff who is suffering from a wrong committed E by a defendant is entitled, so far as money can do it, to be put into the same position as if he had not suffered that wrong. That is what is referred to as *restitutio in integrum.* The second principle which is accepted is that what he is entitled to, as damages for conversion or detention in respect of the article so detained or converted and not F returned, is the value of that article. Then the question is, what is the meaning of "the value of that article"?

Where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article G in the market. That rule has been acted upon over and over again, and that, I think, means that, where there is a market, the man whose rights have been interfered with is bound to diminish the damages by going into the market and buying the goods in the market, so as to put himself in the position in which he is entitled to be put, namely, the H position in which he would have been if he had not suffered any wrong at all; and, in my judgment, the case to which our attention has been called of *Banco de Portugal* v. *Waterlow & Sons, Ltd.* (1) has really nothing to do with the question that we have to decide here, except in so far as I think it supports the view which I have been expressing. In that case, what was recovered ultimately in the House of Lords was what the plaintiffs, who wanted the *escudos*, would have had to pay in English sovereigns in order to get the *escudos* of which they had been deprived by reason of the wrongful act of Messrs. Waterlow. In any event, the case turns upon very special facts, and it does not seem to me to have any bearing upon the question which we have to determine in the present case.

Now, if there had been a market for the davits, to which the appellant could have gone on the day after he was wrongfully deprived of his davits, and bought them at an agreed price, however much lower that might be or however much higher it might be than what he had originally paid for them, he would have been entitled to the cost of replacement by getting them in the market. But, if he cannot get them in the market, what is his position ? He must do that which is analogous to getting them in the market, namely, he must go to the only people from whom he can get goods to put him into the same position as he would have been in if his davits had never been taken away from him, that is to say, he must go to the manufacturer and see for what price the manufacturer will supply him with similar goods. That test would give him £220, and he was entitled to ask the judge to say, and entitled as of right, in my judgment, to say, " I want my goods. If you do not give me back my goods, then you must pay me what I would have to pay in order to put myself into the same position as I would have been in if you had complied with my demand for the goods. I want them for the purposes of further experiments, in order that I may satisfy myself that the design of these davits, and possibly the design of improved davits, may be improved upon." He not having had the davits returned to him, I think the test of their value, and the sum that he is entitled to recover for having failed to get his davits back again, is the £220 which he would have to pay, according to the undisputed evidence of Mr. Small, in order to get davits similar to those of which he had been deprived. The measure given by Mr. Small is the cost per ton. That is the usual way of estimating in engineering matters, and at the price per ton stated by Mr. Small he would have had to pay £220 for these things, and, in my judgment, he is entitled to recover £220 in respect of the davits, as distinguished from the cradle and the other items.

Then, with regard to the testing apparatus, the materials whereof in the same way as the davits had been converted to its own use by the respondent company, Mr. Small said, as regards those, that the costs had become lower at the time of the conversion, and, although Captain Barclay had paid, I think, something like £200 for that part of the material which was supplied to him, according to the evidence of Mr. Small, what he could get those materials for now, so as to restore him to the same position as that in which he would have been if they had not been converted to the use of the respondent company, is the sum of £90. It seems to me that the change in the market is a little piece of good fortune on the part of the respondent company. The same principles as to how the damages for that have to be estimated seem to me to apply to the testing apparatus, just as they do to the davits.

Those being the facts, and that being the position, I think the appellant is entitled to £220 as damages for conversion or for detention, or for failure to return the goods detained, in respect of the davits, and £90 in respect of the testing apparatus or testing equipment.

Slesser, L.J.: The evidence of the appellant is that in 1934, or perhaps a little later, there was need for him to have davits. He was receiving orders, and he had in fact placed orders with another firm, the firm of Wild & Co., Ltd., engineers, for making for him the davits, and I agree with Greer, L.J., that, in considering what it would cost him to have those davits made for him, there being no open market for the davits, the only evidence that we have is that of Mr. Small, the director of Wild & Co., Ltd., who says that the cost of making the davits, the runway, and the "A" pieces, would be, as I understand the evidence, when only a small number such as two which are here claimed had to be replaced, £220, that sum being arrived at on a computation of £33 per ton, the davit and the "A" pieces weighing 5 tons, and an extra one-third being added to the price by reason of the fact that they would have to be obtained in such small quantity. Therefore, I think it is right to say that, in estimating the damage here to produce the restitution which the person who has been injured is entitled to ask for, it would cost £220 to replace those davits. It was faintly suggested, but could not really be argued, in the absence of any evidence, that those davits might have deteriorated in value during the time when the appellant consented that they should be in the possession of the respondent company, but there is no evidence at all that these davits, during the period during which, by consent of the appellant, they were in the possession of J. & E. Hall, Ltd., would have deteriorated, and there is no suggestion that this is the class of case where there is any inherent vice in the davits as such which would make them of less value as time proceeded. Therefore, I think one must assume that the value of the davits, upon the evidence which we have, at the time when they were converted, was £220, and that the judge was not entitled to hold, as he did hold, that they were worth nothing more than scrap.

With every respect, I cannot agree with the judge's view that, because he came to the conclusion, upon the evidence, that these things were left there by the appellant because they were practically scrap, he is therefore entitled to come to the conclusion that the value would be only the value of scrap, first, because there is no evidence that the appellant did leave them there because they were practically scrap, but it is equally possible (although there is no direct evidence) that he left them there because of the existing depression in the shipping trade at that time. I do not think that the further reason stated by the judge, that he is satisfied that, if the respondent company had insisted upon the appellant's taking them away, the appellant would have said: "Well, what can you allow me for them as scrap?" is justified. It is only a conjecture, and the only actual demand which we have from the appellant is for the value for which Mr. Sandlands and Mr. Marks have contended in this case. In my view, the testing apparatus must be treated as the property of the appellant, equally with the davits, and, on that matter, we have therefore to find also the value of these disjected members of the testing apparatus, which have been said to be worth £90 by Mr. Ernest Small, the representative of Wild & Co., Ltd. The appellant says that the testing apparatus would be useful to him in the present state of the shipping industry. In addition to saying that he might want actually to use the davits for the purposes of experiment, he says that the testing apparatus might be useful, and Mr. Small agrees with that view. Again, if the property is his, the respondent company had not a shadow of right, without his authority, to dismember it, and it seems to me that, being his property, he is entitled to damages for illegal detention, and for the failure to restore it, and he is entitled to the value of the testing apparatus at the time of the conversion.

SCOTT, L.J. [after stating the facts]: Upon that, the only question, in my view, is what was the amount of damages, and, therefore, what was the true measure of damages? The judge held, in regard to the davits, that there was a right of action in conversion in respect of them, but that, in regard to the material out of which the testing apparatus was made, or what had been the testing apparatus, and had been dismantled, there was no evidence that the property in that was in the appellant as alleged; and, without (as it seems to me) any evidence at all, the judge inferred, in regard to that, that the appellant had consented to its being scrapped, and to abandoning all rights in respect of it. That decision, I think, was made upon no evidence at all, and was therefore wrong.

The real question in the case, therefore, both as regards the two davits and as regards the testing equipment or apparatus, is what is the correct measure of damages in respect of it? The only issue of law which has been argued before us upon that is, in effect, this: For the appellant, it is said that a fair estimate of the cost to him of obtaining that of which the respondent company's conversion had deprived him was the correct measure, and that, as it was impossible to buy the thing in the market ready made, he was entitled to claim the cost of obtaining it in whatever way he could, and the measure of that cost was what Mr. Small, the director of Wild & Co., Ltd., said would be the cost.

In regard to the davits, the figure was £33 per ton, plus an addition of 33⅓ per cent. because only two davits would be wanted. £33 per ton would be a fair price had a large number been wanted, but, as only two were in question, one-third was to be added. For the equipment or apparatus, the same witness said that £18 per ton on the total weight of 5 tons, making £90, was a fair figure for the cost of that equipment.

On the other side, it was said for the respondent company that, as a matter of law, the measure of damages for conversion is necessarily the selling value of the property converted at the time of the conversion. I do not think that that is the law where the article converted is a thing for which there is no market It is a convenient measure of value where the article is of a kind for which there is a current market price, but, where there is no market, in my view it would be doing injustice to the owner of the article converted if a hard-and-fast rule were applied that, unless he could prove a market selling price, he could get nothing

The judge has not quite given effect to the contention in that bald form. He has said, in his judgment, that the measure of value for the davits should be their scrap value; but that is to treat the davits, not as davits, but as scrap, which depends, not upon their physical appearance, but upon the appellant's having agreed with the respondent company that it should take charge of this material as scrap. In other words, it depends upon the fact that there was an agreement to that effect. In my view, there was no such agreement, and no shred of evidence upon that head appears in the evidence of the appellant, and the respondent company did not go into the witness-box to attempt to prove any agreement of that kind. That being so, in my view, the judge's judgment in regard to the davits was wrong, for that reason.

With regard to the equipment or apparatus, he held that there was no evidence that the scrap, of which, in his view, the equipment was then composed, had any value at all. Again, I say, there being no evidence under that head for the respondent company, the evidence of Mr. Small ought to be taken, for the same reason as in the case of the davits.

In my view, no question of law as to the measure of damages really arises here, except the one question as to whether the rule as propounded by Mr. Willink on behalf of the respondent company is the law of this country, that, in every case of conversion, the measure of damages must be the selling value of the article converted. I agree that the appeal must be allowed.

Appeal allowed, with costs.

Solicitors: *Theodore Goddard & Co.* (for the appellant); *Janson, Cobb, Pearson & Co.* (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

STOCKWELL *v.* SOUTHGATE CORPORATION.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **July 14, 1937.**]

An appeal from the decision of PORTER, J., reported [1936] 2 All E.R. 1343 was dismissed by consent.

WILSONS AND CLYDE COAL CO., LTD. v. ENGLISH.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Maugham), **May 25, 27, 28, 31, July 19, 1937.**]

Master and Servant—Master's duty—Provision of safe system of working—Coal mine—Delegation of duty—Common employment—Master prohibited by statute from taking part in technical management of mine—Coal Mines Act, 1911 (*c.* 50), *s.* 2 (4).

In an action by a miner against his employers for damages for personal injury alleged to be due to the negligence of the employers in that they had failed to provide a reasonably safe system of working the colliery, questions were raised (i) whether the employers were liable at common law for a defective system of working negligently provided or permitted to be carried on by a servant to whom the duty of regulating the system of working had been delegated by the employers, the employers' board of directors being unaware of the defect, and (ii) if they were liable, whether the employers were relieved of their liability in view of the prohibition contained in the Coal Mines Act, 1911, s. 2 (4), against the owner of a mine taking any part in the technical management of the mine unless he is qualified to be a manager:—

Held: (i) the employers were not absolved from their duty to take due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty. Although the employers might, and in some events were bound to, appoint someone as their agent in the discharge of their duty, the employers remained responsible.

(ii) the doctrine of common employment does not apply where it is proved that a defective system of working has been provided. To provide a proper system of working is a paramount duty, and, if it is delegated by a master to another, the master still remains liable.

Interlocutor of Court of Seven Judges of Court of Session in Scotland affirmed.

Dicta in Fanton v. *Denville,* [1932] 2 K.B. 309, *disapproved.*

[**EDITORIAL NOTE.** The Coal Mines Act, 1911, s. 2 (4), prohibits mine-owners from taking any part in the technical management of the mine unless they have the requisite technical knowledge which will qualify them to be managers. The duty of mine-owners to secure a proper system of working the mine is not thereby reduced to the mere duty to appoint a properly qualified manager. Their duty is still to provide a proper system of working, and, if an accident occurs through the failure of their manager in this respect, they will be held liable to the injured persons or their representatives. This is a common law liability and is not a case to which the doctrine of common employment applies. In so far as the judgments in *Fanton* v. *Denville* (16) state anything to the contrary, they are definitely disapproved and overruled in the judgments herein. The history and limitations of the doctrine of common employment are fully stated; but the importance of this may perhaps be soon greatly diminished by the statutory abolition of that doctrine.

As to Appointment of Manager of Mine, see HALSBURY, Hailsham Edn., Vol. 22, pp. 769, 770, para. 1605; and for Cases, see DIGEST, Vol. 34, pp. 211-214, Nos. 1744-1768 and p. 737, No. 1148.]

Cases referred to:

(1) *Johnson* v. *Lindsay & Co.*, [1891] A.C. 371; 34 Digest 215, *1773*; 61 L.J.Q.B. 90; 65 L.T. 97.

(2) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; 34 Digest 202, *1647*; 7 L.J. Ex. 42.

(3) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; 34 Digest 126, *971*; 31 L.T.O.S. 255.

(4) *Farwell* v. *Boston & Worcester Rail Road Corpn.* (1842), 4 Metcalf 49; 3 Macq. 316.

(5) *Sword* v. *Cameron* (1839), 1 Dunl. (Ct. of Sess.) 493; 34 Digest 199, *1624 vii.*

(6) *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300; 34 Digest 126, *972*; 31 L.T.O.S. 258

A (7) *Weir* (*or Wilson*) v. *Merry & Cunningham* (1868), 6 Macph. (H.L.) 84; 34 Digest 207, *1697 xiv*; 40 Sc. Jur. 486.

(8) *Dixon* v. *Rankin* (*or Neilson*) (1852), 14 Dunl. (Ct. of Sess.) 420.

(9) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 34 Digest 202, *1657*; 60 L.J.Q.B. 683; 65 L.T. 467.

(10) *Connell* v. *Nimmo* (*James*) *& Co., Ltd.*, [1923] S.C. 737; 34 Digest 226, B case *p.*

(11) *Monaghan* v. *Rhodes* (*W. H.*) *& Son*, [1920] 1 K.B. 487; 34 Digest 205, *1682*; 89 L.J.K.B. 379; 122 L.T. 537.

(12) *M'Millan* v. *Barclay, Curle & Co., Ltd.*, [1912] S.C. 263; 34 Digest 230, case *c.*

(13) *Toronto Power Co., Ltd.* v. *Paskwan*, [1915] A.C. 734; 34 Digest 196, *1611*; C 84 L.J.P.C. 148; 113 L.T. 353.

(14) *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K.B. 548; 34 Digest 211, *1742*; 76 L.J.K.B. 948; 97 L.T. 181.

(15) *Young* v. *Hoffman Manufacturing Co., Ltd.*, [1907] 2 K.B. 646; 34 Digest 210, *1731*; 76 L.J.K.B. 993; 97 L.T. 230.

(16) *Fanton* v. *Denville*, [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; D 147 L.T. 243.

(17) *Bain* v. *Fife Coal Co.*, [1935] S.C. 681; Digest Supp.

(18) *Rudd* v. *Elder Dempster & Co., Ltd.*, [1933] 1 K.B. 566; Digest Supp.; 102 L.J.K.B. 275; 148 L.T. 337; 25 B.W.C.C. 482; *on appeal*, [1934] A.C. 244.

(19) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1; Digest Supp.; E 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463.

(20) *Butler* (*or Black*) v. *Fife Coal Co., Ltd.*, [1912] A.C. 149; 34 Digest 218, *1809*; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217.

(21) *Hutchinson* v. *York, Newcastle, & Berwick Ry. Co.* (1850), 5 Exch. 343; 34 Digest 207, *1697*; 19 L.J. Ex. 296; 15 L.T.O.S. 230.

(22) *Williams* v. *Birmingham Battery & Metal Co.*, [1899] 2 Q.B. 338; 34 Digest F 195, *1590*; 68 L.J.Q.B. 918; 81 L.T. 62.

(23) *Brydon* v. *Stewart* (1855), 2 Macq. 30; 34 Digest 194, *1583.*

(24) *Weems* v. *Mathieson* (1861), 4 Macq. 215; 34 Digest 196, *1604.*

(25) *Wigmore* v. *Jay* (1850), 5 Exch. 354; 34 Digest 208, *1698*; 19 L.J. Ex. 300; 15 L.T.O.S. 206.

(26) *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A.C. 222; 34 Digest 210, *1726*; G 63 L.J.Q.B. 419; 70 L.T. 630.

(27) *Griffiths* v. *London & St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; 34 Digest 204, *1665*; 53 L.J.Q.B. 504; 51 L.T. 533.

APPEAL against an interlocutor pronounced by a court of seven judges of the Court of Session in Scotland in an action at the instance of the H respondent against the appellant company. The facts and the arguments are set out in the judgment of LORD THANKERTON.

A. G. Erskine Hill, K.C., and *C. D. L. Murray* for the appellant company.

Thomas A. Gentles, K.C., *James Walker*, and *Michael Marcus* for the respondent.

Lord Atkin: My Lords, I have had the opportunity of reading
and considering the judgments which are about to be delivered by my
noble and learned friends, Lord Thankerton, Lord Macmillan,
Lord Wright and Lord Maugham. I agree with them, and feel that
it is unnecessary to add my own language to that which is used by them.
In particular, I wish to express my concurrence in the views which they A
have expressed as to the valuable judgments pronounced by the Lord
President in this case and by the Lord Justice-Clerk on the English case
of *Fanton* v. *Denville* (16) in *Bain* v. *Fife Coal Co.* (17).

Lord Thankerton: My Lords, the respondent, who is an oncost B
workman in one of the appellant company's coal mines, claims damages
at common law from the appellant company in respect of personal
injuries sustained by him on Mar. 27, 1933, while employed at the appellant
company's Glencraig Colliery in Fife. The case was tried before a jury,
on a general issue of fault, and, on the motion of the appellant company, C
the trial judge, under Rules of Court II, 49, put specific questions to the
jury, to which they returned answers. The judge directed the jury on
these questions, and no exception was taken to his charge. Important
questions of law as to the application of the special verdict were raised
before the judge, and a reclaiming motion was taken by the present D
appellant company against the interlocutor of Lord Jamieson, the trial
judge, who applied the verdict in favour of the respondent. This motion
was heard by the second division with three judges of the first division,
who were called into consultation except on an alternative argument
of the present respondent. By a majority of five to two, the decision of E
the Lord Ordinary was approved, and, in accordance therewith, his
interlocutor was affirmed by the second division on July 17, 1936. The
present appeal is taken against this last interlocutor.

The facts may be briefly stated as follows. The respondent, on the
date in question, was employed underground on the work of repairing F
an airway leading off the Mine Jigger Brae, one of the main haulage
roads. When he was proceeding, at the end of the day-shift, between
1.30 p.m. and 2 p.m., to the pit-bottom, by way of the Mine Jigger Brae,
the haulage-plant was put in motion, and, before he could reach one
of the manholes provided, he was caught by a rake of hutches and crushed G
between it and the side of the road. The respondent's case was that
the time fixed by the appellant company for raising the day-shift men
up the pit was between 1.30 p.m. and 2 p.m., and that it was a necessary
part of a safe system of working that the haulage should be stopped
on the main haulage roads during this period, and that this was in H
accordance with usual and recognised mining practice in Scotland.
The appellant company denied this averment, and stated that there was
an alternative road open for the respondent's return to the pit-bottom,
and that, in any event, he should have informed the man in charge of
the haulage machinery, who was within easy call, of his emergence into

the Mine Jigger Brae, and should not have proceeded along the Brae until he had ascertained that the haulage had stopped for the shift, or arranged that he could safely proceed. The appellant company pleaded contributory negligence on the respondent's part. It also stated that the respondent was in breach of the Coal Mines Act, 1911, ss. 43 (1), 74.

A The questions put to the jury, and their answers, were as follows:

1. Was a reasonably safe system of working provided for the men on the day shift in the Butter's Section of the Glencraig Colliery returning to the pit-bottom at the end of the shift?—No.

2. Did (i) the defenders' board of directors or (ii) the agent know of the said system of working in operation in the said section?—(i) No. (ii) Yes.

3. Did (i) the defenders' board of directors or (ii) the agent know of any defect B in the said system?—(i) No. (ii) Yes.

4. Was the provision of the said system of working part of the technical management of the colliery?—Yes.

5. Was the accident to the pursuer caused by failure to provide a reasonably safe system of working in the said section?—Yes.

6. Did the pursuer fail to take reasonable care for his own safety?—No.

7. If so, did he cause or materially contribute to the accident?—No.

C 8. Was the pursuer in breach of (i) the Coal Mines Act, 1911, s. 43 (1), or (ii) the Coal Mines Act, 1911, s. 74?—(i) No. (ii) No.

9. On the assumption that the pursuer is entitled to damages, at what figure do you assess the damages?—£500.

The question in the appeal arises on the first five questions and the answers of the jury. It may be explained that the appellant company D owns five collieries, including Glencraig Colliery, and that the agent referred to above is appointed by its board of directors as its representative on the mining side in respect of all its collieries. The agent in turn selects a mine manager for each colliery, the appointments being approved by the board of directors. All the subordinate officials are E selected and appointed by the mine manager. The agent and mine managers are appointed by the appellant company to carry out the safety provisions of the Coal Mines Act and the regulations. The fourth question and answer refer to the Coal Mines Act, 1911, s. 2 (4), which provides that:

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> The owner or agent of a mine required to be under the control of a manager shall not take any part in the technical management of the mine unless he is qualified to be a manager.

The appellant company maintains that it cannot be responsible for a failure in the technical management of the mine from which it is excluded G by statute. Counsel for the appellant company admitted that, primarily, the master has a duty to take due care to provide and maintain a reasonably safe system of working in the mine, and he stated the question in the appeal as being whether a master, who has delegated to a competent servant the duty of taking due care in the provision of a reasonably safe H system of working, is responsible for a defect in the system, of which he had no knowledge, and he submitted the following general propositions in law: (1) If the master retains control, he has a duty to see that his servants do not suffer through his personal negligence, such as (i) failure to provide proper and suitable plant, if he knows, or ought to have known of such failure, (ii) failure to select fit and competent servants,

(iii) failure to provide a proper and safe system of working, and (iv) failure to observe statutory regulations; but, (2) If he delegates to competent subordinates his duty to take care of the safety of his servants, his responsibility in respect of his primary common law duty ceases, unless there is proof of knowledge by him, not acted upon. That the master's liability in respect of his common law duty may be said to depend on A
the extent of his interference.

The appellant company maintains that the present case is covered by the second proposition, in that it has delegated to a competent agent and manager the duty of providing a reasonably safe system of working, and that any negligence in the provision of such a system is the negligence B
of these delegates, and that, under the doctrine of common employment, the appellant company is not liable therefor. My Lords, it seems to me that the fallacy in the appellant company's argument lies in the view that the master, being under a duty to take due care in the provision of a reasonably safe system of working, is absolved from that C
duty by the appointment of a competent person to perform the duty. In my opinion, the master cannot "delegate" his duty in this sense, though he may appoint someone as his agent in the discharge of the duty, for whom he will remain responsible under the maxim *respondeat superior*. It therefore becomes necessary to examine the nature and limits of the D
doctrine of common employment.

In *Johnson* v. *Lindsay & Co.* (1), at p. 382, LORD WATSON said:

> I do not agree with POLLOCK, B., that the rule which exempts a master from liability to his servant for injuries negligently occasioned by a fellow-servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. E
> The master's responsibility for his servant's acts has its origin in the maxim *qui facit per alium facit per se*, which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his F
> master. . . . The principle of the master's immunity in such cases, frequently termed the doctrine of collaborateur, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestley* v. *Fowler* (2), which was decided in 1837. It was rejected by the courts of Scotland until 1858, when, for the first time in either country, it was fully explained and reduced to its proper limits by LORD CRANWORTH, in the Scotch case of *Bartonshill Coal Co.* v. *Reid* (3). The doctrine had previously been formulated by the Supreme Court of Massachusetts, in a judgment delivered by SHAW, C.J., in *Farwell* v. *Boston & Worcester* G
> *Rail Road Corpn.* (4), which was referred to with approval by LORD CRANWORTH.

In *Bartonshill Coal Co.* v. *Reid* (3), the workman had been killed through the overturning of the cage, the engineman having failed to stop the ascending cage at the platform, and having allowed it to be sent H
up against the scaffolding with great force. Clearly this involved no question of safe system of working. After dealing with the maxim *respondeat superior*, LORD CRANWORTH says, at p. 284:

> But do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought

> to know, to what risks he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken.

This language is quite inappropriate, as it seems to me, to the risks involved in the conditions of safety under which the work is carried on, and for which it is the duty of the master to use due care in the provision of a reasonably safe system. That LORD CRANWORTH took this view is clear from his comments on the earlier Scottish case of *Sword* v. *Cameron* (5), in which a workman, employed in a stone-quarry, recovered damages from his employers for injuries received on the explosion of a shot in the quarry. LORD CRANWORTH says, at p. 290:

> This case may be justified without resorting to any such doctrine as that a master is responsible for injuries to a workman in his employ, occasioned by the negligence of a fellow-workman engaged in a common work. The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. . . . The accident occurred, not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security.

In the case of *Bartonshill Coal Co.* v. *McGuire* (6), which arose out of the same accident, and was decided at the same time as *Reid's* case (3), LORD CHELMSFORD, L.C., said, at p. 310:

> In *Sword* v. *Cameron* (5), the system of blasting in the quarry which had been established had been habitually defective, and therefore the injury which resulted might as much be attributed to the employers as if they had supplied defective machinery, for which undoubtedly they would have been answerable.

It appears clear, then, that, when the workman contracts to do the work, he is not to be held as having agreed to hold the master immune from the latter's liability for want of due care in the provision of a reasonably safe system of working. But the appellant company maintains that the master absolves himself from the discharge of that duty if he appoints a competent servant to discharge the duty, and I will now examine the authorities on which this contention is sought to be based.

In *Weir* (*or Wilson*) v. *Merry & Cunningham* (7), the workman had been killed by an explosion of firedamp in the pit, which had accumulated because of an obstruction of the system of ventilation by a platform, which had been temporarily erected on the side of the pit-shaft under the direction of a pit-manager, to enable a seam to be opened. There was no suggestion that the system of ventilation was defective, but the temporary platform interrupted the free circulation of air. It was admitted that the owners had appointed competent persons for the work on which they were engaged. LORD CAIRNS, L.C., said, in a well known passage, at p. 89:

> The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in

> place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master.

The appellant company seeks to apply that passage to the master's duty as to provision of a reasonably safe system, but it is clear, in my opinion, that Lord Cairns, L.C., who had already stated that there was no question of a defective system of ventilation, was referring to the carrying out of the operations in the mine, and not to the provision of safe and proper conditions under which the operations were to be carried on. This view is confirmed by the speeches of the other noble and learned Lords. Lord Chelmsford said, at p. 91 :

> Although the learned judge in the course of his summing up distinguished "between keeping clear and in good working order the ventilation arrangement or system, when completed, and a defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occured in the course of the operations in the pit, it ought to have been distinguished from that "system of ventilation and putting the mine into a safe and proper condition for working," which, according to the opinion of the Lord Justice-Clerk in *Dixon* v. *Rankin* (8), "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the Haughead pit, it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine ; and if Neish and the deceased were fellow-workmen, it would have been one of the risks incident to the employment in which the deceased was engaged.

Lord Colonsay says, at p. 95 :

> I think that there are duties incumbent on masters, with reference to the safety of labourers in mines and factories, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself, or where he devolves it on others ; the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials, may furnish grounds of liability (and there may be other duties, varying according to the nature of the employment) wherein, if the master fails, he may be responsible. But, on the other hand, there are risks incident to occupations more or less hazardous, and of which the labourer who engages in any such occupation takes his chance. It is eminently so in regard to mining operations. There are perils of the pit as well as of the other deep, and one of those perils is the risk of the consequences that may, even in the best regulated pits, result from the carelessness or recklessness, or other fault of one or more of those persons composing the organised body engaged in working the mine.

Later, he says, at p. 96 :

> Now, the direction of the learned judge, with reference to the circumstances of this case, appears to me to have been objectionable, for these reasons—First, it deals apparently with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views, the

defendant might be regarded as liable, whereas it was a defect in the construction of a temporary structure, erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defendant for the fault of Neish.

I agree with the observations of the Lord President, in his admirable A and lucid opinion in the present case, on these opinions in *Weir (or Wilson)* v. *Merry & Cunningham* (7), and I need not repeat them. In particular, LORD CHELMSFORD and LORD COLONSAY clearly distinguish between duties relating to the actual working or operation of the mine and those relating to the conditions of safety provided by the system B under which such working or operation is carried on. The workman, under his contract of employment, is not to be held impliedly to have taken the risk of want of due care in the provision of a reasonably safe system of working, and the master cannot transfer the duty on to the shoulders of a subordinate. If he appoints a servant to attend to the C discharge of such duty, such servant, in this respect, is merely the agent or hand of the master, and the maxim *qui facit per alium facit per se* renders the master liable for such servant's negligence as being, in the view of the law, the master's own negligence. The same servant may have other duties relative to the working or operation of the mine, as D to which the doctrine of common employment might apply, but that doctrine is not applicable to the provision of reasonably safe conditions under which the working or operation of the mine is to be carried on.

My Lords, I do not find it necessary to deal in detail with the passages from the judgments in the cases of *Smith* v. *Baker & Sons* (9), *Connell* E v. *Nimmo (James) & Co., Ltd.* (10), *Monaghan* v. *Rhodes (W. H.) & Son* (11), and *M'Millan* v. *Barclay, Curle & Co., Ltd.* (12), which are referred to by the learned Lord President, with whose comments thereon I agree. They afford no assistance to the argument of the appellant company, and are in conformity with the views I have expressed. But I will cite F one sentence from the opinion of LORD WATSON in *Smith* v. *Baker & Sons* (9), at p. 353:

> But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42) that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.

G I agree with the Lord President that the principle of vicarious liability of the master has been uniformly applied to defective plant and defective premises, and is equally applicable in the case of defective systems. I may add a reference to the case in the Privy Council of *Toronto Power Co., Ltd.* v. *Paskwan* (13), in which it was held that the duty towards an employee H to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. SIR ARTHUR CHANNELL, who delivered the judgment of the Board, says, at p. 738:

> It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is

> for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. In *Cribb* v. *Kynoch, Ltd.* (14), and *Young* v. *Hoffman Manufacturing Co., Ltd.* (15), the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing. It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them ?

In my opinion, that passage equally states the law of this country, and I do not agree with the comments on this decision in *Fanton* v. *Denville* (16), to which I will now refer. As I have had the privilege of reading the opinion of my noble and learned friend Lord Wright, who makes a detailed criticism of the decision in this case, in which I entirely concur, I will say only, first, that the conclusion arrived at appears to me to be justified by the facts of the case, as accepted by the Court of Appeal, in that they do not disclose any defect in the material supplied by the defendant, but an error of judgment on the part of his servants in selection of the properties necessary on a particular occasion for a particular purpose ; the extra baize was there and available. There was no suggestion that the mattress was defective in itself, but it was not by itself sufficient to break the fall of the plaintiff. In the case of a touring company, such as that in question, the selection of the particular properties to be used for a particular presentation may well be said to be part of the common work on which the employees are engaged, and the master, apart from knowledge imputable to him, will not be liable, provided the properties have been provided with due care. In the second place, I am quite unable to agree with the construction placed by the Lords Justices on the opinion of Lord Cairns, L.C., in *Weir* (*or Wilson*) v. *Merry & Cunningham* (7), as to which I have already expressed my opinion.

There remains the recent case of *Bain* v. *Fife Coal Co.* (17), in which *Fanton's* case (16) came under the consideration of the second division of the Court of Session. I agree with the comments, at p. 693, of the Lord Justice-Clerk on *Fanton's* case (16) and will repeat them and adopt them, if I may :

> This appears to me to be a startling whittling down of the duties which the law has hitherto recognised, at any rate in Scotland, as attaching to a master towards his servant. It ignores what has always been regarded as a fundamental doctrine of the law of master and servant, viz., that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of these duties. The master's liability as for breach of these paramount duties is unaffected by the doctrine of fellow-servant, for in the eye of the law they are duties that cannot be delegated. If, in fact, they are entrusted by the master to others, the maxim applies *qui facit per alium facit per se.* The duty may not be absolute, and may be only a duty to exercise due care, but, if, in fact, the master entrusts the duty

to someone else instead of performing it himself, he is liable for injury caused through the want of care of that someone else, as being, in the eye of the law, his own negligence.

That admirable statement of the law which, in my opinion, applies also in England, involves the rejection of the appellant company's contentions, except the special contention that its exclusion from interference in the A technical management, by the Coal Mines Act, 1911, s. 2 (4), relieves it from responsibility, in view of the fourth answer of the jury. I agree with the opinion expressed by the five judges in the Court of Session who rejected this contention; neither of the judges who dissented appears to have expressed an opinion on this point. I agree with the Lord B President's statement:

> There is no reason in principle that a compulsory delegation should displace the vicarious responsibility of the employer, if a *de facto* delegation, which is often unavoidable, has not this effect. I hold that the responsibility is the same whether the employer is himself qualified to act as manager or not, and whether, if qualified, he chooses to act himself or to delegate to a qualified servant as manager. In all C these cases he is answerable either directly for his own negligence or vicariously for his servant's negligence, if the negligence affects the provision of a safe system of working.

My Lords, it is always difficult to define a principle of the law so precisely that its application to every combination of circumstances is D beyond question, but I may at least express the hope that the decision in this appeal has narrowed the debatable area, without being as optimistic as the reporter in *Reid's* case (3) and *McGuire's* case (6), who said, nearly eighty years ago:

> Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law.

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In my opinion, the appeal fails, and should be dismissed with costs.

LORD MACMILLAN: My Lords, in this appeal your Lordships have to consider and accommodate the spheres of operation, in the law of F master and servant, of two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment. According to the former, a master is responsible for the negligence of his servant acting within the scope of his employment; according to the latter, a master is not responsible for the negligence of his servant causing injury to a G fellow-servant. Both doctrines are well established in the law. It is obvious that they may come into conflict. If a servant is injured by the negligence of a fellow-servant acting within the scope of their common employment, the former doctrine would impose liability on the master, while the latter doctrine would exculpate him. The question is, which H of these two principles is applicable to the present case. I do not rehearse the facts, already so fully and clearly set out by my noble and learned friend LORD THANKERTON, but I emphasise the findings of the jury, that, on the occasion of the accident which befell the respondent, there was not provided in the appellant company's colliery a reasonably safe system of working, that the accident was due to this failure to provide a reasonably safe system of working, and that the defect in the system was known to the agent employed by the directors of the appellant company, but not to the directors personally. The negligence, be it observed, lay in the failure to provide a safe system, not in the working of the system provided. In these circumstances, the appellant company says that it is not responsible for the accident because it was due to the negligence of its agent. Its duty, it says, was fulfilled when it appointed a competent agent to supervise the working of the colliery, a task which it was personally, and, indeed, by statute, disqualified from performing, and, as the negligence was that of a fellow-employee of the respondent, it should be absolved.

Now, I take it to be settled law that the provision of a safe system of working in a colliery is an obligation of the owner of the colliery. He cannot divest himself of this duty, though he may—and, if it involves technical management, and he is not himself technically qualified, must—perform it through the agency of an employee. It remains the owner's obligation, and the agent whom the owner appoints to perform it performs it on the owner's behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by proving merely that he has appointed a competent agent. If the owner's duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible.

But then it is said that, if the person injured, in consequence of the non-performance of the owner's duty by the owner's agent, is an employee of the owner, there is no redress, because the agent is engaged in a common employment with the injured party, and the latter took the risk of the negligence of his fellow-employees. To this, the conclusive answer is that the agent engaged in discharging the owner's duty of providing a safe system of working in the mine is not engaged in a common employment with the ordinary workmen in the mine. He is not collaborating with them; he is performing the duty of the owner, not the duty of an employee. The doctrine of common employment implies that the employment must be common. The owner of a colliery is not engaged in a common employment with the miners who work in the colliery, and the agent carrying out the obligations of the owner is not collaborating with the workmen in the mine. Consequently, the defence of common employment is not available to the mine owner where an accident occurs to an employee in the mine through the negligent performance of the owner's duty by the person appointed by the owner to perform that duty for him, for such agent of the owner and the injured workman are not in this respect engaged in a common employment.

My Lords, while adding these few observations, I desire to express my concurrence in every respect with the views of my noble and learned friends, whose opinions I have had the advantage of reading in print. In particular, I should like to associate myself with the appreciation of

LORD THANKERTON of the admirable opinions delivered by the Lord President in the present case and by Lord Justice-Clerk Aitchison in the case of *Bain* v. *Fife Coal Co.* (17).

LORD WRIGHT: My Lords, I have had the advantage of reading in A print the opinion which has just been delivered by my noble and learned friend LORD THANKERTON, and am in agreement with it. The observations which I go on to make are directed to considering certain recent authorities in the Court of Appeal, which, it seems to me, contain propositions of law which contradict the settled authorities binding on B this House in regard to the obligation of an employer towards his employees, to use the more modern terminology. The Lord President has left to your Lordships the task of reconciling with the authorities which he cites in his admirable judgment what the Court of Appeal have laid down. It is clear, as has been said in this House, that, on this branch of C the law, there is no difference between the law in England and that in Scotland.

The principal decision of the Court of Appeal thus brought into question is *Fanton* v. *Denville* (16). The facts of that case are somewhat obscure. The answers of the jury are inconclusive. The plaintiff does D not appear to have established a breach by the employer of the duty owing by him to the servant, as I shall define it hereafter. The result of the case may be correct, but I do not see that it was necessary for the Court of Appeal to lay down the proposition that they did lay down in regard to the precise extent of the duty which rests on the employer E towards his employee. GREER, L.J., at p. 327, thus states, in agreement with what SCRUTTON, L.J., said in the same case, that:

> even in cases where the negligence relied on by the plaintiff consists of negligence in the supply or maintenance of plant or machinery, the employer is only liable if personal negligence is proved, and that if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom F the duty has been entrusted by the employer, the employer is not responsible unless it can be shown that he failed to use reasonable care to select a competent manager or that he has in some way been guilty of personal negligence in connection with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition.

SLESSER, L.J., agreed with SCRUTTON and GREER, L.JJ. Similarly, in G *Rudd* v. *Elder Dempster & Co., Ltd.* (18), SCRUTTON, L.J., applying the view he had expressed in *Fanton's* case (16), held that the employer fulfilled his duty in regard to plant and system by using reasonable care to appoint competent foremen and overseers, and that, if he fulfilled that duty, he was not liable for the negligence of such foremen or overseers H towards their fellow-workmen. Similarly, GREER, L.J., said, at p. 597:

> If the system has been put into operation and is being carried out by his servants on his behalf . . . he [the employer] is not responsible to his workpeople for injuries thereby caused. He is free from liability unless it be proved that the injuries complained of were caused by his own negligence or wilful act.

LAWRENCE, L.J., agreed. In my judgment, these statements are directly contrary to opinions and decisions of this House and of the Court of Appeal over a long period of years. In *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (19), this House overruled the decision of the Court of Appeal in *Rudd's* case (18), on the scope of the employer's liability to his workpeople for breach of a statutory duty. In *Rudd's* case (18), the Court of Appeal, applying their general views which I have just stated, held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in this sense, that he was bound to perform it, by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision"; I repeat the statement of the duty by LORD McLAREN, quoted with approval by LORD SHAW in *Butler (or Black)* v. *Fife Coal Co, Ltd.* (20), at p. 173, and again approved in the *Lochgelly* case (19), at p. 28. The rule has been stated so often that I hesitate to multiply authorities. What the Court of Appeal have said amounts to reducing the three heads of duty to one only, that is, to engage competent employees of the higher grades, and then everything else may be left to them. If that is done, the employers, it seems, will be free from further responsibility. Those whom they have engaged, if chosen with due care and skill, may appoint any other employee, may deal with the provision of plant and material, may determine the system of work. However negligently they may act, and however dangerous the results of what they do may be to the workpeople, the employers, on this view, will be free from liability. The employee will have no remedy against the employer. His only remedy will be against his fellow-employee, which will be difficult to establish, and, in all probability, worthless.

The well established, but illogical, doctrine of common employment is certainly one not to be extended, and indeed has never in its long career been pushed so far as the Court of Appeal sought to push it. Even in *Farwell* v. *Boston & Worcester Rail Road Corpn.* (4), the *fons et origo* (I almost add *mali*), SHAW, C.J., reserved the question of an employer's obligations in respect of adequacy of plant and competence of fellow-workmen. In *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (21), where the doctrine of common employment was first laid down in this country, ALDERSON, B., said that the doctrine must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. I do not read this as limited merely to the selection of competent servants. In *Williams* v. *Birmingham Battery & Metal Co.* (22), in a judgment concurred in by VAUGHAN WILLIAMS, L.J., A. L. SMITH, L.J., at p. 342, quotes and applies the words of LORD HERSCHELL in *Smith* v. *Baker & Sons* (9), at p. 362 :

> A It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

In *Young* v. *Hoffman Manufacturing Co., Ltd.* (15), KENNEDY, L.J., states that the employer *vis-à-vis* his employees undertakes, *inter alia*, B (*a*) to use reasonable care in the selection of competent fellow-servants ; (*b*) in having and keeping his machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition, and free from defect. I have chosen these few examples to show that the doctrine of common employment which was hinted at in connection C with a butcher's cart, and has roamed in its application to colliers, seamen, railwaymen, apprentices, chorus girls, and, indeed, every sphere of activity, has always distinguished between the employer's duty to the employee and the fellow-servant's duty to the employee. The rule is explained on the ground that the employee, by his contract of employ- D ment, agrees with his employer to assume the risk of his fellow-servant's negligence. The principle is stated, with little regard to reality or to modern ideas of economics or industrial conditions, to be that this particular risk is included in the agreed remuneration. This result is stated rather as a dogma to flow logically from the relation of master E and servant. Notwithstanding repeated expressions of disapproval the doctrine has survived, largely because of statutory remedies given to employees to minimise what, to modern ideas, appears to be its obvious injustice. But it has never been carried to the extremity of excluding all remedy against employers, or all duty in the employers, so long as F they have exercised care in the selection of managers or foremen. It is difficult to see what that duty would mean in the case of an absentee, or infant, or inexpert, employer, or what it would mean in the case of a great modern industrial concern. But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to G be performed by the employer *per se* or *per alios*. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, H or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert : the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance.

The extent of the employers' obligation has several times been stated by this House. Thus, in *Weir* (*or Wilson*) v. *Merry & Cunningham* (7), LORD CAIRNS, L.C., said, at p. 89:

> What the master is, in my opinion, bound to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work.

To this must be added a third head, viz., to provide a proper system of working: see *per* LORD COLONSAY in *Merry's* case (7), at p. 95. By this is meant, not a warranty, but a duty to exercise (by himself and his servant and agents) all reasonable care. In addition to *Merry's* case (7), I may refer to the following cases as authorities to the same effect: *Brydon* v. *Stewart* (23), *Bartonshill Coal Co.* v. *McGuire* (6), *Weems* v. *Mathieson* (24), in which, at p. 226, LORD WENSLEYDALE said that the employer was responsible in law for defect on his part in not providing good and sufficient apparatus and in not seeing to it being properly used. These latter words I take to refer to system. It was the effect of these and similar cases in this House that was compendiously and accurately expressed in *Smith* v. *Baker & Sons* (9) by LORD HALSBURY, L.C., LORD WATSON, and LORD HERSCHELL. The language of LORD HERSCHELL has already been quoted by me. LORD WATSON said, at p. 353:

> It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by LORD CRANWORTH, and other noble and learned Lords, that it is needless to quote authorities in support of it.

In the Court of Appeal these observations were put aside. It was said that they were *obiter dicta*, which may in one sense be true, but, though the issue was concluded by what happened in the county court, this House thought fit to explain the reason on which the employers could properly be held liable, viz., the defective system of working. It was said that the observations need not be seriously considered, because the relevant authorities were not cited to their Lordships. It would, however, be strange to imagine that these three great lawyers did not trouble to appreciate the authorities relevant to the principles which they were enunciating. But LORD WATSON does actually refer to and quote from *Bartonshill Coal Co.* v. *McGuire* (6), *Bartonshill Coal Co.* v. *Reid* (3), and *Weems* v. *Mathieson* (24), and explain *Sword* v. *Cameron* (5). I venture, with all respect, to say that, in my opinion, it was the failure of the Court of Appeal to appreciate the effect of these authorities which led them to lay down the rules which they did, and to fall into the fallacy of not distinguishing between what has been called the master's province of duty and what has been called the servant's province of duty to his fellow-servants. When it is said that the workman takes the risk of his fellow-workmen's negligence, it must be added that he does not take the risk of his master's negligence. The distinction between these provinces of duty was fully discussed in, among other places, *Merry's* case (7). The workman succeeded there, because it was held that the actual defect in the ventilation of the pit was not a defect in the system of ventilation for which the employers were liable, but a defect

caused by a temporary structure erected in the actual conduct of the operations owing to error of judgment on the part of the mine's manager, who was a fellow-workman within the rule of common employment. It may often be difficult to draw the line, in any particular case, between these two categories. But the Court of Appeal seem to base their con-
A clusion on a number of cases in which the negligence was that of those who were fellow-servants, however exalted their grade. *Wigmore* v. *Jay* (25), which was strongly relied on by SCRUTTON, L.J., was, I think, such a case. The use of the defective scaffold-pole may well have been merely an act of negligence on the part of the foreman, the master having
B taken due care to provide a proper supply of scaffold-poles. I think that the same observation applies to the other cases cited by SCRUTTON and GREER, L.JJ. Thus *Cribb* v. *Kynoch, Ltd.* (14) and *Young* v. *Hoffman Manufacturing Co., Ltd.* (15) are cases in which the foreman, being generally competent, was negligent in the instruction of the young
C person or apprentice, a particular duty which was reasonably held to appertain to the fellow-servants' and not to the employers' province. If, in any of these cases, the principles which I have stated as to the extent of the master's duty are not correctly applied to the facts, such decisions cannot stand against the authorities in this House to which
D I have referred. But I doubt if there is any such case. In *Toronto Power Co., Ltd.* v. *Paskwan* (13), SIR ARTHUR CHANNELL, delivering the judgment of the Privy Council, aptly observed, at p. 738:

> It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake.
> E It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.

I think that the decision was correct, and that its effect was accurately stated in the headnote.

F There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save
G by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As LORD
H MACMILLAN said, in the *Lochgelly* case (19), at p. 18, with reference to a duty to take care:

> It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case and in either case it is a duty imposed by law.

To the same effect LORD ATKIN says, at p. 9:

> Where the duty to take care is expressly imposed upon the employer and not

by this House. Thus, in *Weir (or Wilson)* v. *Merry & Cunningham* (7), Lord Cairns, L.C., said, at p. 89:

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> It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case and in either case it is a duty imposed by law.

To the same effect LORD ATKIN says, at p. 9:

> Where the duty to take care is expressly imposed upon the employer and not

repeatedly approved in this House, to the effect that an employer cannot
divest himself of responsibility in regard to the three matters which are
in his peculiar province.

My Lords, this view is decisive of the present appeal; but counsel
for the appellant, in his persuasive argument, relied so strongly on the
English case of *Fanton* v. *Denville* (16) that it would not be right to A
abstain from dealing with that case. My noble and learned friend
LORD WRIGHT has carefully examined the decision, and has stated the
English authorities (including the decision of the Privy Council in
Toronto Power Co., Ltd. v. *Paskwan* (13)), and I am in complete accord
with what he has said. B

My Lords, it has already been pointed out that the employer's liability
is fulfilled by the exercise of due care and skill, and I may be allowed to
point out that it is this circumstance which has led, on occasion, to a
misapprehension of the true position. An illustration will demonstrate
the mistake. Suppose some new machinery is necessary in a factory, C
and the employer is absent, or complerely unskilled in such things.
He necessarily leaves the matter to a manager, let us suppose a highly
skilled person, who, however, is negligent in this case. An accident
follows, due to a defect in the machine. If the liability of the employer
is stated as being an obligation to use his best endeavours to supply D
and install good machinery, it may well be said on his behalf that he
left the matter to a highly skilled man, and it may be asked, with force,
what more could he do? I should reply, nothing; but I should add
that the premise is incorrect. The possessive pronoun "his" is that
which leads to the error. The proposition would be more correctly E
stated to be that his duty is to supply and install proper machinery so
far as care and skill can secure this result. He can, and often he must,
perform this duty by the employment of an agent, who acts on his
behalf; but he then remains liable to the employees unless the agent
has himself used due care and skill in carrying out the employer's duty. F
This has sometimes been expressed by saying that the duty is personal
to the employer; but the adjective if unexplained is apt to mislead,
like the word "absolute" and the word "delegate." The employer
can, of course, and often must, delegate the performance of any of his
duties to skilled agents; but it would need an altogether new implied G
term in the contract between employer and employee before a court
could properly hold that this delegation has the result of freeing
the employer from his liability. This becomes apparent if we imagine
the contract between employer and workman to be written out in full,
with all the implied clauses. There would be, for the reasons given by H
the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (17) and by your Lordships,
no clause to the effect that the employer was to be freed from his
special obligations to the workmen if he delegated them to an agent;
and, in the absence of such a clause, the employer would plainly remain
liable if the agent was guilty of not using proper care and skill, since,

in the contract law of Scotland, as in England, it is impossible to transfer a liability towards the other party to the contract without the consent of that party. I will express my opinion, agreeing with that of my noble and learned friend LORD THANKERTON, that, on the facts as reported, the decision in *Fanton* v. *Denville* (16) was right. For the reasons already A given by your Lordships, some of the *dicta* in that case must be regarded as contrary to authority, and in principle unsound.

My Lords, there remains for consideration only the special circumstance that the appellant company, not being possessed of the necessary technical qualifications, was prohibited from taking part in the technical B management of the mine by the Coal Mines Act, 1911, s. 2 (4). On this point (as in others), I am in complete agreement with the opinion of the Lord President already cited by my noble and learned friend LORD THANKERTON, and have nothing to add.

I agree with the opinions already expressed that the appeal fails, C and should be dismissed.

Appeal dismissed, with costs.

Solicitors: *Beveridge & Co.*, agents for *Wallace Begg & Co.*, W.S., Edinburgh, and *J. A. McAra*, Glasgow (for the appellant company); *Golding, Hargrove & Golding*, agents for *Fred Robinson*, Edinburgh, D and *J. T. Tinman & Co.*, Dunfermline (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

E
Re HOWELL'S TRUSTS, BARCLAYS BANK, LTD. *v.* SIMMONS.

[CHANCERY DIVISION (Bennett, J.), **July 15, 1937.**]

Will—Construction—Legacy—Person in testator's service at date of his death—Employee of business carried on in partnership.

By his will, made in Oct., 1933, a testator gave "to every person who F shall at the date of my death be in my service and shall have been in my service for not less than three years continuously immediately prior to that date" one year's wages. The testator had carried on the business of a sports ground proprietor. In May, 1931, the testator had signed a declaration of trust whereby he admitted and acknowledged that he held the business of a sports ground proprietor carried on in his name in trust for the persons mentioned in the declaration in certain proportions. G The testator continued until his death to manage the business exclusively. The question arose whether certain persons who had been employed in the testator's business since before May, 1931, and, without any knowledge of any change in the ownership of the business, had remained in the employ of the business continuously until the testator's death, were entitled to legacies under the testator's will:—

H HELD: the employees were in the testator's service for a continuous period of three years immediately prior to his death within the terms of the will, and they were entitled to legacies.

[EDITORIAL NOTE. It is common for testators to give legacies to employees and this case deals with the position arising where the employees have all along believed themselves to be employed by the testator when they were technically not so employed.

As to Legacies to Servants, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 759, 760, para. 1393; and for Cases, see DIGEST, Vol. 44, pp. 899-903, Nos. 7589-7640.]

Case referred to:

(1) *Cox* v. *Hickman* (1860), 8 H.L. Cas. 268; 36 Digest 328, *91*; 30 L.J.C.P. 125; 3 L.T. 185.

Summons asking the court to determine whether certain groundsmen and others employed on the sports ground referred to in the judgment were entitled to benefit as legatees under the will, dated Oct. 26, 1933, of a testator who died on Aug. 2, 1936. The facts and the material parts of the will are set out in the judgment.

G. P. Slade for the plaintiff bank, the trustee of the will.

G. R. Upjohn for the defendant, Mr. Simmons, who claimed as a legatee.

J. Neville Gray for the defendant, Mrs. Turner, who also claimed as a legatee.

Roger Turnbull for the defendant, Mr. Hull, who also claimed as a legatee.

W. J. C. Tonge for the defendant, Mr. Guyver, who also claimed as a legatee.

H. R. G. Rowley for Mrs. E. M. Howells and Mr. C. J. Howells, who were interested in residue but consented to any order that might be made.

Upjohn: If a man is in the employ of a partnership, he is in the employ of each of the partners. The relation between the testator and those associated with him in carrying on the business of a sports ground proprietor was that of trustee and *cestuis que trust.* He carried on the business in his own name and the others were merely his beneficiaries. There is no evidence that he ever asked leave of the others to do anything in connection with the business. There is no evidence of that connection which partners usually have with one another. [Counsel referred to *Cox* v. *Hickman* (1).]

Gray: There was not a partnership existing between the testator and the others who were interested in the sports ground business, but that was not material. The words of cl. 4 of the will were "every person in my service at the time of my death." Construing that, it must be remembered that these persons thought themselves to be solely in the testator's employ, and it may be assumed that he so regarded them. My client was engaged by the testator before the date of the trust deed, and she did other work for the testator in addition to her work at the sports ground.

Slade: The mere fact of the legal relationship of the service ought not to be treated as concluding a matter of this kind. Only those persons with whom the testator contracted and whom he paid out of his own money ought to be included. It does not matter whether there was any partnership or not. There is a line of authorities which says that a gift of a year's wages applies only to those who are engaged and paid by the year. In the present case there is no one who can say he was engaged and paid by the year.

Bennett, J.: This summons raises the question of the construction of the will of the testator. The matter at first appeared to be quite an easy one. After having heard the facts, I am not quite so sure about it. The testator died on Aug. 2, 1936. He made his will on Oct. 26, 1933. He says in his will:

> I give free of legacy duty to every person who shall at the date of my death be in my service and shall have been in my service for not less than three years continuously immediately prior to that date one year's wages at the rate payable to such person at the date of my death.

The testator carried on a curious sort of business. It was the carrying on of sports grounds in the vicinity of London. It seems to have been a profitable business judging by the size of his fortune. Whether he made it out of sports grounds or not I do not know. Ostensibly, he was the only person carrying on the business, but in fact, on May 26, 1931, he signed a declaration of trust, whereby he admitted and acknowledged that, for good and sufficient consideration already received by him, he held the business of a sports ground proprietor carried on in his name in trust for the persons whose names appear in the first column of the first schedule in the proportions specified in the schedule. Also, he undertook that he would, at the request of the persons mentioned in the schedule, transfer the assets of the business to a company. The shareholders should be the same persons and himself. The scheme was to be in such form as counsel nominated by Messrs. H. B. Wedlake, Saint & Co. might consider reasonable, having regard to the respective interests of the parties in the business. In the first schedule are the names of the persons in addition to his own and their interests. He was interested to the extent of about six-tenths, and the others to the remainder in various proportions. The second schedule sets out five pieces of freehold land, some leasehold land, and other land held on tenancies. After the date of that deed the testator continued to manage the business exclusively. I am proposing to assume, without deciding the matter, that the relationship which existed on May 26, 1931, between the testator and the other five gentlemen named in the declaration of trust was that of partnership. The question arises with regard to the four persons named in the summons, Mr. Simmons, Mrs. Turner, Mr. Hull, and Mr. Guyver, as to whether they were in the service of the testator at the time of his death, and so entitled to the legacies under cl. 4 of his will. Each of these persons was engaged by the testator before May 26, 1931. It would seem that the wages of each of them, after May 26, 1931, were paid out of moneys which were, on the assumption which I have made, partnership moneys. The question arises as to whether these persons were exclusively in the service of the testator at the time of his death. It takes two to make a contract. It may be said that it takes two to undo a contract, once made, and to make another in its place. On the facts, in my judgment, there is no ground upon which it can be concluded that the contracts of service were ever determined by the testator in his lifetime. It may be that each of these persons, upon the assumption which I have made, would have had a right to go against the other persons mentioned in the declaration of trust. But that is irrelevant, because the original contract of service was never in the lifetime of the testator changed by him. None of these four persons ever knew that there had been a change in the ownership of the business he was carrying on. The only questions I have to determine are whether there was an existing contract of service for three years and if it was for three years immediately prior to his death. I hold that they were in his service, and had been in his service, for a continuous period of three years immediately prior to his death, and I make a declaration accordingly.

Solicitors: *H. B. Wedlake, Saint & Co.* (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

D. BATES & CO. *v.* DALE

[CHANCERY DIVISION (Clauson, J.), **July 5, 6, 1937.**]

Trade—Covenant in restraint of trade—Accountant.

The defendant carried on business as an accountant in Leek, Staffordshire, having some 60 or 70 clients. He was not a qualified accountant and, desiring to be associated with a firm of accountants, the partners in which had professional qualifications, he sold his business to the plaintiffs, a firm practising in the Potteries. Forty pounds was paid for the goodwill of the defendant's business. The defendant was to act as manager of the plaintiffs' branch in Leek, being the defendant's business which the plaintiffs had purchased. The agreement for sale contained a covenant by the defendant that he would not carry on or be concerned in the business of an accountant within 15 miles from Leek town hall for a period of 15 years from the operation of the agreement. This area included Macclesfield and Buxton. In an action to restrain the defendant from setting up in business as an accountant in Leek after he had ceased to be in the plaintiffs' employment:—

HELD: in the circumstances, the covenant was too wide for the adequate protection of the plaintiffs as purchasers of the defendant's business, and the covenant was, therefore, unenforceable.

[EDITORIAL NOTE. There is no restatement of the law in this case; but the judgment deals so carefully and fully with the details that must be considered in drafting a restrictive covenant in the case of an accountant, that it will be of the greatest assistance in drafting such clauses in a way that will meet the requirements of the law in such circumstances.

AS TO COVENANTS RESTRAINING COMPETITION, see HALSBURY, Hailsham Edn., Vol. 22, pp. 139-141, para. 229; and FOR CASE, see DIGEST, Vol. 43, p. 57, No. 584.]

Cases referred to:

(1) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 43 Digest 22, *139*; 63 L.J.Ch. 908; 71 L.T. 489.

(2) *Mason* v. *Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724; 43 Digest 22, *143*; 82 L.J.K.B. 1153; 109 L.T. 449.

(3) *British Reinforced Concrete Engineering Co., Ltd.* v. *Schelff*, [1921] 2 Ch. 563; 43 Digest 35, *310*; 91 L.J.Ch. 114; 126 L.T. 230.

(4) *Smedley's, Ltd.* v. *Smedley* (1918), [1921] 2 Ch. 580, *n.*; 43 Digest 37, *332*.

(5) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 43 Digest 24, *154*; 85 L.J.Ch. 210; 114 L.T. 618.

(6) *Fitch* v. *Dewes*, [1921] 2 A.C. 158; 43 Digest 34, *276*; 90 L.J.Ch. 436; 125 L.T. 744.

ACTION for an injunction to restrain the vendor of a business from setting up a business in breach of a covenent in the agreement of sale. The covenant and the facts are fully set out in the judgment.

J. Leonard Stone for the plaintiffs.

H. A. H. Christie, K.C., and *F. H. L. Errington* for the defendant.

Stone: The suggestion that the plaintiffs should purchase the business came from the defendant because his business had very creditably grown to such a size that he could not control it. In the case of vendor and purchaser, there is far greater latitude in the imposition of an agreement than there is in the case of master and servant. A radius of 15 miles from Leek in the case of a professional business, in which the goodwill was so vital, was eminently reasonable. [Counsel referred to *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (1); *Mason* v. *Provident Clothing & Supply Co., Ltd.* (2); *British Reinforced Concrete Engineering Co., Ltd.* v. *Schelff* (3); *Smedley's, Ltd.* v. *Smedley* (4).]

Christie, K.C.: In every case in which a covenant containing a very long time or a very large area has been held good, there has been a limited population. The sum of £40 was the figure at which was valued the goodwill which it was said should be protected by this very sweeping covenant. If the defendant was employed by a London firm doing business in the area, he would come within this restrictive covenant. The covenant imposes upon the defendant an obligation to recommend the plaintiff's firm whenever required, and he was to do all in his power to renew and extend the practice of the plaintiffs. Therefore, the covenant extends beyond 15 miles and 15 years. In the present case, the covenant was very much wider than was required for the protection of the plaintiffs. The area is an important one, having a population of well over 400,000. [Counsel referred to *Herbert Morris, Ltd.* v. *Saxelby* (5).]

Errington, following on the same side: It is necessary to consider the positions of the covenantor and the covenantees. The covenantor was, at the time the agreement was made, a young man of 25 years of age, and had no professional qualifications. His only experience was in income tax matters. The plaintiffs had all the necessary qualifications, and had had 20 years' experience, and theirs was the third largest business in the Potteries. The business purchased was a small tradesmen's business, the clients consisting of people who could pay only small fees. The business has remained a local one, although there have been all the advantages of a big firm behind it. If it had been necessary to protect the large business of the plaintiffs from the competition of this small local man, the Potteries would have been a sufficiently large area.

Stone, in reply: The principal attack which has been made upon the covenant in the agreement has been directed to the area. But this is an agreement between vendor and purchaser, and not between master and servant. The goodwill of professional men may run further than that of a trader. [Counsel referred to *Fitch* v. *Dewes* (6).]

Clauson, J.: The circumstances are these: Mr. Dale, the defendant, was employed, as a youth, in some shape or form in connection with the Income Tax Department. He, however, seems to have left that employment at about the time when he came of age, or very soon afterwards, and he cannot, I think, have risen to a very distinguished position in the service, but, on leaving the service, he was minded to take advantage of his knowledge of income tax matters, and he set up in business as an accountant at Leek in the county of Stafford, his business consisting (as I gather from the evidence that has been given to me) almost entirely of looking after the profit and loss accounts of small tradespeople, and one or two professional people, in the neighbourhood, with a view to getting their accounts into a shape which would enable the matter of income tax to be settled with the local income tax people. Mr. Dale (whom I have seen in the box) is obviously a careful and intelligent person, and he seems to have worked up quite a nice little business of that character, describing his practice as that of an accountant, though he has none of the usual professional qualifications of an accountant, but it was no doubt an accountancy business. He had, it would seem, quite a substantial number of clients, some 60 or 70 people, and he was, I should gather, more or less regularly employed for the sort of work that I have indicated. But one can understand that it occurred to him that it would add to his prestige, to his position, and to the chance of getting a somewhat higher type of accountancy work, if he were associated with a firm of what I may call regular accountants, the partners in which would have the ordinary professional qualifications. The plaintiff firm is a well-established firm of accountants practising in the Potteries, and in some way or other the defendant came into touch with them. As the result, two agreements were entered into between the parties on Dec. 24, 1927. The first agreement was a sale agreement, and under it Mr. Dale agreed to sell, and the purchasers (the plaintiffs) agreed to purchase all his office furniture, stationery, and so on, for the sum of £70, and the goodwill of his business for the sum of £40, and that arrangement was to operate as from the previous Aug. 8. The sale agreement contained a covenant by Mr. Dale, under which the plaintiffs are now suing, that he would not:

> either alone or jointly or in partnership with or as agent or manager for any other person or persons whomsoever and either directly or indirectly carry on or manage or be concerned or interested in or act as a servant or clerk of any person concerned or interested in the business of an accountant or incorporated accountant or

chartered accountant within 15 miles from the Town Hall Leek aforesaid for a period of 15 years from Aug. 8 last, neither shall he during the period aforesaid authorise his name to be used for the purpose of any such business by any person or persons within the limits aforesaid and the vendor will at all times if and when required by the purchasers recommend the firm of the purchasers to the customers of the said practice and will do all in his power to retain renew and extend such practice for the benefit of the purchasers.

A Contemporaneously there was another agreement of Dec. 24, 1927, under which the plaintiffs agreed to employ the defendant as manager of their branch business at Leek, which was a branch constituted by the business which they were purchasing from Mr. Dale. Mr. Dale was to get a fixed salary of £5 a week, and a bonus of 20 per cent. per B annum on the profits. Then there is a provision as to the method of ascertaining the profits, and so on. Then there is a provision as to compensation in case the arrangement was terminated within a period of five years, but as it, in fact, continued beyond the five years, I need not trouble with the details of that. Then there is a covenant that, for a C period of five years after the termination of the manager's employment, he should not :

canvass or solicit business from any person or persons firm or company who shall at any time during the continuance of his employment hereunder have been a customer or client of the firm.

This action, however, is not concerned with that covenant, and I need D say no more about it. There is a provision that, in consideration of the manager, Mr. Dale, performing the terms and conditions of the agreement, the partners in the firm will, by all reasonable means, instruct him in the business and practice of an accountant and auditor. That arrangement having been made and completed, things went on very much as E before, except, of course, that the defendant, instead of owning the business, carried on the business as manager for the plaintiff firm. The defendant, as a matter of fact, lived, I think, at all the material time, or, at any rate, for most of it, not at Leek, but at Newcastle-under-Lyme, travelling, I suppose, backwards and forwards daily to Leek F for the purposes of his business. It appears that, as a part of the Leek branch, there was a certain amount of business obtained personally by the defendant through personal acquaintances in the area surrounding his home at Newcastle-under-Lyme. From time to time, as part of the Leek business, business was done for just a few persons in the outlying G places a little way from Leek. That was the feature of the business. The whole thing was on rather a small scale. From time to time the business expanded. The number of active clients, to use a convenient phrase, during each year rose, and in 1934 the number of active clients exceeded 100. An active client meant a client who, in the course of H the year in question, had had work done for him by the business for which the business claimed the benefit.

For reasons which are quite immaterial, and about which, indeed, I know little, the plaintiffs came to the conclusion that it would be a good thing to put an end to this arrangement. Accordingly, notice was given to Mr. Dale that they proposed to put an end to the arrangement. In due course, after a period which exceeded the necessary period of notice, as a matter of fact, the arrangement came to an end by Mr. Dale throwing up his business in the office, I daresay quite reasonably, but that does not matter at all. Very shortly after leaving the employment of the plaintiffs, he set up, in the first instance, in Leek as an estate agent and insurance agent, but he obtained advice which I suppose satisfied him that he could disregard the covenant into which he had entered, and very shortly afterwards he resumed the business of the nature that I have indicated, namely, this income tax business, and, as one would naturally expect, he was employed by a very considerable number of the former clients of his branch. The plaintiffs appear to have continued the office at Leek for some time, at all events, and they put in some other manager. Thereupon this action started, and the plaintiffs are claiming to enforce against Mr. Dale the covenant which I have read.

It will be observed that the covenant extends so as to keep him out of business over an area measured by a radius of 15 miles from Leek. It is material to look at the map in order to see exactly what that area is. I have before me the ordnance map with a limit of the area marked in red. South-west of Leek is the very thickly-populated area known as the Potteries, in which the main business of the plaintiffs is centred. In the north of the area, towards the east, there is Buxton, and towards the west of the northern part of the area is Macclesfield. It is reasonably obvious to anyone who is in the habit of reading a map on this scale that Leek and Macclesfield are likely to have but little connection for the purposes of such a business as that which I have been describing, and it is quite clear, when one studies the contours, that between Leek and Buxton the country is such that one would hardly expect there to be much connection in regard to such a business as that of which I have spoken between Leek and Buxton. The question whether the covenant is enforceable turns, of course, upon this: does the covenant afford more than adequate protection to the party in whose favour it is imposed? If it affords no more than adequate protection to the party in whose favour it is imposed, then (subject to certain other conditions with which I need not trouble) the covenant may be enforceable, but if it affords more than adequate protection to the party in whose favour it is imposed, the covenant is unenforceable. I do not propose to attempt to re-state the law on this subject, which is, of course, well settled. There is a series of authorities in the highest tribunal, to which I need not refer, to which my attention has been directed in the course of the case.

On the facts that I have stated, is it possible for me to hold that this covenant affords no more than adequate protection to the plaintiffs? Having regard to the type of business with which the particular branch is concerned, and having regard to the business of the plaintiffs (they had I was told, the third largest accountancy business in the Potteries), can it really be suggested that it is necessary, for their adequate protection as purchasers of this £40 goodwill of the business which I have described, that Mr. Dale should be precluded from acting as an accountant in any shape or form in Buxton or Macclesfield? Thus stated, the problem seems to me to answer itself. Even if I felt any doubt about that, there are other difficulties to which it is not necessary for me to A allude, but that seems to me to be quite conclusive. In the circumstances of the case, I personally can feel not the slightest doubt that the protection which would be conferred by this covenant, if it were a valid covenant, is far more than such protection as would be reasonably adequate in the circumstances of the case. Coming to that conclusion, B of course there can be but one result: the covenant is unenforceable, and, accordingly, the claim for an injunction, and for damages for breach of covenant, fails.

There is one other quite small point, and I mention it in order to show that nothing has been overlooked. It will be noticed that there are, C at the end of the covenant, these words:

> The vendor will at all times if and when required by the purchasers recommend the firm of the purchasers to the customers of the said practice and will do all in his power to retain renew and extend such practice for the benefit of the purchasers.

Then there is this allegation in the statement of claim:

> D Further in breach of his covenant to "do all in his power to retain renew and extend such practice for the benefit of the purchasers" the defendant has removed from the offices of the Leek business the papers of certain clients of the plaintiff firm and has since leaving the employment of the plaintiff firm done work as an accountant for certain persons who prior thereto were clients thereof.

The circumstances, as a matter of fact, are these: of course the defendant E made no secret of the fact that he was going to leave the plaintiff firm, and a considerable number of the customers of the branch asked him to hand over to them their papers, as they were entitled to do. When the defendant ceased to be in the employ of the firm, those clients employed him again, and I daresay that they are the stable part of his F new practice, but I cannot see that I can, in those circumstances, hold that there has been any breach of that part of the covenant, apart from any difficulties as to the enforceability of it. Indeed, if there had been a breach, I cannot see that it is a breach that I can really assess in damages. It seems to me to be too nebulous to deal with at all. I G mention this only in order to show that it has not been overlooked, because no point is really raised on that matter, but, if there is any point in that, I must confess that I cannot see my way to giving any legal effect in respect of it. The result is that the action will be dismissed with costs.

H *Action dismissed, with costs.*

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Hollinshead & Moody*, Tunstall (for the plaintiffs); *Gibson & Weldon*, agents for *Bowcock & Pursaill*, Leek (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

STROOD ESTATES CO., LTD. *v.* GREGORY.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, and Lord Maugham), **June 25, 28, July 26, 1937.**]

Landlord and Tenant—Rent restriction—Rates—Compounding by landlord—Calculation of net rent—Deduction of rates " chargeable on the occupier "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *ss.* 2 (1), 12 (1) (*c*). A

A landlord of controlled premises paid the rates and received a compounding allowance from the local authority. In calculating the net rent, he claimed to deduct from the standard rent only the amount of the rates he actually paid and not the amount with which the occupier would have been charged if he had been rated directly :— B

Held : in order to ascertain the net rent, the landlord must deduct from the standard rent the amount of rates with which the occupier would have been charged, and not merely the amount payable by the landlord.

Decision of the Court of Appeal, [1936] 2 All E.R. 355, *affirmed.*

[EDITORIAL NOTE. The point in this appeal is whether a landlord who pays the C rates, whether by agreement or by reason of statutory enactment, and who in consequence receives a " compounding allowance," is entitled to deduct the full amount of the rates or only the amount paid in arriving at the net rent. It is held that he must deduct the full amount chargeable and not the smaller amount paid. The result is to reduce the increases the landlord may make since they are calculated as percentages on the net rent. D

For Increases under the Rent Acts, see HALSBURY, Hailsham Edn., Vol. 20, pp. 323-325, paras. 383-386 ; and for Cases, see DIGEST, Vol. 31, pp. 567, 568, Nos. 7139-7150.]

Case referred to :

(1) *Nicholson* v. *Jackson* (1921), 90 L.J.K.B. 1121 ; 31 Digest 567, *7149* ; 125 L.T. 802. E

Appeal from an order of the Court of Appeal (Sir Boyd Merriman, P., Scott, L.J., and Eve, J.), dated May 22, 1936, and reported in [1936] 2 All E.R. 355, setting aside a judgment of His Honour Judge Clements given in Rochester County Court on Feb. 12, 1936, in an action in which F the present appellant company was the plaintiff and the present respondent was defendant. The facts and the arguments are set out in the judgment of Lord Macmillan.

Linton Thorp, K.C., *Donald McIntyre* and *Eric Falk* for the appellant company. G

Thomas Southall and *J. D. Walker* for the respondent.

Lord Atkin : My Lords, at the conclusion of the arguments in this case, I came to the conclusion that the decision of the Court of Appeal was right, and that the reasons they gave for that decision were correct. I have now had the opportunity of reading the opinion about to be H delivered by my noble and learned friend Lord Macmillan, affirming that decision, with which I entirely agree, and I have nothing to add.

Lord Thankerton ; My Lords, I also desire to express my concurrence in the opinion about to be delivered by my noble and learned friend Lord Macmillan.

Lord Macmillan: My Lords, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1), permits the rents of dwelling-houses to which the Act applies to exceed the statutory "standard rent" *inter alia* (*c*) by an amount not exceeding 15 per cent. of the "net rent," and (*d*) where the landlord is responsible for the whole of the repairs, by a further amount not exceeding 25 per cent. of the "net rent."

"Net rent" is defined by sect. 12 (1) (*c*) of the Act as follows:

> The expression "net rent" means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent.

The question at issue in this appeal is whether, in cases where the landlord at the relevant time paid the rates, there should be deducted from the standard rent to arrive at the "net rent," (*a*) the amount actually paid by the landlord to the appropriate local authorities; or (*b*) the amount which the occupier would have had to pay to the local authorities if he had himself had to pay the rates. The difference between (*a*) and (*b*) arises in consequence of the provisions of the statutes under which the rates were levied. These statutes are the Poor Rate Assessment and Collection Act, 1869, and the Public Health Act, 1875. By sect. 4 of the Act of 1869, the vestry of any parish may order that the owners of all rateable hereditaments whose rateable value does not exceed a certain figure shall be rated to the poor rate in respect of such rateable hereditaments instead of the occupiers; and, where such an order is in force:

> The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate.

If the owner notifies that he is willing to be rated in respect of his rateable hereditaments, whether the same be occupied or not, the overseers are required to rate him accordingly, and to allow him a further abatement or deduction not exceeding 15 per cent. Sect. 211 of the Act of 1875 directs that general district rates shall be made and levied on the occupier of all kinds of property for the time being assessable to any rate for the relief of the poor, but "the owner, instead of the occupier, may at the option of the urban authority be rated" in cases where the rateable value does not exceed £10, or where the premises are let to weekly or to monthly tenants, or where the premises are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly:

> Provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two thirds nor more than four fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessments may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers.

Thus, under these statutes, where the rates were paid by the landlord, he was entitled, in the case of the poor rate, to a percentage " abatement or deduction " from the amount of the rate, and, in the case of the general district rate, to be assessed on a reduced estimate of the net annual value of his premises.

The respondent is in possession, as a weekly tenant, of a dwelling-house at Strood, belonging to the appellant company. It is agreed that the standard rent of the premises is 5*s.* 6*d.*, and that, at Aug. 3, 1914, being " the time by reference to which the standard rent is calculated," the appellant company paid rates to the local authority in respect of the premises, in the case of the poor rate subject to the statutory abatement or deduction, and, in the case of the general district rate, on a reduced estimate of the net annual value of the premises. The sum actually paid by the appellant company in name of rates was 1*s.* 2¼*d.* per week; if the occupier had paid the rates the sum charged on him would have been 1*s.* 6¼*d.* per week. The " net rent " is thus either 5*s.* 6*d.*—1*s.* 2¼*d.* =4*s.* 3¾*d.*, or 5*s.* 6*d.*—1*s.* 6¼*d.*=3*s.* 11¾*d.*, according as one or other of the rival interpretations of the statutory definition of " net rent " prevails. The difference is 4*d.* a week. The appellant company naturally contends for the larger figure, as the permitted 40 per cent. increase of rent is larger if the 40 per cent. is calculated on 4*s.* 3¾*d.* than if it is calculated on 3*s.* 11¾*d.*; the respondent, equally naturally, contends for the smaller figure.

The present proceedings originated in the county court, where the appellant company sued the respondent for certain arrears of rent computed in conformity with its contention as to the proper mode of ascertaining the " net rent "; the respondent did not dispute liability for arrears computed according to his contention as to the proper mode of ascertaining the " net rent." The county court judge found in favour of the appellant company, and gave judgment for £3 2*s.* 11*d.*; the Court of Appeal set aside this judgment, decided the question at issue in favour of the respondent, and gave judgment accordingly for £2 12*s.* 10*d.*

The statutory definition of " net rent " is, no doubt, not very happily worded, and lends itself to the verbal refinements which counsel for the appellant company ingeniously elaborated. But for myself I find little difficulty in agreeing with the reading adopted by the Court of Appeal, which seems to me to be the straightforward meaning of the language employed. The " net rent " is to be " the standard rent less the amount of such rates," i.e., less the amount of the rates chargeable on the occupier, or which would be chargeable on the occupier but for the provisions of any Act. The rates chargeable on the occupier are the full rates on the net annual value of the premises; where the provisions of any Act place the burden of the rates on the landlord, and grant him corresponding concessions, then the rates " which but for the provisions of any Act would be chargeable on the occupier " are again the full rates. Therefore, in either case, to arrive at the " net rent " the full rates chargeable on the occupier are to be deducted from the standard rent.

But the appellant company says that the true antecedent of "such rates" is not, "the rates chargeable on or which but for the provisions of any Act would be chargeable on the occupier," but the rates actually paid by the landlord, i.e., the sums paid by him under abatement, or on a diminished annual value, which were accepted from him by the local authority in discharge of his liability to pay the rates chargeable in respect of the premises. I cannot accept this reading. It is said that, in point of fact, the landlord did not, at Aug. 3, 1914, pay "the rates chargeable on or which but for the provisions of any Act would be chargeable on the occupier," if the words quoted mean the full occupier's rates, for the landlord paid less sums than those the occupier would have had to pay. Therefore, it is said, the reference must be to the sums actually paid by the landlord, for, otherwise, if the reference is to the full occupier's rates, the present case would not be one in which the landlord paid the rates, and the "net rent" would, under the definition, be the standard rent, for which neither party contends. To this the answer is that, when the definition speaks of the landlord having paid the occupier's rates, it does not mean that he has paid the actual sum which the occupier would have paid as rates, but that the landlord has paid in place of the occupier. The phrase is descriptive of the nature of the rates paid, not of the amount paid in discharge of them. Thus, when the definition speaks of "such rates," it does not refer to the sums actually paid by the landlord, but to the kind of rates in respect of which the landlord has paid, namely, occupier's rates. In my opinion, it is the occupier's rates which have to be deducted, not the rates assessed on the landlord, or accepted by the local authority from the landlord in discharge of the rates. What is to be deducted is that which the occupier was, or would have been (but for special legislation), liable in law to pay, not what the landlord in fact paid, or was liable to pay, in place of the occupier.

The only authority referred to was the case of *Nicholson* v. *Jackson* (1), in this House. But that case turned upon the materially different language of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1 (1) (iv), and is not of assistance in the solution of the present problem.

I accordingly move your Lordships to dismiss the appeal and affirm the judgment of the Court of Appeal. As regards the costs of the appeal, the appellant company was placed on special terms by the order of the Court of Appeal granting it leave to come to this House, and the respondent will have his costs of the appeal, except in so far as already paid to him or defrayed for him by the appellant company in terms of the order of the Court of Appeal.

LORD WRIGHT: My Lords, I agree with the opinion which has just been delivered by my noble and learned friend LORD MACMILLAN.

Lord Maugham: My Lords, I also concur.

Appeal dismissed, with costs.

Solicitors: *Simon, Haynes, Barlas & Ireland* (for the appellant company); *W. H. Thompson* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

A

ROWELL *v.* PRATT.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **June 11, 14, July 26, 1937.**]

B

Evidence—Return to Potato Marketing Board—Refusal to produce—Privileged document—Agricultural Marketing Act, 1931 (*c.* 42), *s.* 17—*R.S.C., Ord.* 39, *r.* 6.

Practice—Appeal to House of Lords—Leave to appeal—Appellant to pay costs in any event—Dissenting Judgment in Court of Appeal.

C

The appellant brought an action against the respondent to recover the price of certain potatoes sold and delivered to the respondent. The respondent counterclaimed damages, on the ground that the appellant had agreed to grow 9½ acres of royal kidney potatoes, and to deliver the whole crop to the respondent at a fixed price, but that, in breach of his contract, the appellant had not delivered to the respondent the whole product of the 9½ acres, but had wrongfully sold part thereof to other buyers, at a price higher than that at which he had contracted to sell to the respondent. For the purpose of proving that the appellant had planted only 9½ acres with royal kidney potatoes, the respondent *subpœnaed* the secretary of the Potato Marketing Board to produce the return made by the appellant showing the total acreage of potatoes planted on his land. The county court judge refused to make an order for the production of the return, on the ground that it was a privileged document, which need not be produced, and, after hearing evidence, he gave judgment for the appellant. On appeal, his judgment was set aside by the Court of Appeal (by a majority), and a new trial ordered, for the reason that the Agricultural Marketing Act, 1931, s. 17, did not expressly alter the common law whereby material evidence of this kind could not properly be excluded:—

D

E

F

Held: (i) on a true construction of the whole of sect. 17 of the Act of 1931, the return in question was a privileged document, and need not be produced.

(ii) on the assumption that the county court judge was wrong in refusing to order production of the return, this was not a case for granting a new trial, as there was no evidence of any substantial wrong or miscarriage of justice.

G

Per Lord Maugham: There are doubtless cases where leave to appeal should be granted only on the terms that the appellant agrees to pay the costs of the respondent in any event, but it may well be doubted whether that is right in a case where the Court of Appeal by a majority is reversing the decision of the trial judge.

Decision of Court of Appeal (Slesser and Greene, L.JJ., Greer, L.J., *dissenting*), [1936] 2 All E.R. 576, *reversed.*

H

[EDITORIAL NOTE. This case is not one respecting the production of a state document, since the Potato Marketing Board is not a department of state. Nor is it a case of privilege, since the Board was not objecting to production on its own behalf. Production was objected to as being contrary to a provision in an Act of Parliament, and whether this was "sufficient cause" for the exclusion of the evidence is a question of construction only of the section in question. It was suggested that this question should be approached with a presumption in favour of the production of such evidence, but the correct rule appears to be that there is no presumption either in favour of or against production.

As to Privilege from Production, see HALSBURY, Hailsham Edn., Vol. 13, pp. 727, 728, para. 801; and for the Cases, see DIGEST, Vol. 22, pp. 392-395, Nos. 4013-4033. For a Case of a Document Prohibited by Statute from Production, see DIGEST, Vol. 22, p. 161, No. 452. For the Agricultural Marketing Act, 1931, s. 17, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 24, p. 29.]

Cases referred to:

(1) *Amey* v. *Long* (1808), 9 East, 473; 22 Digest 427, *4409*.

(2) *Brown* v. *Dean*, [1910] A.C. 373; Digest, Practice, 602, *2431*; 79 L.J.K.B. 690; 102 L.T. 661.

(3) *Hip Foong Hong* v. *Neotia & Co.*, [1918] A.C. 888; Digest, Practice, 602, *2433*; 87 L.J.P.C. 144; 119 L.T. 588.

Appeal from an order of the Court of Appeal (Slesser and Greene, L.JJ., Greer, L.J., dissenting), setting aside a judgment in favour of the appellant on the counterclaim of the respondent entered by His Honour Judge Farrant at Wisbech County Court, and directing that a new trial be had between the parties on the counterclaim. The facts and the arguments are set out in the judgments. The proceedings in the Court of Appeal are reported in [1936] 2 All E.R. 576.

J. W. Morris, K.C., and *Gerald Gardiner* for the appellant.

D. N. Pritt, K.C., and *S. L. Elborne* for the respondent.

Lord Atkin: My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends Lord Wright and Lord Maugham. I entriely agree with them, and they so completely cover the ground that, though we are differing from the Court of Appeal, I find it unnecessary to express the same reasons in different words.

Lord Thankerton: My Lords, I also concur in the opinions about to be delivered by my noble and learned friends.

Lord Macmillan: My Lords, I also concur.

Lord Wright: My Lords, I have had the advantage of reading in print the opinion prepared and about to be delivered by my noble and learned friend Lord Maugham in this appeal. I completely concur in that opinion. The few observations I now add relate merely to the principles which should, in my opinion, be followed in construing the material section, that is, the Agricultural Marketing Act, 1931, s. 17. It is inevitable that a court of law should approach in a critical spirit any legislation which is calculated to impede a court in the discharge of its duty to administer justice, by preventing it from obtaining any material evidence of a nature likely to assist it to ascertain the truth. Hence, a court will be disposed, as was the majority of the Court of Appeal, to construe the section, if possible, so as to avoid that result.

Now, it is true that, if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is just, reasonable and convenient, while the other is not, the court will prefer the former. But, if the words, properly construed, admit of only one meaning, the court is not entitled to deny to the words that meaning, merely because the court feels that the result is not in accordance with the ordinary policy of the law or with what seems to be reasonable. The court cannot mould or control the language. This is particularly true of legislation in these days, when Parliament has established so many new institutions and bodies, and has imposed on individuals so many duties and disabilities for which in the former law no precedents can be found. A statute must be construed as a whole, and with some regard to its apparent purpose and object. The language of one part may help to interpret the language of another. On the other hand, it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction, each statute, like each contract, must be interpreted on its own merits.

For myself, I find the language of sect. 17 (2) clear and unambiguous, and not even difficult when read as a whole. It is curious that the subsection does not contain an express prohibition, but a prohibition of an act must be implied when the act is made a criminal offence, punishable by fine or imprisonment or both. This prohibition is quite unqualified. It is not necessary to determine whether the first paragraph, if it stood alone, would require a judge to refuse to order any person by whom information of the character described has been obtained to disclose that information in court, because, in my opinion, the matter is put beyond doubt by the saving paragraph which follows. That paragraph falls into two parts, an exception, and then a limitation upon that exception. The exception relates to disclosures so far as required for the purposes of legal proceedings. If the paragraph stopped there, that exception would have covered the present case. But the super-imposed limitation is fatal to that view. The exception is limited by the superimposed limitation to legal proceedings under or in virtue of the Act. It is only within these narrow limits that the information may be disclosed. The present case seems to me to fall outside the precisely expressed limits of the proviso, and the proviso removes any doubt that there might be as to whether the main prohibition applies to disclosure for the purposes of legal proceedings. A judge cannot compel a man to commit a criminal offence. I need not consider if the objection could be cleared by the interested party's consent. I cannot construe the words "for the purposes of legal proceedings" in a restricted sense, which would cover only matters anterior to the proceedings in open court, or in the actual hearing of the arbitration, but would exclude from their scope proceedings in open court or arbitration. The words "for the purposes of legal proceedings" are wider than "in legal proceedings." But, in any case, only legal proceedings under the Act come within the liberty. I do not agree that there is any rule of construction, or any *prima facie* implication, which makes it necessary to have express words to prohibit a person from producing a document, or giving oral testimony, if ordered to do so by a court in legal proceedings. But perhaps it is more accurate to say that here the actual language can be construed only as covering A such a case.

In the Act in question, like other Acts of a similar character, an individual is required by law to disclose to the proper person or body certain information as to his private affairs. The Act proceeds to secure to him that this information shall be kept secret, save only in the one B specially defined circumstance. So regarded, the provision is, in addition to being unambiguous, quite reasonable.

On the further question, now become hypothetical, whether, if the judge's order had appeared to be wrong, the case was one in which the court should exercise its discretion to order a new trial, I do not attempt C to add anything to the opinion of LORD MAUGHAM.

LORD MAUGHAM: My Lords, this appeal is from an order of the Court of Appeal setting aside a judgment in favour of the respondent after trial of an action and counterclaim in the county court of Cam-D bridgeshire. The county court judge gave judgment with costs for the plaintiff Rowell in the sum of £97 12*s.* 10*d.*, and dismissed with costs a counterclaim which had been limited to £100. On appeal, the Court of Appeal (GREER, L.J., dissenting) set aside the judgment on the counterclaim, and directed a new trial, the costs of the appeal to be paid E by the plaintiff. Leave to appeal to this House was given on the unusual terms that the plaintiff (the appellant) should obtain from the National Farmers' Union an undertaking to pay the costs of the appeal as between party and party of both parties.

My Lords, the appellant, plaintiff in the action and defendant in F the counterclaim, is a farmer, carrying on business at Inkerson Fen, near Sutton St. Edmunds. He is a grower of potatoes. The respondent is a Wisbech merchant, and he is also a grower of seed potatoes. By agreements dated Jan. 6, 1934, and Mar. 31, 1934, the appellant contracted to grow for the respondent 9½ acres of royal kidney potatoes, sufficient G seed for the purpose being supplied free of charge by the respondent. The potatoes were to be paid for by the respondent at the price of 50*s.* per ton delivered. The appellant in pursuance of the agreement delivered to the respondent 74 tons 14 cwt. 2 qrs. and 20 lbs. of royal kidney potatoes. He sued for the balance of the purchase price, and this claim H was admitted by the defence. The respondent, however, alleged, in his counterclaim, that, in breach of contract, the appellant had not delivered to the respondent the whole product of the 9½ acres, but had sold to certain other merchants some 43 tons of potatoes belonging to the respondent from the 9½ acres. He counterclaimed for the value of these potatoes, £131 18*s.* 3*d.*, a sum reduced to £100 on the action being remitted to the county court. The appellant denied that the potatoes which he had sold to other merchants were the produce of the 9½ acres. The sole issue as it was developed on the trial of the counterclaim was whether or not the appellant had planted royal kidney potatoes in a field (called at the trial "field A") on his farm in addition to those admittedly planted on approximately 9½ acres on a field called "field C." The action was heard in the county court before His Honour Judge Farrant on July 23, Aug. 20, 21, and Nov. 19, 1935. The respondent called certain witnesses, in an effort to prove that no royal kidney potatoes at all were planted in field A, and that the royal kidney potatoes admittedly sold to other merchants were his. He sought to support this evidence by an endeavour to obtain the production on summons of a return made by the appellant under an order made pursuant to the Agricultural Marketing Act, 1931. His failure to obtain this document is the sole ground on which the Court of Appeal have based their order for a new trial. It will be necessary, therefore, carefully to state the facts as to this attempt. In the absence of the document, the judge felt no difficulty, on the evidence before him, in believing a number of witnesses for the appellant, and discrediting some witnesses for the respondent. He found as a fact that the appellant, as he alleged, did plant about 4 acres of royal kidney potatoes in field A, apart from those which were planted in field C; and he further found that the appellant delivered to the respondent all the royal kidney potatoes which were the produce of approximately 9½ acres of land in field C, in compliance with the terms of the two contracts entered into between the appellant and the respondent. The amount so delivered worked out at about 8 tons per acre, which he found was a fair average yield, in the circumstances which had existed. Lastly, he found, as regards the sale of certain royal kidney potatoes to some other merchants, that these represented the produce of the 4 acres planted in field A, and that they formed no part of the crop of royal kidneys planted in field C. There being no appeal on fact, these findings would be amply sufficient to put an end to the litigation, but for the circumstance already referred to, as to the return made by the appellant to the Potato Marketing Board, which must now be stated.

My Lords, the Agricultural Marketing Act, 1931, s. 1, provides for schemes regulating the marketing of agricultural products by the producers, which must be submitted to the Minister of Agriculture and Fisheries, and, in effect, be approved by him and by both Houses of Parliament, whereupon the Minister is to make an order approving the scheme. By sect. 2, every scheme shall provide for the registration of any producer who makes application for that purpose, and shall constitute a board to administer the scheme. Sect. 5 states that a scheme (amongst other things) may provide for requiring registered producers to furnish to the board such estimates, returns, amounts, and other information relating to the regulated product as the board consider necessary for the operation of the scheme. Sect. 17 of the Act is in the following terms :

> 17.—(1) No information with respect to any particular undertaking (other than the undertaking of a board) shall, without the consent of the owner of that undertaking, be included in any report laid before Parliament in pursuance of this Act A or in any recommendations of an Agricultural Marketing Reorganisation Commission published in pursuance of this Act.
>
> (2) Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee, committee of investigation, or Agricultural Marketing Reorganisation Commission, shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years or a fine not exceeding £100 or to B both such imprisonment and fine, or on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding £50 or to both such imprisonment and fine : Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purpose of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder. C

By the Potato Marketing Scheme (Approved) Order, 1933, a scheme for regulating the marketing of potatoes in Great Britain was approved under the Act. By the scheme so approved, the Potato Marketing Board was constituted as a body corporate, with a common seal, and D power to hold land without licence in mortmain. By para. 76 of the scheme, the board was empowered, when it considered it necessary for the operation of the scheme so to do, to serve on any registered producer a demand in writing, requiring him to furnish to it such estimates, returns, and other information relating to potatoes as might be specified E in the demand. There was a penalty for failure to comply with any demand or requirement made by the board, or for making a false statement. Information was required from registered producers, including the appellant, by the board in due course, and the appellant made a return in the prescribed form, but kept no copy of it. The form of F return required each producer to state the acreage planted by him with each variety of potatoes, including, of course, royal kidney potatoes. It is plain that the return might have shown that the acreage figure in respect of royal kidney potatoes was only 9½ acres, a statement consistent with the respondent's contention, and one which would have been G fatal to the appellant's case, unless he could satisfy the judge that it was inserted by a mistake. The respondent's solicitor had accordingly served on the registrar of the Potato Marketing Board a writing (described in the proceedings as a *subpœna duces tecum*) requiring the board to produce to the court the appellant's returns of the acreage and variety of H potatoes he had planted on his said farm. John Workington Eyres, the registrar of the said board, duly appeared at the trial, with the documents named in the said *subpœna duces tecum*. Mr. Charles Greenwood, a solicitor of Wisbech, instructed on behalf of the said board, was allowed to be heard, and objected to producing the documents, and he referred to sect. 17 of the Act. Mr. Eyres was called. Cross-examined by counsel for the respondent, he said that the board was perfectly willing to disclose the documents with the consent of the plaintiff. It had not asked the plaintiff for his consent. Counsel for the appellant interposed a little later to state that his client had never been asked to give his consent, and he added that the board ought not to base its refusal to disclose the return, if at all, on the basis of there being no consent on the part of his client, the maker of the return. A surprising circumstance is that, upon these statements being made, counsel for the appellant was not asked then and there whether he would consent to Mr. Eyres producing the document, or at least handing it to the judge for his perusal. In the result, the judge, according to his note, held that the document was "privileged, and need not be produced."

It should be added that, when the appellant went into the box, and was cross-examined, the matter of the return was again referred to. According to the careful note kept by the judge, the cross-examination began as follows:

> I understand the report is confidential. I have no objection to its being shown to the court. I have all along been of that opinion. I was never asked for this for the purpose of settling this dispute. My solicitor did not tell me that the case would be settled if this report was produced.

The return at this time was apparently not in court, for Mr. Eyres had returned to London; but it is manifest, from what took place when Mr. Eyres was called on his *subpœna*, taken together with this statement by the appellant, that the non-production of the return was not the appellant's fault. Nor could he be sure, when he stated that he had no objection to the report's being shown to the court, that there would not be an adjournment to enable that to be done. It should be noted that the appellant's words are "shown to the court." It is possible that he would have objected to the return being shown to the respondent.

My Lords, it should be mentioned here that the instrument described as a *subpœna duces tecum* was not in the form, or of the nature, of the writ properly called a *subpœna*, the antiquity and compulsory effect of which are described by Lord Ellenborough, C.J., in *Amey* v. *Long* (1). It was in truth only a summons issued pursuant to the County Courts Act, 1888, s. 110, and the County Court Rules, 1903-1935, Ord. 18, r. 3 (see now the County Courts Act, 1934, s. 109, and the County Courts Rules, 1936, Ord. 20, r. 8). Under sect. 111 of the Act of 1888, the penalty for refusing or neglecting "without sufficient cause" to produce the document is a fine not exceeding £10, and the fine may be applied in the discretion of the judge towards indemnifying the party injured by such refusal or neglect. It is not unimportant to observe that there is no power to attach the person served with the summons who refuses to produce the document, and, if the registrar of the Potato Board had been advised to raise the legal question before the High Court on another occasion, and therefore to refuse production, he would have been quit on payment of the fine. The position of a party to an action who refuses to produce a relevant and non-privileged document was and is very different: County Court Rules, 1903-1935, Ord. 16, r. 21.

My Lords, the first point that arises for decision is whether, having A regard to the terms of the Agricultural Marketing Act, 1931, s. 17, the judge acted rightly in refusing to order the production of the return. With all respect to the Lords Justices who formed the majority in the Court of Appeal, I do not think the question can accurately be stated as being whether the return was a document privileged from production. B The document was the property of a third party, namely, the Potato Board, and the Potato Board was not objecting to produce the return in its own interest, but simply and solely because it thought sect. 17 involved a statutory prohibition as regards production. The question then arose whether there was, in the language of the County Courts Act, 1888, s. 111, C "sufficient cause" for the refusal. This is, I think, equivalent to the "lawful or reasonable excuse" which would exist in the case of a *subpœna duces tecum* issued in High Court proceedings, and the court alone would be the judge there of the validity of the excuse: *Amey* v. *Long* (1). The excuse need not be limited to a claim of privilege and, in my opinion, D a county court judge is not compelled to fine a third party who is, in his view, acting reasonably in the matter.

My Lords, before considering the language of sect. 17, it may be useful to remark that the legislature has in several modern statutes required elaborate returns to be made by farmers and others, either to a department E of state or to a board charged with duties of a public character, and the Act has in several cases contained a provision either identical with, or at least resembling, the section which now has to be construed. There are now separate marketing boards relating to bacon, hops, milk and pigs, as well as to potatoes. The true construction and effect of the F section is therefore a matter of considerable importance. The reason for such a provision in a marketing scheme is obvious, namely, that farmers and other producers as a class are so reluctant to disclose the details of their business that such a scheme would have poor prospects of being brought into successful operation unless they were given an G assurance that the information contained in the estimates, returns, accounts and so forth furnished by them would not be divulged to rivals or competitors. It is true, as pointed out in the Court of Appeal, that the Potato Marketing Board is not a department of state, but is merely a domestic executive body, which the legislature has thought fit in the H public interest to entrust with important statutory powers. The excuse of the board for not willingly producing the return must therefore rest on sect. 17: but, in my opinion, it is not a correct proposition to say that there is a presumption that the secrecy attaching to such a return is not intended to be applicable if its production is called for in a legal proceeding, unless the legislature has in plain language declared the contrary. In my judgment, the matter is one to be decided without any presumption either way. The reasons for secrecy in such a case are, I think, almost equally cogent, whether the production of a return is demanded for some collateral purpose in an action or whether the information is sought for out of court.

My Lords, if the matter is so approached, I find myself, with the greatest respect, unable to agree with the judgments of Slesser and Greene, L.JJ. It is not unimportant to note that sect. 17 (1) prohibits the use of any information with respect to any undertaking without the consent of the owner, even in a report laid before Parliament in pursuance of the Act. I do not think it can be doubted that the first part of sect. 17 (2) impliedly prohibits the disclosure of any information such as that contained in a return, for there is no better way of prohibiting an act than by making the doer of it liable to fine and imprisonment. The only question is whether the prohibition applies to ordinary legal proceedings.

It does not seem to me necessary to say what the answer to this question would have been in the absence of the proviso, for, I think, the proviso is decisive in the matter. I am quite unable to take the view that the proviso relates only to disclosure to solicitors and counsel employed in proceedings under the Act. In my opinion, it plainly relates to any disclosure for the purposes of legal proceedings under the Act, the most important of all being the statement of the facts on oath, and the production of the returns at the trial. It may be noted that the proviso goes on to authorise a report of such proceedings, meaning plainly a report of the information disclosed at the trial. There could not be a reason for this part of the proviso if the information could always lawfully be disclosed at a trial in open court. The proviso, in my view, according to its true construction, makes an exception for any information required to be disclosed for the purposes of legal proceedings under the Act, and it accordingly follows that there is no exception for information which a litigant may desire to have disclosed for the purposes of legal proceedings not under the Act. I should add, with all respect, that the words " for the purposes of " the proceedings were, on this view of the section, perfectly appropriate. The draftsman was desirous of limiting the disclosure to the information " required to be disclosed . . . for the purpose of " the proceedings. Similar words are used in the sentence " or for the purpose of any report of such proceedings," and I am unable to see any sufficient reason for limiting the words in the way suggested. I agree, on the point as to the construction of sect. 17, with the opinion expressed by Greer, L.J., and with the reasons he has given in support of it, and I think that the county court judge was right in declining to order the registrar of the Potato Board to produce the return.

My Lords, the conclusion above stated is sufficient to dispose of this appeal, but a second point has been elaborately argued, and it would not be right, I think, for your Lordships to be silent upon it. Assuming, contrary to the view above expressed, that the county court judge was wrong in refusing to order production of the return, would that circumstance alone have been a sufficient ground for ordering a new trial ? This question is one of considerable importance. Greer, L.J., was for answering the question in the negative, while Slesser and Greene, L.JJ., took the other view. My Lords, it is, in my opinion, clear that, according to the modern practice, no new trial should be granted because of the refusal of the judge to order production of a document in the hands of a third party, unless "some substantial wrong or miscarriage of justice has been thereby occasioned." It is true that this is not a case precisely within the terms of R.S.C., Ord. 39, r. 6, since the stage of rejecting the evidence contained in the return had not been reached. The production of the return would not make it evidence. It was for counsel for the respondent to decide, after its production, to put it in evidence, subject to any objection. But there can, I think, be no doubt that the rule must be held to apply, by way of analogy, to such a case as the present, and it was necessary for the respondent, when applying for a new trial, to establish that there had been a substantial wrong or miscarriage.

Two circumstances should be borne in mind, first, that the appellant was in no way to blame for the non-production of the return, and, secondly, that, so far from there being any evidence, presumptive or otherwise, leading to the conclusion that the return would have assisted the respondent's case, the evidence is the other way. True it is that the return might have contained statements which would have been admissible in evidence as admissions against the appellant, and in that case the respondent's counsel would doubtless have put the document in. But why is the court to assume, in the complete absence of evidence, and, one may add, in spite of the evidence, that the document contained such statements ? If the appellant was an honest man and had made a proper return, the document was useless to the respondent, and not properly admissible in evidence It may be added that counsel for the respondent abstained, and, one may conjecture, deliberately abstained, from suggesting that, the appellant not objecting, the judge should himself look at the return My Lords, no case has been discovered, at least none has been cited, supporting the view that, if a litigant is unable to secure the production at the trial of a document in the hands of a third party, who has no just excuse for withholding it, that alone is a ground for holding that some substantial wrong or miscarriage of justice has been occasioned, and for directing a new trial Such a litigant is in no better position to demand a new trial than is one who fails to secure the attendance on *subpœna* of a witness, the other party to the litigation not being in any way responsible for the failure The remedy of such a litigant in the High Court is not by way of new trial, but by action against the witness who has failed to obey the *subpœna* ; but there the litigant could doubtless get production of the document by means of the great powers of the court As we have seen in the county court, there was no certain way of procuring production of the return. Moreover, in the case we have to deal with, it was, in my opinion, not possible to establish that some substantial wrong or miscarriage of justice had been occasioned, unless *prima facie* evidence could be given to show that the return in fact contains statements such as the respondent imagines to exist in it. I am unable to see, for the present purpose, any substantial A difference as regards a claim to a new trial, between the present case and that of a litigant who seeks a new trial on the ground that he has discovered, since the trial, some fresh evidence. In such a case, it is not sufficient to show that the new evidence exists and is relevant to the issue; he must establish that the evidence is *prima facie* likely to be B believed, and, if believed, would, if not conclusive, at least form a determining factor in the result: see *Brown* v. *Dean* (2), *Hip Foong Hong* v. *Neotia & Co.* (3). In the present case, there is no ground for supposing that the document would be admissible in evidence at all, and, if that is the case, a new trial would be useless, as well as being a gross hardship C on the appellant. On this point also I have arrived at the same conclusion as has GREER, L.J.

My Lords, I am of opinion, for the reasons above stated, that the appeal succeeds, and that the judgment of the county court judge should be restored with costs in the county court and in the Court of Appeal. D

A word must be said as to the terms on which leave to appeal to this House was granted. There are doubtless cases where leave to appeal should be granted only on the terms that the appellant agrees to pay the costs of the respondent in any event, but it may well be doubted whether that is right in a case where the Court of Appeal by a majority E is reversing the decision of the trial judge. If the matter had come before the appeal committee of this House, I think leave to appeal would probably have been granted without the imposition of such a term.

Appeal allowed with costs in the county court and in the Court of Appeal.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the appellant); *Burton,* F *Yeates & Hart*, agents for *Southwell, Dennis & Farrow*, Wisbech (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

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BAILEY *v.* GEDDES.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **July 16, 19, 1937.**]

Negligence—Breach of statutory duty—Motorist—Pedestrian crossings—Defence of contributory negligence—Availability—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 3, 4.

Street Traffic—Pedestrian crossing—Accident—Failure of motorist to stop before reaching crossing—Contributory negligence of pedestrian—Availability of defence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 3, 4.

The defendant in a running-down action alleged that the plaintiff had been guilty of contributory negligence, in that, while using a pedestrian crossing, he had emerged from behind other traffic, and had continued to cross, without looking to see whether the road was clear :—

Held : although in some cases a defendant can plead contributory negligence as a defence to a claim based on a breach of a statutory duty, yet the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4, are so framed as to make it impossible for this defence to be raised in cases to which these regulations apply.

[**EDITORIAL NOTE.** The decision here is that there is an absolute statutory duty upon a motorist approaching a pedestrian crossing not to enter thereon unless he can see that there is no pedestrian upon the crossing. This would appear to be the case whether the motorist can see the pedestrian or not. This proposition can be stated in another way by saying that the motorist cannot plead contributory negligence to a claim for personal injuries due to an accident on such a crossing. This latter view of the case possibly raises questions on the possibility of such a plea in a case of breach of statutory duty which are not considered as definitely settled, and may one day be dealt with by the House of Lords.

As to Pedestrian Crossings, see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724 ; and for Cases see DIGEST, Supp., Street and Aerial Traffic, Nos. 31a, 31b.]

Cases referred to :

(1) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.,* [1934] 2 K.B. 132 ; Digest Supp ; 103 L.J.K.B. 465 ; 151 L.T. 87 ; *revsd. on other grounds,* [1936] A.C. 206.

(2) *Dew* v. *United British S.S. Co., Ltd.* (1928), 98 L.J.K.B. 88 ; Digest Supp. ; 139 L.T. 628.

(3) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan,* [1934] A.C.1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463.

Appeal by the plaintiff from a decision of Greaves-Lord, J., dated Feb. 18, 1937, dismissing an action for damages for personal injuries received when the plaintiff was knocked down by the defendant's motor car as he was crossing the roadway on a pedestrian crossing. Greaves-Lord, J., held on the evidence that the plaintiff was as much to blame as was the defendant, and he gave judgment for the defendant. The facts are set out in the judgments.

J. D. Cassels, K.C., and *F. G. Paterson* for the appellant.

W. H. Cartwright Sharp, K.C., and *N. R. Fox-Andrews* for the respondent.

Greer, L.J. : This is an appeal from a decision of Greaves-Lord, J., in an action in which the plaintiff alleged that the defendant had been guilty of a breach of the statutory regulations relating to the crossings known as the crossings at Belisha beacons. It is, of course, a matter of grave importance to the public that the regulations, which have been made for the protection of the public who venture to cross at those supposedly safe crossings, should be strictly adhered to. Among the regulations in force at the time this action came on were the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, which provide :

> 3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.
>
> 4. The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing.

Now, the facts proved in this case are quite plain, and really indisputable. The two foot passengers, who were on the north side of the road, in order to get to the Belisha crossing had to cross the entrance to Bowman's Place. They did that, according to their evidence, which was not contradicted. They came to the Belisha crossing, and at that place for a time their view was obscured, by reason of the fact that a tram was passing and a lorry was coming up in the opposite direction ; and, though it might have been held to be negligent, if they had not been at a Belisha crossing, to start crossing at a time when they could not see, by reason of the other vehicles, whether there was any car coming in the opposite direction, on this occasion they were under no such liability, because they were protected by the regulations which had been passed, and they were entitled, both of them, to suppose that vehicles coming in the opposite direction would strictly obey the regulations, which were made for the benefit of foot passengers. The judge was told that there was an independent witness to be called on behalf of the defendant, and that witness was called. He was a witness who was stopping at the outlet of Tufnell Park Road, on the side opposite to where the crossing began. So far from assisting the defendant's case, he proved the plaintiff's case up to the hilt, when he was stopped by the judge, on the assumption that he had conclusively put the plaintiff out of court. What he said was this. He did not see the actual accident, but it took place when the two men who were crossing were very nearly right across. One of them was fortunate enough to escape ; the other one was just too late, but would have been fully and clearly protected if effect had been given to the regulations by the driver of the car. But effect was not so given, and it is obvious that, before he got to the crossing, the approaching car must have had an opportunity of seeing these two men upon the crossing, and an opportunity, therefore, of strictly adhering to regs. 3 and 4.

The unfortunate part of the case was this. The judge having stopped the case when the case was apparently (as it seems to me) proved up to the hilt on behalf of the plaintiff, we are now asked to say that there ought to be a new trial, because other evidence might have been given which would have affected the case. In my judgment, no new trial ought to be ordered in this case, because the evidence which it is suggested might have been given was available at the trial, and counsel, for good reasons or bad, did not think it worth while to ask the judge to wait until that evidence was given before he gave his judgment. In my opinion, the evidence, if given, could not have altered the accepted facts of the case, which were not contradicted, namely, that these two men were on the Belisha crossing, that they were visible to the oncoming car, that the plaintiff had very nearly got free from difficulty at the time he was knocked down, and that the car had passed over the crossing before it stopped. In those circumstances, though the judge, if applied to, would, I have no doubt, have allowed the further evidence to be given, I do not think it could in any event have affected this case, and his failure to give an opportunity for the further evidence to be given would not, and could not, amount to a failure of justice.

I think that the judge was wrong, and ought to have decided that the sole cause of this accident was the failure of the defendant driver to observe the regulations, and there was no evidence on which he could hold that there was any negligence on the part of those crossing the road at the Belisha crossing. For those reasons, I think the judge's decision must be reversed, and, as the damages, I think, were agreed, this court should enter judgment for the plaintiff for the agreed amount of damages.

Slesser, L.J.: I am of the same opinion. In my view, in fairness to the judge, it should be said that part of the difficulty which has arisen in this case has come from the fact that the regulation, which is a statutory regulation made under the Road Traffic Act, 1934, s. 18, was never clearly put before the judge at all. Throughout the argument, which I have read, reference is made to the Highway Code. The only effect of the Highway Code, so far as legal authority is concerned, is under the Road Traffic Act, 1930, s. 45 (4), to the effect that:

> A failure on the part of any person to observe any provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

It is, therefore, from a legal point of view, far less potent than are the regulations made under the provisional Rules and Orders which we have here to consider, the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. Now, the reason why I think that the judge never really gave full effect to this regulation appears in his judgment, where he starts off by saying, "First of all, I do not agree with the artificial reading of the Highway Code which is suggested." True it is that Mr. Paterson, in using the Highway Code in his argument, quoted from

p. 23 of the Highway Code, which does paraphrase the Pedestrian Crossing Places Regulation which covers this case, and to that extent the statutory regulation was brought before the judge. But, the Highway Code being brought in in that way, I do not think that the judge fully appreciated, in the way in which the argument was conducted, that he had to deal with a regulation made under a statute having the force of law. At any rate, I think that that is the reason, or one of the reasons, why he came to his conclusion. Having said that, as I say, in justice to the judge, because I think the proper way in which this case ought to have been argued for the plaintiff was to have put the regulation as such, and not the paraphrase of it contained in the Highway Code, before the judge, when one looks at that regulation, I agree with Greer, L.J., that it is fatal here to the defendant's case. Assuming, as one must, on this evidence, that the plaintiff was on the crossing, one is met with two clauses in the 1935 regulations :

> 3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.

That regulation appears to me to be positive in its terms, not that there is any general right to proceed at a speed which may or may not make it possible to stop before reaching such crossing, but that, unless the driver can see that there is no foot passenger thereon, he is under an obligation to proceed at such a speed as to be able, if necessary, to stop before reaching such crossing. In this case, it is obvious, on the evidence, that he was unable to see that there was no foot passenger thereon if he had used reasonable care and observation. There were, in fact, two foot passengers at least thereon, and thereupon it became his absolute statutory duty to proceed in such a manner as to be able, if necessary, to stop before reaching such crossing. Then reg. 4 say this, dealing with this type of crossing, " every such foot passenger shall have precedence over all vehicular traffic at such crossing." That I understand to mean that the foot passenger is to be allowed to cross before ever the driver of the vehicle attempts to proceed to a point where he might come into collision with the foot passenger, once the foot passenger is on the crossing. These appear to me to be positive regulations.

Now, what is said by Mr. Cartwright Sharp is this, that there is nothing in these paragraphs to exclude the doctrine, as it is called, of contributory negligence. As I understand it, what is called the defence of contributory negligence in cases of breach of a statutory provision on the part of the plaintiff is really this : it is said that, on the facts of the particular case, the injury was not caused by the breach of the statute at all, but was caused by the negligence of the plaintiff himself. That principle has found expression in many cases, and I think, in the present state of the law, that it is binding on this court, albeit certain doubts may or may not have been expressed on the principle in the House of Lords. Where it can be shown that, though there be a breach of a statutory regulation, the damage is actually caused by the failure of the plaintiff himself, and that that is the cause of the injury, that is a defence in the mouth of the defendant, who broke the statutory regulation. That is the latest condition of the law, as I understand it, as stated in this court by SCRUTTON, L.J., in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (1), where he says at p. 145:

> As to the question of law [which is the one I have stated] in my opinion this court is bound by its own decision in *Dew* v. *United British S.S. Co., Ltd.* (2), in which all the members of the court, as I read the judgments, stated that contributory negligence of a plaintiff was a defence to an action for an admitted breach of a statute.

Speaking for myself, I am unable to find anything in any subsequent decision, either in this court or in the House of Lords, which binds us to say, at the moment, anything to the contrary, albeit some doubt may have been cast upon that doctrine, more particularly in the opinion of LORD WRIGHT in *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (3). That being so, Mr. Cartwright Sharp says: "Admitted I have broken this regulation; the cause of this man's damage was the contributory negligence of not keeping a proper lookout to see that my car was approaching." I think the answer is contained in the regulation itself. These regulations are so framed as to make it impossible, when they apply, for any such defence to be raised, and for this reason. Reg. 3 says that, unless the driver can see that there is no foot passenger thereon, he must proceed at such a speed as to be able, if necessary, to stop before reaching such crossing and (reg. 4) to give precedence to the passenger. Now, if his duty is to stop, it is physically impossible in such a case that the cause of the accident can be the negligence of the plaintiff, because *ex hypothesi* the defendant, if he has done his duty, has already stopped. Each of these cases must depend upon a consideration of the particular language of the particular regulation. The questions which may arise, and which have arisen, in cases of breach of statutory duty under the Factory Acts, as to whether the breach of statutory duty or the negligence of the injured workman is the cause of the accident, cannot arise in the case of a geographical area, such as a crossing, where the duty is to stop before the vehicle reaches the crossing at all. It is impossible that what is done inside the crossing can be the fault or the negligence of the plaintiff himself, because, if the regulation had been obeyed, there would have been no car upon the crossing at all which could, on any view, have injured the plaintiff.

For these reasons, I think that, while this doctrine, as I say, may stand in appropriate cases, the language of this particular regulation, once there is committed a breach of it, makes it impossible to rely on contributory negligence. Once the vehicle is wrongly on that crossing, it does not lie in the mouth of the driver of that vehicle to say to the pedestrian, "You have caused this accident by your negligence," because, if he had obeyed the regulation, the driver never would have been on the crossing. I agree, therefore, with GREER, L.J., that this appeal succeeds.

SCOTT, L.J.: I agree with both judgments. The case is one of great public importance, because the reality of the regulations providing for the safety of foot passengers on passenger crossings is really involved in our decision. If a plea of contributory negligence were open, in the case of an accident to a foot passenger on a crossing, caused to him by a motor car within the limits of the crossing, it would completely abolish that safety A of the crossing which is intended by these regulations. The regulations have the same statutory force as if they were in the statute itself, being made under a section of the statute. In my view, it is of the very essence of the safety of our streets, on the one hand, that the foot passenger public should cross the streets by the crossings, and not where B there is no crossing and, on the other hand, that at the crossings motor traffic should really recognise the overpowering obligation, imposed by the passenger crossing regulations, so to check its speed that it can, if necessary, stop, in order really to give to passengers on the crossings the safety which it is intended that they should have. C

I entirely agree with what SLESSER, L.J., has just said, that the idea of a plea of contributory negligence is fundamentally inconsistent with the very basis of the regulation, and that is the ground upon which this appeal must necessarily be allowed. The question of what is the duty of approaching traffic to pedestrians waiting on the kerb in order to embark D upon a crossing, and what are the duties of the pedestrians standing there in regard to courtesy to approaching traffic, does not arise in this case, though I think the duties can be deduced from the rules quite clearly. But it does seem to me that the management of traffic in our great cities is really dependent upon the satisfactory enforcement of the E provisions of the relative rights and duties of pedestrians and vehicular traffic under the rules.

Appeal allowed, with costs. Judgment entered for the plaintiff for the agreed sum of damages.

Solicitors: *Raymonds* (for the appellant); *Stanley & Co.* (for the F respondent.)

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

G

Re STRICKLAND'S ESTATE, NATIONAL GUARANTEE AND SURETYSHIP ASSOCIATION, LTD. *v.* MAIDMENT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 28, 1937.**] H

An appeal from the decision reported in [1936] 3 All E.R. 1027 was dismissed by consent, each side paying its own costs.

WYNDHAM v. JACKSON.

[King's Bench Division (Goddard, J.), **July 1, 2, 8, 1937.**]

Arbitration—Reference to court—Extra cursum curiæ—Order for account—Master dealing with questions outside order at request of counsel on both sides.

A The plaintiff issued a writ in the Chancery Division claiming an account and payment of all sums due to her under a contract entered into by the plaintiff with the defendant. An order was accordingly made for an account. At the request of both parties, the master gave a decision on a matter which was not covered by the judge's order for an account, and he issued a certificate to the effect that a certain sum B was due from the defendant to the plaintiff. The defendant sought to have the certificate discharged or varied by a judge of the Chancery Division, but the judge treated the certificate as a nullity, on the ground that the master had no power to consider matters not within the scope of the original order for an account. The plaintiff then sought unsuccessfully to enforce the master's certificate, asking for the payment of the sum alleged to be due to her. The plaintiff then brought an action in the C King's Bench Division claiming payment of the amount awarded by the master:—

Held: as both parties had requested the master to decide a matter not covered by the order for an account, the master's certificate was in the nature of an award by an arbitrator, and therefore binding upon the parties.

D **[EDITORIAL NOTE.** The previous authorities dealing with proceedings taken out of the ordinary *cursus curiae* by consent of parties have dealt with the absence of any right of appeal from such decisions. The enforcement of such decisions does not appear to have been the subject of any express decision hitherto. As they have always been treated as an award under an arbitration, it seems clear that the procedure to enforce the decision should be the same as in the case of E the award of an arbitrator.

As to Proceedings *extra cursum curiae*, see HALSBURY, Hailsham Edn., Vol. 1, pp. 624, 625, para. 1072; and for Cases, see DIGEST, Vol. 2, pp. 317, 318, Nos. 42-45.]

Cases referred to:

F (1) *Burgess* v. *Morton*, [1896] A.C. 136; 2 Digest 317, *40*; 65 L.J.Q.B. 321; 73 L.T. 713.

(2) *Craig* v. *Duffus* (1849), 6 Bell, Sc. App. 308.

(3) *Dudgeon* v. *Thomson* (1854), 1 Macq. 714; 2 Digest 317, *42*; 24 L.T.O.S. 39.

(4) *Renfrew (Provost)* v. *Hoby* (1856), 4 W.R. 632; 2 Digest 317, *43*; *sub nom. Robin* v. *Hoby*, 2 Macq. 478.

G (5) *Harrison* v. *Wright* (1845), 13 M. & W. 816; 2 Digest 317, *39*; 14 L.J. Ex. 196.

(6) *Re Durham County Permanent Benefit Building Society, Ex p. Wilson* (1871), 7 Ch. App. 45; 2 Digest 318, *45*; 41 L.J. Ch. 164.

(7) *Pisani* v. *A.-G. for Gibraltar* (1874), L.R. 5 P.C. 516; 16 Digest 136, *350*; 30 L.T. 729.

H (8) *Bickett* v. *Morris* (1866), L.R. 1 Sc. & Div. 47; 2 Digest 318, *45 i*.

Action for (i) £91 11*s.* 4*d.*, the amount awarded to be paid by the defendant to the plaintiff by an award in writing of Master Mosse made pursuant to an oral submission to arbitration by counsel for the plaintiff and the defendant, and (ii) payment of the costs directed by the award in question to be paid by the defendant to the plaintiff, subject to taxation. The facts are set out in the judgment.

Constantine Gallop for the plaintiff.

John Busse for the defendant.

Gallop: The certificate of the master is an award made following a submission of counsel, even though dealing with matters not strictly within the scope of the original order of the judge, because this was done with the consent—indeed at the desire—of all parties. There is authority to show that if the court, either of its own accord, assented to by all the parties, or at the request of all the parties, gives a decision, both parties must be bound by that decision, as having agreed to be so bound, even though the court was acting outside its powers as a court: *Craig* v. *Duffus* (2), *Dudgeon* v. *Thomson* (3), *Harrison* v. *Wright* (5), and *Burgess* v. *Morton* (1).

Busse: The decisions of the master, in the granting of the certificate, were not binding on the parties, since he was not an arbitrator, but an officer of the court, acting outside his powers.

GODDARD, J.: In May, 1935, the parties to this action, who are both ladies in the theatrical profession, became interested in a production called *Lover's Leap*. The defendant was producing the play on a provincial tour, and the plaintiff was to act in it. The latter found £225 towards the expenses, and was to have a half share of the profits. The only written agreement between them is a letter passing from the defendant to the plaintiff dated May 13, and it is in these terms:

> Dear Gwen—In consideration of the sum of £225 I hereby agree to sell you a half share of all net profits derived from the tour or tours of the production *Lover's Leap*. It is understood that your capital is returned before any division of profits is made and that the above-mentioned sum is the limit of your liability. A weekly balance sheet will be prepared by chartered accountants and a copy sent to you and you or your authorised representative can have a sight of the books at any time that you may so desire. Yours sincerely, Ena G. Lovell.

Subsequently, differences arose between them as to the division of the profits, the principal dispute, as so often happens in cases like this, being what expenses were to be allowed to the defendant in arriving at the net profits. In Oct., 1935, the plaintiff issued a writ in the Chancery Division, claiming an account of the profits, and payment of all money due to her under the terms of the agreement in writing dated May 13. It will be observed that this is the only agreement alleged, in the writ, to exist between the parties. On Dec. 6, an order was made in the action by consent, directing an account, and again, in the order, the only agreement referred to was that contained in the letter of May 13. The application for the order was dealt with by a master, and, the order being by consent, the matter did not have to go before the judge. On Feb. 17, the master made the suggestion that the account should be referred to some person agreeable to the parties who was conversant with theatrical matters, but this did not commend itself to either party, who both preferred that the master should take the account and decide on the items in dispute, and, on Feb. 27, 1936, the plaintiff's solicitors wrote to the defendant's solicitors as follows:

> You have no doubt received the master's note as to the procedure which he suggests should be adopted in regard to this matter. We have now inspected A your client's accounts and are in a position to notify you of the items contained therein which we dispute on behalf of our client. These items are as follows.

They then set out the several items which are in dispute, and the letter concludes by saying:

> The master has suggested that the disputed items should be submitted to an B agreed person for his decision and report. We feel, however, that as this is not a matter of accountancy but a matter of principle the court should be asked to adjudicate upon the points in dispute. We shall be glad to have your views as early as possible.

That letter was answered on Mar. 2:

> We are in receipt of your letter of the 27th ultimo and observe that you are in C a position to give us notice of the items you dispute. As at present advised we are inclined to agree with the feeling expressed by you in the final paragraph of your letter, but we will discuss the matter with you before we meet again upon the adjourned hearing of the summons to proceed.

On Mar. 25, the parties' solicitors attended before MASTER MOSSE, when it was agreed that the plaintiff and defendant and two other D witnesses should be examined before him *viva voce*. Some evidence seems to have been taken that day, but on Mar. 27 and Mar. 31 there were full hearings before the master, when both parties were represented by counsel. Apparently, both counsel had come to the conclusion that the whole terms of the contract were not contained in the letter of May 13, E and that the outstanding questions referred to in the solicitors' letter of Feb. 27 could not be satisfactorily disposed of if that letter were treated as containing the whole of the terms of the contract. Whether they were right or wrong in this view does not matter; what is clear is that they both invited the master to extend the ambit of his inquiry beyond F the strict terms of the order, and the master took the precaution of writing down the exact request made to him, in these circumstances, and reading it over to counsel, so as to be sure that he got their exact agreement before proceeding with the inquiry. The master deposed before me as to the precise, and, if I may say so, very careful, steps that G he took to ensure that there was no mistake, and I am quite satisfied that the note that he took, and afterwards embodied in his certificate, is exactly correct.

Accordingly the reference proceeded, and, in the end, the master found that £91 11*s*. 4*d*. was due from the defendant to the plaintiff. H It seems that, at the last minute, the defendant sought to bring forward what was called a production account, and to take credit for a sum of over £200 as an expense. This the master declined to consider; he regarded it as an afterthought. He told me that he had never heard about it till the inquiry was practically over, and he pointed out that the defendant had tendered a sum of £70 to the plaintiff as being all that was due, a sum only £20 short of what he found was due, whereas, if this production account had been a matter seriously to be taken into account, there could have been nothing whatever due from the defendant. I have nothing to do with whether he was right or wrong in this view, though, if I may say so, it seems to be very good sense, nor was I asked in this action to express any view one way or the other upon it, nor, indeed, having regard to the form that this action took, does it seem that I could have been asked to do so. The next step in the action was the issue of the master's certificate on May 21, which was immediately followed by a summons by the defendant to discharge or vary it. On the master's adhering to his decision, the defendant required the matter to be referred to the judge. The summons came before FARWELL, J., on June 30, when he adjourned it to consult the master, and, on the adjourned hearing on July 7, he dismissed the summons with costs. It was this decision that has given rise to the present action. The judge, I am told, without hearing argument, declined to consider the summons, on the ground that the master had no power to accede to the request of counsel to consider matters not strictly within the ambit of the original order, and stated that he regarded the certificate as a nullity, by which I gather he must have meant that it was made without jurisdiction, as not following the order. Accordingly, he declined to go into the merits of the summons, and, though counsel for the plaintiff was not only willing but anxious that he should do so, he dismissed it, and gave the plaintiff the costs. The view of the judge seems to have disconcerted both the counsel, whose attitude before me has been perfectly frank on the subject, but, at any rate, it was not appealed.

The next step was taken by the plaintiff, and at least did not lack boldness. In spite of the view the judge had expressed, a summons was taken out on her behalf to enforce the certificate by asking for an order for payment. The master was prepared to make an order, believing he had no option, as his certificate had not been set aside, but, not unnaturally, the defendant, who had been ordered to pay the costs of the previous summons, on the ground that the certificate was a nullity, insisted that the matter should go before the judge, and it came before LUXMOORE, J. On hearing of the previous order of FARWELL, J., that judge dismissed the summons, and this time the plaintiff had to pay the costs, so that in that respect honours were easy. But I was told that he expressed the view that the master's certificate could be regarded as an award, and thereupon the plaintiff began the present action in the King's Bench Division. No one contended that the view of LUXMOORE, J., was more than an *obiter dictum*, and I have now to determine whether, in view of the several authorities cited to me, that *dictum* is right.

But, before doing so, I will complete this unhappy story, unhappy because, by this time, the costs must have grown out of all proportion to the trivial amount involved, and what they will be when this litigation is ended I do not care to think. The writ in this action was issued on Nov. 5, and, on Nov. 27, the plaintiff actually applied for summary judgment, an application which did not meet with the fate it deserved. However much one may marvel at the optimism, if that be the right word, whereby this young woman was advised to swear the necessary affidavit under Ord. 14, if ever there was a summons which should have been dismissed with costs, this, in my opinion, was that summons. However, the order was that leave to defend should be given. An application was later taken out by the defendant to dismiss the Chancery action for want of prosecution. In view of all the circumstances, and the pendency of the present action, that would seem to have been a futile application, and so it proved. It came before CLAUSON, J., who did his utmost, even going so far as to draft an order suggested by him, to put a stop to this disastrous litigation, but without avail, and he refused to deal with the summons till the present action was disposed of. The plaintiff now alleges that she is entitled to recover the amount certified by the master, on the ground that the certificate is equivalent to an award having been made pursuant to an oral submission by counsel, who asked him to deal with all matters in dispute, though not technically covered by the order directing an account. It is also submitted on her behalf that the minute in the master's book, indicating an order that he was prepared to make on the plaintiff's application for an order for payment, is also an award entitling her, not only to the £91 11*s.* 4*d.*, but also to the costs of the Chancery proceedings.

Now, for the plaintiff, it is argued that a series of cases decides that, when the court, either of its own motion, assented to by the parties, or on the request of the parties, acts *extra cursum curiæ*, departs, that is, from the ordinary course of procedure, to use the expression of LORD HALSBURY, L.C., in *Burgess* v. *Morton* (1), the resulting determination or order cannot be regarded as a judgment or order in an action, because the court is acting outside its proper sphere or powers, but, nevertheless, the judge may be regarded as acting as an arbitrator, and his decision is equivalent to an award, in that he has determined, though not in the regular course of an action, the questions on which the parties have requested him to adjudicate. Among the cases relied on by the plaintiff are *Craig* v. *Duffus* (2), *Dudgeon* v. *Thomson* (3), *Renfrew* (*Provost*) v. *Hoby* (4), *Harrison* v. *Wright* (5), and *Burgess* v. *Morton* (1). I think that, in stating the plaintiff's submission as I have done, I have fairly summarised the result of those decisions. True it is that they all deal with the question of whether an appeal lay from the decision in question, but it seems to me that the ground of the decision is not that the parties impliedly agreed not to appeal, as in the case of *Re Durham County Permanent Benefit Building Society, Ex p. Wilson* (6), where the case was left to the summary decision of the judge, but that the parties, by asking the judge to decide something in a manner outside the ordinary course of law, must be taken to have agreed to be bound by his decision, not as a judge who can act only within the ordinary course of law, but as an arbitrator. The convenience and practical justice established by this line of authority are obvious. The judge has done what the parties asked him to do: an inquiry, a trial, in everything except for technical requirements, has been held, and the decision of a trained and impartial mind obtained. It is surely right that this result should not, if it can be avoided, be regarded as a complete nullity, and the parties put to the expense of a further hearing, again going over exactly the same ground. It may well be that the parties did not think that this would be the result; it may well be that, at the time, they had no idea that what they were doing would prevent the unsuccessful party from carrying the case to appeal. I can find no trace, in the cases to which I have referred, that intention in this respect has anything to do with the matter. What is of importance is that the parties deliberately and consciously asked for the determination by a particular person of a particular matter, and got it. The consequence of so doing is a matter of law, not of intention, or, as I think I may put it, persons' rights are what the law says they are, and not what they think they are. Mr. Busse contended that, while, in these cases, the result was said to be in the nature of an award, there was no authority for saying that it could be enforced as such. But it seems to me that this must follow, and I need only quote from the opinion of LORD CAMPBELL in *Craig* v. *Duffus* (2), where he says, at p. 315:

> My Lords, my humble opinion is that the court, as the Court of Session, had no jurisdiction over this case; that they were merely private arbitrators; and that as no corruption is imputed to the arbitrators, and nothing at all is brought forward which would set aside the award, their award is final.

Mr. Busse, however, founding his argument on *Pisani* v. *A.-G. for Gibraltar* (7), and some passages in *Bickett* v. *Morris* (8), contends that a mere departure from the ordinary rules of practice, with the consent of the parties, who have no intention of departing from the *cursus curiæ*, does not turn the proceedings into an arbitration, and this, he contends, is what happened in this case. If I felt at liberty to form my own opinion on this matter, I should hold that there was here nothing more than a departure from practice, and that the case was on the same footing as *Pisani* v. *A.-G. for Gibraltar* (7). But the difficulty I feel about so holding is this: FARWELL, J., must, as it seems to me, have held the contrary, and held it in a matter to which both the plaintiff and the defendant were parties. Very respectfully, and perhaps because I am unfamiliar with Chancery proceedings, I differ from FARWELL, J. I should have thought that, where parties, both of whom are *sui juris*, ask the master (who, be it observed, is sitting under an order in fact made by himself) to hold an inquiry which an order could direct him to hold, the proceedings ought not to be regarded as a nullity, or otherwise than as a step in the action, and that any technical requirements could be satisfied by enlarging the ambit of the order *nunc pro tunc*. It is only fair to say that the objection that the order was a nullity did not come from either party. But the judge did so hold; he himself took the objection, and refused to consider a summons asking for variation, and ordered the defendant to pay the costs. Then, when the other side sought to enforce it, LUXMOORE, J., as I was told, without expressing A an opinion himself, but following FARWELL, J., refused an order on the same ground. Neither party appealed against either order, and they are now conclusive against them. Whether the judge would have decided the same way if *Pisani's* case (7) had been in his mind, I respectfully doubt; but I have neither the right nor the wish to act as a Court B of Appeal, and it seems to me that, were I to hold that the certificate was given *in cursum curiæ*, I should be in effect reversing both the orders made when that certificate was before the judges in the Chancery Division. I must take it that it has been finally decided, in a matter between the parties, that the certificate was given *ex cursum curiæ*. C Then, as I find it was the result of a hearing which both parties requested, and to which they assented, I think it falls within the line of cases on which the plaintiff relies, and can be enforced as an award.

I confess that I am glad to be able to come to this conclusion, and not to feel obliged to hold that a two days' hearing before the master, at D which the plaintiff and defendant and their witnesses were examined and cross-examined, and argument heard, and a careful decision given, is to be disregarded for all purposes.

Mr. Gallop has asked me also to treat the master's minute of July 31 as a further award, dealing not only with the £91, but also with the E costs of the Chancery proceeding. This seems to me quite impossible. The original order under which the parties went before MASTER MOSSE expressly reserved all costs, and his certificate did not deal with them. By the time the parties were before him, on July 31, FARWELL, J., had given his decision that the proceedings were a nullity. The master's F minute is only a record of what he would have ordered had Mr. Busse not required the matter to go to the judge, according to the practice of the Chancery Division, and there is no pretence for saying that he, on behalf of the defendant, ever assented or submitted to the master's dealing with the costs on July 31.

G The result is that I give judgment for the plaintiff for £91 11*s.* 4*d.*, with the costs of this action on the High Court scale. What, if my judgment stands, may be the consequences to the Chancery action, or how the costs there are to be dealt with, are not matters with which I can deal.

H Solicitors: *Lazarus, Son & L. A. Hart* (for the plaintiff); *Samuel Tonkin, Booth & Co.* (for the defendant).

[*Reported by* J. MACGILLIVRAY ASHER, ESQ., *Barrister-at-Law.*]

Re SPENCE'S ESTATE, BARCLAYS BANK, LTD. *v.* STOCKTON-ON-TEES CORPORATION.

[Chancery Division (Luxmoore, J.), **June 2, 16, July 19, 1937.**]

Charities—Charitable gift—Gift for purchase of site and erection on it of public hall to be presented to local authority for public purposes—Gift of antiques to be displayed in public hall.

By his will a testator gave a collection of antiques to the defendant corporation subject to the condition that the corporation should deposit them in one of the rooms of a public hall, hereinafter referred to, where they were to be kept open to inspection by the public, subject to such reasonable restrictions and regulations as might be imposed by the corporation. The residue of the testator's estate was to be applied in the purchase of a suitable piece of land at Stockton-on-Tees and in or towards the erection on such site of a public hall which site and hall when completed were to be presented by the trustees to the defendant corporation in memory of the testator's father and mother, and to be used by the corporation for such public purposes as it might from time to time consider desirable. The surplus, if any, was to be paid to the corporation absolutely to be used by the corporation for such public purposes as it might from time to time consider desirable:—

Held: (i) the gift for the purchase of a site and the erection on it of a public hall to be presented to the corporation was a valid charitable gift.

(ii) the gift of the collection of antiques was a valid charitable gift.

(iii) the question whether the gift of the surplus was a valid charitable gift ought to stand over until it was ascertained whether there was any such surplus.

[EDITORIAL NOTE. The judgment herein emphasises the fact that, the site and the public hall were to be conveyed to and become the property of the corporation. From this it is deduced that the "public purposes" for which the property is to be used are purposes for the benefit of the inhabitants of the borough generally, and this view is not affected by the words in the will "such public purposes as the corporation might from time to time consider desirable." It was, of course, contended that there are public purposes which have been held not to be charitable.

As to Gifts for Public Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, 136-138, paras. 161-168, 177-179; and for Cases, see DIGEST, Vol. 8, pp. 255-260, Nos. 161-217.]

Cases referred to:

(1) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 8 Digest 327, *1099;* 52 L.J.Q.B. 193; 48 L.T. 239.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1;* 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53.

(3) *Re Holburne, Coates* v. *Mackillop* (1885), 53 L.T. 212; 8 Digest 257, *191.*

(4) *Houston* v. *Burns*, [1918] A.C. 337; 8 Digest 297, *739;* 87 L.J.P.C. 99; 118 L.T. 462.

(5) *Blair* v. *Duncan*, [1902] A.C. 37; 8 Digest 295, *721;* 71 L.J.P.C. 22; 86 L.T. 157.

(6) *Dolan* v. *MacDermot* (1868), 3 Ch. App. 676; 8 Digest 298, *751.*

(7) *Re Birkett* (1878), 9 Ch. D. 576; 8 Digest 300, *776;* 47 L.J.Ch. 846; 39 L.T. 418.

(8) *Re Porter, Porter* v. *Porter*, [1925] Ch. 746; Digest Supp.; 95 L.J.Ch. 46; 133 L.T. 812.

(9) *Ewan* v. *Morgan* (1858), 32 L.T.O.S. 19; 8 Digest 299, *762; sub nom. Dundee Magistrates* v. *Morris*, 3 Macq. 134.

(10) *Re Ogden, Brydon* v. *Samuel*, [1933] Ch. 678; Digest Supp.; 102 L.J.Ch. 226; 149 L.T. 162.

(11) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 8 Digest 294, *716*; 76 L.J.Ch. 240; 96 L.T. 357.

SUMMONS by which the plaintiff bank, as executor and trustee of the A will of Gilbert Ormerod Spence, asked for the determination of the following questions: 1. Whether, according to the true construction of the said will, a trust to apply the residuary estate of the testator in the purchase of land at Stockton-on-Tees and in or towards the erection thereon of a public hall to be presented to the Stockton-on-Tees Cor- B poration, to be used by the corporation for such public purposes as it may consider desirable, and to pay the surplus to the said corporation to be used for such public purposes as the said corporation may consider desirable, is a valid trust, either as a charitable gift or otherwise, or whether the same is invalid, either wholly or partially, and, if so, to what C extent. 2. Whether the gift in the said will of the testator's collection of arms and antiques and articles *de vertu* to the said corporation is valid as a charitable gift or otherwise, and, if so, to what condition the same is subject, or whether the said gift is invalid, and to what extent.

In the event of the gifts, or either of them, being held valid as charitable D gifts, the court was asked to settle a scheme, and give the necessary directions to the plaintiff bank.

F. Baden Fuller for the plaintiff bank.

E. M. Winterbotham for Lady Grey, who claimed to be interested in any of the testator's property as to which he died intestate.

E *G. R. Upjohn* for the defendant corporation.

J. W. Brunyate for the Attorney-General.

Winterbotham: This is a gift which cannot be given effect to. The hall would be public or private according to the uses to which it was put. The testator has said that the hall is to be used for such public F purposes as the corporation might think desirable from time to time. It is not necessary for the corporation to use it only for the relief of the rates, or only for the benefit of the people of Stockton-on-Tees. The corporation can allow it to be used for such public purposes as it may think desirable. A gift cannot be made charitable because, if it is given G effect to, one of its by-products will be the relief of the rates. Public purposes are more extensive than charitable purposes. If the hall could be used for public purposes which were not charitable, then the corporation could use it for such public purposes, and for those purposes alone. The trust is so general that it cannot be limited to charitable H purposes, and, therefore, the gift must fail for uncertainty. [Counsel referred to *Houston* v. *Burns* (4); *Blair* v. *Duncan* (5); *Dolan* v. *MacDermot* (6); *Re Birkett* (7); *Re Porter, Porter* v. *Porter* (8).]

Upjohn: The gift of a public hall containing a museum is something which is for the benefit of the inhabitants. By saying that the hall was to be used for such public purposes as the corporation should determine, it was clear that the testator did not mean for private purposes which might not be charitable. There is no possible ground for saying that there is any ambiguity or uncertainty in the gift. The court can see exactly what the testator said should be done. By the Local Government Act, 1933, s. 268, a local authority has power to accept a gift for public purposes. The fact that members of the public, other than the inhabitants of Stockton-on-Tees, could also enter the hall would not make what was otherwise a good charitable gift a bad one. [Counsel referred to *Houston* v. *Burns* (4); *Dundee Magistrates* v. *Morris* (9); *Re Ogden, Brydon* v. *Samuel* (10); *Re Holburne, Coates* v. *Mackillop* (3).] A

Winterbotham: To set up a museum is not necessarily charitable. B It is charitable because it is educational. There is no such principle that a gift to a local authority is a gift for the benefit of the inhabitants of that authority's area. If it is a gift to the corporation, it is a gift to the corporation in its private capacity. It would not necessarily be for the benefit of the public, because it would give the public no rights. C The testator in the present case has stated definitely for what purposes the hall is to be used, namely, for such public purposes as the corporation may direct. This hall was really to be as much in memory of the testator's father and mother as for any particular purpose. It was intended by the testator as a memorial to his father and mother, and that was more D in his mind than was the question of benefit to the town. The testator seems to have taken no interest in the public life of Stockton-on-Tees. A broad view has to be taken, and, if the court considers that the gift is for such public purposes as the corporation may consider desirable, the gift is void for uncertainty. [Counsel referred to *Re Holburne; Coates* v. *Mackillop* (3); *Re Garrard, Gordon* v. *Craigie* (11).] E

Upjohn: As regards the gift of the surplus, where there is a gift for charitable and for non-charitable purposes, and the testator has not indicated the proportion in which the charities are to be benefited, it may be that the whole gift is bad. But this is a wholly different case. F If the original gift is charitable, it cannot be bad because it may be argued that the gift of the surplus is bad. In the present case, there is a gift which is charitable, which the court can carry out. The testator has not given a specified sum for the purchase of a site and for the erection of a building, but the court will, if it is held to be a charitable gift, direct G a scheme, and will ascertain what is a proper public hall for the inhabitants of Stockton-on-Tees. If the first gift were held bad, I should have to admit that the whole would be bad. [Counsel referred to *Dundee Magistrates* v. *Morris* (9).]

H

Luxmoore, J.: The testator by his will dated Aug. 14, 1922, made certain bequests in favour of Stockton-on-Tees Corporation. The questions raised by this summons are directed to ascertaining whether all or any of those bequests are invalid. It is agreed that the answer in each case depends on the determination of the question whether the gift is charitable. If it is, the gift is valid; if not, the subject-matter of the gift is undisposed of, and passes as on an intestacy. The first bequest is of a collection of arms and antiques. It is in these terms:

> I give my collection of arms and antiques and articles *de vertu* to the Corporation of Stockton-on-Tees subject to the condition that the said corporation shall deposit the same in one of the rooms of the public hall hereinafter mentioned where the A same shall be kept open to inspection by the public subject to such reasonable restrictions and regulations as may be imposed by the said corporation.

The second bequest is of the proceeds of sale and conversion of the testator's real and residuary personal estate, after payment of funeral and testamentary expenses and debts, and the legacies bequeathed by B him and the due provision of an annuity. The material trust is:

> to apply the residue in the purchase of a suitable piece of land at Stockton-on-Tees and in or towards the erection on such site of a public hall which site and hall when completed shall be presented by the trustees to the Corporation of Stockton-on-Tees in memory of my deceased father and mother and to be used by the said corporation for such public purposes as it may from time to time consider desirable.

C This bequest is followed by a direction that:

> the surplus (if any) shall be paid to the said Corporation of Stockton-on-Tees absolutely to be used by the said corporation for such public purposes as it may from time to time consider desirable.

The testator further declared:

> D that any regulations made or any use declared by the Corporation of Stockton-on-Tees shall be made and declared in such terms that if any special provision or exemption be made in favour of residents in Stockton-on-Tees the same shall also be expressly extended to and in favour of and shall also include residents in Thornaby-on-Tees.

E The Stockton-on-Tees Corporation is anxious to obtain the benefit of all these bequests, but there is difficulty in the acceptance of the collection of arms and antiques unless the gift of the public hall is valid, for the corporation has no room for its display, and would, I am told, in the circumstances, reluctantly refuse the gift. I propose, first, to consider F the question of the validity of the gift of a public hall. It is well settled that a gift for the benefit of the inhabitants of a particular locality, such as a town or a county, is a good charitable gift: *Goodman* v. *Saltash Corporation* (1). In that case, LORD SELBORNE, L.C., said, at p. 642:

> A gift subject to a condition or trust for the benefit of the inhabitants of a parish G or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust.

Gifts of such a nature fall within the fourth class of charitable gifts enumerated by LORD MACNAGHTEN in *Pemsel's* case (2), at p. 583. This class is defined as embracing gifts for other purposes beneficial to the H community, not being trusts for the relief of poverty or for the advancement of education or religion.

There are many cases in the books dealing with this class of gift. It is, I think, impossible to classify them, or deduce any fixed principle from them. It is sufficient to say that the mere fact that the object of the gift may be beneficial to the community does not, of itself, make the gift charitable. Before referring to any of the authorities cited in argument, it is convenient to consider the precise language of the will, and to determine its scope and nature. It is a gift of the proceeds of sale of the testator's residuary estate to the trustees, who are directed to apply it, first, in the purchase of a site at Stockton-on-Tees, and then in or towards the erection on that site of a public hall. The site and hall, when completed, are to be presented by the trustees to the Stockton-on-Tees Corporation. Pausing here, it seems fairly plain that the site and public hall are to become part of the property of the Stockton-on-Tees Corporation, and, accordingly, are to be held, like its other corporate property, for the benefit of the borough. If there were nothing else in the will, it would appear that this would be a valid charitable gift, but it is argued that the gift is rendered invalid because the hall is to be a "public hall," and is to be used for "such public purposes as the corporation may from time to time consider desirable." It is to be observed that one of the purposes declared by the testator is that one of the rooms in the public hall is to be used for the housing and exhibition to the public of the testator's collection. In my judgment, the reference to "public purposes" in this will is limited to public purposes for the benefit of the inhabitants of the borough of Stockton-on-Tees, and is used in order to exclude any possibility of the hall being used for private purposes, and in contradistinction to any such private user. The fact that the subject-matter of the gift is to be conveyed to the corporation appears to be of first importance in considering the validity of the gift. The corporation could not employ the hall for the purposes of members of the corporation in their private capacity, but must use it as a public institution, for the benefit of the inhabitants of Stockton-on-Tees. In this connection, I would refer to a passage in the judgment of Chitty, J., in *Re Holburne, Coates* v. *Mackillop* (3). In that case, the object of certain bequests to trustees was not defined in the will, but was set out in contemporary correspondence in such manner as to constitute a trust. The object of the trust was to form an art museum in Bath, to be called the Holburne Museum. Chitty, J., said, at p. 215 :

> It is argued for the next of kin that the letters, according to their true construction, do not show that the collection and the funds are to be held for public purposes exclusively, and consequently that there is no charity, and it is contended accordingly that the trust is void for perpetuity or for uncertainty. As part of this argument it is urged that the trustees might consistently with the trust employ the collection and funds, or part of them, for private purposes, such, for instance, as the enjoyment of the museum by themselves and their friends, and such other private individuals as they might in their discretion choose to admit to the collection. But I think that a public purpose or general utility, to the exclusion of private benefits, is sufficiently shown on the face of the documents. The collection is to bear the name of "Holburne," or "Holburne of Menstrie ;" it is to be maintained and preserved for ever ; it is to form an art museum in Bath. No doubt there are to be found in this country some instances of private museums, but they are comparatively rare. Most of the museums are public institutions. I consider that, according to the fair reading of the letters, "Museum in Bath" does not mean merely that the collection is to be kept in Bath, but that it is to be kept in Bath as a public institution for the benefit of the inhabitants of that city, and such other persons, members of the public at large, as may from time to time visit the city.

It is true that the subject-matter of the gift was an art museum, but the passage to which I have referred is not based on any educational aspect of the gift, but on the wider view that the gift was for the benefit of the inhabitants of Bath, and, as such, was a public charity. It was argued that the present case was governed by the decision in *Houston* v. A *Burns* (4). In that case, the gift in question was to a number of individuals as trustees, and was to be applied by them :

> for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such terms and under such conditions as they in their discretion shall think proper.

B The House of Lords held that the gift was void for uncertainty notwithstanding the express limitation to the particular locality named. The ground of the decision was that, if the clause was to be construed (as in fact it was construed by the House of Lords) as being for such public or benevolent or charitable purposes connected with the locality as the C trustees think proper, it was bad, because the purpose was too vague, and the vagueness of the purpose was not cured by the specification of the locality to be benefited : *per* LORD FINLAY, L.C., at p. 341. But LORD FINLAY, L.C., pointed out, in his speech, that, in the case of a gift of this nature, the addition of a local limit might well make a difference D in favour of its validity if the gift :

> was in favour of institutions within a certain area, the particular institution to be selected by the trustee.

LORD ATKINSON said, at p. 345 :

> E It is the insufficiency of these words, "public purposes," because of their vagueness and uncertainty, to identify and fix the limits of the class of individuals or objects from which the trustees are to choose that renders void a bequest for "public purposes." That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised.

But he went on to point out that the case under consideration had no F resemblance :

> to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all.

G LORD SHAW OF DUNFERMLINE said, at p. 348 :

> Local limitations expressed by the words "in connection with the parish of Lesmahagow or the neighbourhood" do not add any definiteness to the class of purposes or objects which it was in the mind of the testator to benefit or promote. The foundation of political clubs, school of art, a zoological garden, or an astronomical observatory in Lesmahagow, along with a thousand other things in connection with that parish or its neighbourhood, might, in the trustees' opinion, be excellent, H but the bequest is void by reason of the uncertainty as to which of them or which class of them the truster meant to favour. This is exactly the reason which invalidates the bequest where there is no geographical reference. Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit.

The *ratio decidendi* in *Houston* v. *Burns* (4) was the vagueness of the testator's directions, and his failure to identify the particular objects meant to benefit. In the present case, the testator has been guilty of no such failure. The object is clearly defined. It is a public hall. The fact that the testator has directed it to be conveyed to the Stockton-on-Tees Corporation shows with certainty that the public hall is to be for the benefit of the inhabitants of Stockton-on-Tees, and this certainty is not rendered uncertain by reason of the fact that the testator has limited its user to "such public purposes" as the corporation may consider desirable. In my judgment, the gift for the purchase of a site and the erection on it of a public hall to be presented to the Stockton-on-Tees Corporation is a valid charitable gift, and I so declare.

With regard to the gift of the collection of arms and antiques, somewhat different considerations apply. Having regard to my declaration with regard to the public hall, it is probable that no difficulty will arise. It is necessary, however, to determine whether it is a good charitable gift. The object of the gift is to allow the collection to be inspected by the public. This is an educational object, and is, therefore, charitable. Accordingly, even if the corporation should refuse the gift, the gift would not fail, and, in such case, a scheme would be necessary for its application *cy pres*. The remaining gift is of the surplus, if any, of the residue, after the purchase of the site and erection of the public hall, to the Stockton-on-Tees Corporation absolutely, to be used by the corporation for such public purposes as it may from time to time consider desirable. It cannot at present be ascertained whether there will be any such surplus, because this must depend on the amount which the trustees decide to expend on purchasing the site and erecting the public hall. If they decide to expend the whole of the available residue, the question as to the validity of the gift of the surplus will be purely academic. In these circumstances, I do not propose to deal with it. It will be sufficient to direct that this question shall stand over, with liberty to restore if and when the occasion for its determination arises.

Solicitors: *Gibson & Weldon*, agents for *Archer, Parkin & Townsend*, Stockton-on-Tees (for the plaintiff bank); *Bell, Brodrick & Gray*, agents for *Town Clerk*, Stockton-on-Tees (for the defendant corporation); *J. D. Langton & Passmore*, agents for *Grey & Co.*, Weston-super-Mare (for Lady Grey); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION AND LONDON, MIDLAND & SCOTTISH RAILWAY CO.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 21, 22, 1937.**]

A *Electricity Supply—Powers of undertakers—Supply outside area of supply—Amalgamated railway company—Electrification of part of railway undertaking outside area of supply—Electrified part previously owned by company absorbed into amalgamated company—Electric Lighting Act*, 1909 (c. 34), s. 5 (1)—*Electricity* (*Supply*) *Act*, 1926 (c. 51), ss. 12, 47.

The respondent railway company, an amalgamated railway company, was the owner of a railway undertaking situated partly within and B partly without the area of supply for electricity purposes of the respondent corporation, which railway undertaking included an undertaking which was, before absorption, the undertaking of the W. railway company. No part of the W. railway passed through or was situated within the area of supply of the respondent corporation. The respondent company had adapted part of the W. railway to electric traction and the consent was obtained of the Minister of Transport under the Electricity (Supply) C Act, 1926, s. 47, to the supply by the respondent corporation of electricity for the purposes of the W. railway. The respondent corporation at present supplied the respondent company with electricity, part of which was used for operating certain capstans, wagon hoists and traversers. It was contended that the respondent corporation was not competent to give, nor the respondent company competent to take, a supply of D electricity for the purpose contemplated, on the grounds (i) that the W. railway did not, for the purpose of sect. 47 of the Act of 1926, form part of a railway undertaking of which the respondent company was owner and that the respondent company's power to take a supply of electricity for the W. railway remained that conferred by the W. railway's own Act, (ii) that the words "may supply" in sect. 47 referred back exclusively to the Electric Lighting Act, 1909, s. 5 (1), and the respondent E corporation did not bring itself within that section, and (iii) that the words "for haulage and traction" in sect. 47 referred to a special supply for that purpose only, that there was no such supply by the respondent corporation to the respondent company, and that it could not, therefore, be said that the respondent corporation was supplying electricity to the respondent company within sect. 47 :—

HELD : (i) sect. 47 of the Act of 1926 referred to the whole under- F taking of the respondent company, including the W. railway, and the respondent company was competent to take a supply of electricity for the purpose contemplated.

(ii) the words "may supply" did not refer back exclusively to the Electric Lighting Act, 1909, s. 5 (1), and the respondent corporation came within those words.

G (iii) the words "for haulage and traction" did not refer to a special supply for that purpose only, and, as the respondent corporation was supplying electricity for the general purposes of the company, including all the haulage and traction involved in operating capstans, hoists and traversers, the corporation was brought within sect. 47 and was competent to supply electricity to the respondent company for the purpose contemplated.

H *Decision of* SIMONDS, J., [1937] 2 All E.R. 698, *affirmed.*

[**EDITORIAL NOTE.** Generally speaking, an undertaker may not supply electrical energy outside his own particular area, but in the case of a supply to large undertakings such as railway companies and others providing haulage and traction, the Minister may make special orders. In the present case the position is complicated by the recent amalgamation of railway companies.

As to Supply Outside Area, see HALSBURY, Hailsham Edn., Vol. 12, pp. 591, 592, paras. 1135, 1136; and for Cases, see DIGEST, Vol. 20, pp. 205, 206, Nos. 40-43.]

Cases referred to:

(1) *A.-G.* v. *North Eastern Ry. Co.*, [1906] 2 Ch. 675; 42 Digest 682, *946*; 76 L.J. Ch. 5; 95 L.T. 512.

(2) *Blackpool Corpn.* v. *Starr Estate Co.*, [1922] 1 A.C. 27; 42 Digest 770, *1974*; 91 L.J.K.B. 202; 126 L.T. 258.

(3) *R.* v. *Minister of Health, Ex p. Villiers*, [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp.; 154 L.T. 630.

Appeal from a decision of Simonds, J., dated Apr. 29, 1937, and reported in [1937] 2 All E.R. 698. The facts are set out in the judgment of Sir Wilfrid Greene, M.R.

Sir Stafford Cripps, K.C., and *Anthony E. W. Ward* for the appellant.

W. E. Tyldesley Jones, K.C., *Alfred Tylor* and *Roger Pezzani* for the respondents.

Cripps, K.C.: The words of the Electricity (Supply) Act, 1926, s. 47, cannot apply to this case, because the Liverpool Corporation are not undertakers who "may supply," for they have not consent under the Electric Lighting Act, 1909, s. 5. In other words, the words "may supply" in sect. 47 refer back to sect. 5 of the 1909 Act, and that is a condition precedent to the application of sect. 47. The corporation are not already supplying electricity for haulage or traction to the railway company, because "supply for haulage or traction" means supply for that purpose alone. The condition is not met by a supply for general purposes including the operation of capstans, even if capstans are "haulage and traction." The use of the same words in sect. 12 indicates that they mean a special supply for haulage and traction. A use does not necessarily import a supply within the meaning of the section. The railway company is a unit created by a special Act, and the Wirral Railway, an isolated part of the amalgamated undertaking of the company, does not fall within the words "partly within and partly without." The undertaking contemplated by the section must be taken to be the undertaking originally belonging to the Wirral Railway Company, which is not "partly within and partly without," and therefore does not fall within the words of this section: *A.-G.* v. *North Eastern Ry. Co.* (1). In any event the only railway undertakings in this section are those that run continuously from within to without. That does not apply to the London, Midland & Scottish Ry. Co. as far as the Wirral Railway is concerned, for there is no continuity between the part within the area of the corporation and the part which they wish to supply. No authorisation for the use of electricity for haulage or traction can be given under this section, for it only applies to any other purpose of the undertaking and not to haulage and traction. The words "so supply" mean supply for haulage or traction. Therefore, *ex hypothesi*, the corporation must be supplying for haulage or traction before the section can operate at all.

Under the Wirral Railway Act, 1900, the Wirral Co. was limited in its power to contract, and could only contract with persons authorised to supply in the district through which the railway ran. The limitation was not extended by sect. 47. [Counsel referred to *Blackpool Corpn.* v. *Starr Estate Co.* (2) and *R.* v. *Minister of Health, Ex p. Villiers* (3).]

A *Tyldesley Jones, K.C.*: If each word in the section be read in its ordinary meaning, the corporation and company come within that meaning.

Cripps, K.C., in reply.

B SIR WILFRID GREENE, M.R.: This is an appeal by the plaintiff in the action from a judgment of SIMONDS, J., delivered upon the hearing of a motion, which, by agreement between the parties, was treated as the trial of the action. As the result of that judgment the action stands dismissed. The plaintiff is the Attorney-General at the relation of C the Birkenhead Corporation, and he seeks in this action to restrain the London, Midland & Scottish Ry. Co. from taking, and the Liverpool Corporation from giving, a certain supply of electricity for the purposes which I shall indicate in a moment.

The London, Midland & Scottish Ry. Co. is, of course, one of the amal- D gamated railways constituted under the Railways Act, 1921. So far as concerns its actual physical possessions in the neighbourhood in question, they may be shortly stated as follows: The company has a series of lines physically situated within the electricity supply area of the Liverpool Corporation. Those lines extend, of course, outside the area, E and reach to London on the one hand and to other parts of the country on the other, by a continuous series of lines. The company is also the owner of a railway situated in the Wirral Peninsula, on the other side of the Mersey, which is not physically connected with any line belonging to the London, Midland & Scottish Ry. Co. It has a physical connection F with two other railways, one being the Birkenhead Railway. That is a joint line belonging to the London, Midland & Scottish Ry. Co. and the Great Western Ry. Co., which has a junction with the Wirral Railway, but, for the purposes of this case, that joint line is not of any importance. The other line—I am not sure whether there is a physical connection with G the Wirral Railway, but, if there is not a physical connection of the rails, there is contiguity in the matter of terminal stations in Birkenhead—is a line called the Mersey Railway, which runs from Liverpool, by a tunnel under the Mersey, and ends in Birkenhead.

The London, Midland & Scottish Ry. Co. is minded to electrify a H portion of the Wirral Railway, and the portion which it proposes to electrify lies in part within the electricity supply area of the Birkenhead Corporation, in part in the Wallasey supply area, and in part in the Hoylake supply area, and the manner in which it proposes to obtain the electricity necessary for that railway is this: it proposes to take from the Liverpool Corporation a supply at terminals in Liverpool within the area of supply of that corporation. The terminals will be situated upon a building which will be erected by the London, Midland & Scottish Ry. Co. on a piece of land which is going to be taken for the purpose from the Mersey Railway. The cables will then be led from the London, Midland & Scottish Ry. Co.'s switchboard at their terminals, and will be led by the Mersey Railway's tunnel under the Mersey, and so will be brought to Birkenhead and the Wirral Railway, the passage of the cable through the tunnel being provided for by a wayleave agreement between the London, Midland & Scottish Ry. Co. and the Mersey Railway. A proposal for the giving and taking of this supply was brought before the Minister of Transport for his consent, which, under the Electricity (Supply) Act, 1926, s. 47, assuming that it applies to the case, was necessary, and such consent was given. The relators in the present action took the view that the Minister had no power under that section to give consent, and accordingly they instituted these proceedings with a view to restraining the Liverpool Corporation and the London, Midland & Scottish Ry. Co. from giving effect to the arrangement. Stating it quite shortly, the ground of that contention was and is that, under sect. 47, there is no power, on the facts of this case, in the Liverpool Corporation to give a supply to be used in connection with the Wirral Railway, which lies right outside the area of supply of the Liverpool Corporation. Simonds, J., held that the action was not well-founded, and, accordingly, he dismissed the action, and this appeal is an appeal from his decision. In my opinion, the decision of the judge was perfectly right. If, in the course of this judgment, I do not appear to do full justice to all the arguments in their various aspects which have been put before us by Sir Stafford Cripps and by Mr. Ward on behalf of the appellant, it must not be taken that I have not understood them, or not carefully weighed them.

The question really turns upon sect. 47, but, before I come to consider that section, I must refer to some other statutory provisions, which must be understood before the points raised can be followed. First of all, from the point of view of the railway company, its position is this: under the Railways Act, 1921, two schemes were made, and, under the provisions of that Act, they have statutory force. The first is the scheme under which the London, Midland & Scottish Ry. Co. itself was formed, but the actual scheme under which the Wirral Railway was taken in was another scheme, namely, the London, Midland & Scottish Railway (Absorption) No. 1 Scheme, 1923 (S.R. & O., 1923, No. 1180). Under that scheme, it is provided that:

> 5. The undertakings of the vested companies [that phrase includes the Wirral Company] are hereby transferred to and absorbed by and shall form part of the undertaking of the company [the London, Midland & Scottish Ry. Co.] and each such transfer and absorption shall take effect as on and from the date of vesting.
>
> 6. On and from the date of settlement the vested companies shall be and are hereby dissolved except for the purpose of anything to be done in accordance with this scheme.

Para. 3 of the order incorporates the Railways Clauses Act, 1863, Part V, subject to the provisions of the Act. I shall have to refer to that

Clauses Act in a moment, but for the present I will not say anything about it. The effect of that order would appear, in the ordinary understanding of the English language, to be to merge into the single undertaking of the London, Midland & Scottish Ry. Co., which is treated as a single undertaking according to the language of para. 5, the undertaking A of the Wirral Railway, and when the legislature passed the Electricity Act, 1926, it must have had in mind the position of these amalgamated railway companies in relation to the companies which they had absorbed, and must have had in mind the language that had been used in relation to the undertakings of these amalgamated companies under the Act of 1921.

B So much for the manner in which the Wirral Railway became part, as the order says, of the undertaking of the London, Midland & Scottish Ry. Co. But the Wirral Railway, when it became so absorbed, was a company which, under the statutes affecting it, had certain powers, and, in particular, powers in relation to electrification. The relevant Act C under which the electrification powers of the Wirral Railway had been obtained was the Wirral Railway Act, 1900, to one or two provisions of which I must now refer. The importance of them in the argument will appear later. The Act recites the purposes of the Act, including this, amongst other things:

> D And whereas it is expedient that the company be empowered to enter into and carry into effect agreements with other companies public bodies and persons and with the Mersey Railway Company as hereinafter mentioned.

Effect is given to that recital by, among other sections, sect. 6 of the Act. Sect. 4 gives power to the Wirral Railway to work its railway by electrical or other motive power. Sect. 5 gives it power to erect stations, engines E and machinery, and sect. 6 provides as follows:

> The company may enter into and carry into effect agreements with any other company body or persons authorised to supply electricity in any district in which any part of the railways and works of the company are situate for the supply to the company by such other company body or persons of electricity or electrical power for the working of the railway and works of the company or any part thereof.

F That is one of the sections which the recital says it is expedient should be passed in order to empower the company to enter into and carry into effect agreements; and it is, on the face of it, an enabling section, and nothing more.

So much for the position from the side of the London, Midland & G Scottish Ry. Co. and the Wirral Railway. From the other side, that is to say, the side of the Liverpool Corporation, its power to supply electricity is at present derived from the joint effect of the Liverpool Corporation Act, 1921, ss. 175, 176. Under those sections, the corporation has the powers conferred by the Electric Lighting (Clauses) Act, 1899, s. 10, H empowering the undertakers to "supply energy within the area of supply for all public and private purposes as defined" by the Electric Lighting Act, 1882. That Act, by sect. 3 (4), defines "private purposes" as including:

> any purposes whatever to which electricity may for the time being be applicable, not being public purposes, except the transmission of any telegram.

The power, therefore, of the Liverpool Corporation extended to the supply of electricity to any person and for any purpose within its area.

Now, I come, bearing those statutory provisions in mind, to the consideration of the Electricity Supply Act, 1926, s. 47. That section is in the following terms:

> Where any authorised undertakers may supply and are supplying within their district or area of supply electricity for haulage or traction to any company or authority being the owners or lessees of a railway, dock, harbour or canal undertaking situate partly within and partly without that district or area, such authorised undertakers may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any particular case, so supply electricity to be used for any purposes of such undertaking, whether within or without such district or area of supply, and such company or authority may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any particular case, use the electricity so supplied for any purposes of their undertaking for which they are entitled to use electricity.

Then there follows a proviso which I need not read. Reading that section in its natural sense, and applying it to the facts, it appears to me beyond possibility of argument that, in its language so read, it covers this case. First of all, the section deals with the necessary state of facts before it is going to come into operation. The first thing is this: There must be an authorised undertaker. The Liverpool Corporation is an authorised undertaker. Secondly, that authorised undertaker must have power to supply—the words are: "may supply . . . within their district or area of supply electricity for haulage or traction." The Liverpool Corporation has such power. But it is not "supply electricity for haulage or traction" merely, but:

> supply electricity for haulage or traction to any company [the London, Midland & Scottish Ry. Co. is a company] or authority being the owners or lessees of a railway, dock, harbour or canal undertaking.

The London, Midland & Scottish Ry. Co. is the owner of a railway undertaking which, in my judgment, is the undertaking constituted under the Act of 1921 and the orders passed under it. The undertaking must be "situate partly within and partly without that district or area." The undertaking of the London, Midland & Scottish Ry. Co. is situate partly within and partly without the district or area of the Liverpool Corporation. The last requisite is the requisite that the undertakers must not only have power to supply, but must also in fact be supplying the company indicated for haulage or traction. As a point of fact, the Liverpool Corporation at the relevant date was supplying to the London, Midland & Scottish Ry. Co. electricity which was being used for the purpose of running certain capstans, certain travelling cranes and travelling conveyors upon parts of their track in the Liverpool Corporation supply area. That those purposes are haulage or traction purposes cannot, I think, be disputed, nor was the contrary seriously argued; and, subject to the points which I shall mention in a moment, when I come to deal with the argument of the appellant, the Liverpool Corporation, at the relevant date, was in fact supplying electricity for, among other things,

haulage or traction, in the way which I have mentioned with regard to those capstans and conveyors. The section then proceeds to give the power for which it is designed, and the power is, with the consent of the Minister of Transport, a power to the authorised undertaker "so [to] supply electricity to be used for any purposes of such undertaking."
A Reading those words in their ordinary sense and context, I should have thought that the words "so supply" meant supply within its district, and that the words "to be used for any purposes of such undertaking" meant what they say, namely, any purposes, whether haulage or traction or any other purpose. But, as will appear later, it is said
B that that is not the meaning which must be put upon those words. Then, the purpose may be whether within or without such district or area of supply. Then comes the corresponding power to the railway company, or the other company, as the case may be, with the consent of the Minister, to "use the electricity so supplied for any purposes of
C their undertaking." The running of the Wirral Railway by electricity is a purpose, I should have thought, of the undertaking of the London, Midland & Scottish Ry. Co., of which it forms part. Nevertheless, it is said that the section must be read subject to a number of qualifications, with which I will now proceed to deal as fully as I can.

D It is said, first of all, that the authorised undertaker, namely, the Liverpool Corporation, does not come within the language of the section, for certain reasons. The first reason is this: It is said that the Liverpool Corporation is not a corporation which may supply electricity for the purposes indicated, and the reason why that is said is this, that the
E power of the Liverpool Corporation to supply for haulage or traction to a railway company, part of whose undertaking lies within and part without the area of the Liverpool Corporation, can be derived only under the Electric Lighting Act, 1909, s. 5. It is further said that, as, under that section, the power to supply does not exist until the consent of the
F Board of Trade has been given, and no such consent has been given, the Liverpool Corporation is not an authorised undertaker with the necessary power to supply for haulage or traction. In my opinion, that argument is ill-founded. When sect. 5 of the Act of 1909 is examined, it will be found that it authorises "any local authority, company, or person . . .
G with the consent of the Board of Trade" which has authority to supply electricity in an area, to:

> supply at any point within that area electricity for the purposes of haulage or traction on any railway, tramway, or canal situate partly within and partly without that area, and for the purposes of lighting vehicles and vessels used on any such railway, tramway, or canal.

H It is said that, on the true construction of that section, once you find a railway, or a tramway, or a canal which is physically situate partly within and partly without an area, the mere fact that it is so physically situate deprives the local authority in each of those two areas of the power to supply electricity for the purposes of haulage or traction, notwithstanding that the electricity is to be so used entirely within the area of the supplying authority. The way in which that argument is constructed is this : It is said there is a railway situate partly within and partly without. Whenever, on any point of that railway, haulage takes place, it is haulage on a railway situate partly within and partly without that area, and, accordingly, once you find that the railway extends into two areas, whatever the limitation on the haulage may be, nevertheless, the section applies. It appears to me that to place that construction on the section would lead to very remarkable results, and I do not think that it is in accordance with the language of the section. First of all, take the language of the section itself. What it is dealing with is haulage or traction on a railway situate partly within and partly without an area. In the context, I myself should have thought that that is referring, not to traction on the part of the railway within one area, but to traction which passes from one area to another along the railway. Traction can take place only along a railway, and if, instead of the word "on," the word "along," which has really the same meaning, had been used, there could be no question, to my mind, that the kind of haulage or traction contemplated, which is to be effected by the use of electric power, is haulage or traction which does, or may, pass from one area to the other, along the railway situate partly within the one and partly within the other. If that be the true effect of sect. 5, the point really disappears. That it is the true effect, quite apart from the language used, is confirmed by considering some of the results which might follow from the appellant's construction. One of them, which was pointed out by Romer, L.J., in the course of the argument, will be sufficient. The section applies to tramways, and, if you had a case where a tramway was constructed and operated entirely within one area, deriving its supply from the undertakers for that area, and then extended its track into another area, the supply of electricity from the first undertaker to the part of the tramway within its area would, *ipso facto* and necessarily, become illegal. That consequence would follow, notwithstanding the fact, if it were the fact, that the tramway company had obtained the supply for the new piece of its line from the authority in whose area it was situate. It seems to me that such a result would be quite absurd, and it confirms the construction which I would have placed upon the language, without a consideration of the results which might follow from adopting the construction which the appellant puts forward.

There is a further argument with regard to the words "may supply," an argument for excluding the suggestion, or for countering the suggestion, that it is only under sect. 5 that the Liverpool Corporation could obtain its power of supply, and it is this : It is to be noticed that there is a very important difference in language between the two sections. Sect. 5 refers to a supply of electricity for the purpose of haulage or traction on a railway situate partly within and partly without the area. Sect. 47 refers to a supply of electricity for haulage or traction to a company, being the owner of a railway undertaking situate partly within and partly without. Sect. 47 does not contemplate any continuity in the haulage between one area and another; all that it requires is that there should be a company owning a railway undertaking physically situate within two districts, and a supply for haulage to that company, quite irrespective of the question whether the company used that supply entirely within one area or partly within and partly without the area. That change in language appears to me to reinforce the argument I have put forward on the construction of sect. 5 and on that of sect. 47, but there is one other important change. The supply is to be to a company "being the owner of a railway undertaking," not "the owner of a railway," as in sect. 5, and those words appear to me to be exactly apt to cover the present case of the London, Midland & Scottish Ry. Co.

I think I have said enough to dispose of the argument that the Liverpool Corporation is not a corporation which may supply electricity on the facts of this case. The next point is that it is said that it is not in fact supplying for haulage or traction. I have dealt with the matter whether the use for capstans and conveyors is haulage or traction, but I must now deal with an argument of a different nature. The actual supply that is being taken is a general supply, and part of it is being used for haulage or traction by means of the capstans and conveyors. It is said that a supply of that kind is not a supply for haulage or traction, because you can have a supply for haulage or traction only if it is a supply specifically for that purpose, and earmarked for that purpose, and for that purpose only. I am quite unable to put that construction upon the words. It appears to me that, where you are having a supply for several purposes, one of which is haulage or traction, you are having a supply for haulage or traction within the meaning of the section. It is said, in answer to that, that sect. 12 of the Act points in the other direction, because, under that section, a railway company is entitled to obtain from the undertaker a supply for haulage or traction at certain favourable rates; and it is said, accordingly, that, when you find the words "supply for haulage or traction" in sect. 47, it must be limited to cases where sect. 12 is brought into operation, and you can say of the supply that it is a supply entitling the railway company to the special terms in sect. 12. It seems to me that there are two answers to that. The first answer is that there is nothing in sect. 12 to make it compulsory on the railway company to take a supply at that price, and therefore sect. 47 must be dealing with both cases, the case where the railway company does, and the case where it does not, take advantage of sect. 12. The other answer is that sect. 12 applies to a railway company only, whereas sect. 47 applies to any company "being the owners or lessees of a railway, dock, harbour or canal undertaking." Accordingly, the argument based on sect. 12, as limiting the meaning of supply for haulage or traction, could not be applied to the case of a dock, harbour or canal company, and it appears to me that the argument is not one that has any real weight. That deals with the first two requirements.

It is next said, turning to the railway company's side of the matter, and away from the undertaker's, that the railway company is not the owner of a railway undertaking situate partly within and partly without the district of the Liverpool Corporation. The first point that is taken is this: it is said that this is a disconnected piece of line, and cannot be treated as part of the undertaking which is situate in the Liverpool area. I am quite unable to accept that argument. "The railway undertaking" is an expression, in using which the legislature must have had in mind the nature of the railway undertakings set up under the Act of 1921, and it seems to me quite impossible to suggest that the word "undertaking" there does not include the whole of the undertaking of any railway so constituted.

It is then said that the word "undertaking," when applied to an amalgamating and absorbing undertaking, such as is the London, Midland & Scottish Ry. Co., must be read in reference to the history of the constitution of that unified undertaking. What is meant by that, as I understand it, is this, that the legislature, when it used the word "undertaking," must have remembered that the Wirral undertaking had at one time been a separate undertaking, and must have used the word "undertaking" in the light of that fact, and that the section must in some way be read as splitting up or disintegrating the present undertaking of the London, Midland & Scottish Ry. Co. into the various undertakings which were amalgamated or absorbed into it. I am afraid that that argument is one to which I find it difficult to do justice. It seems to me that to impute to Parliament an intention, in enacting a section the language of which is perfectly apt to deal with the existing railway situation in the year 1926, to use a phrase which, in view of that situation, would have been entirely misleading, and would impose upon those whose duty it is to construe the section the obligation of in some way disintegrating the London, Midland & Scottish Ry. Co. and other amalgamated railways into their component parts, is to impute a fantastic intention. I am unable to ascribe to Parliament any such fantastic intention, nor can I find any justification in the language for so doing.

There is another argument in relation to the Wirral undertaking to which I must devote a little more attention, and that argument is this: it is said that the only power of the Wirral undertaking to electrify its system is to be found in the Act of 1900, to which I have referred. Let me assume that that is the case. It is then said that that Act is a complete code, laying down and delimiting the method by which that shall be done. It is then said that the matter of obtaining supplies from outside bodies is to be found exhaustively provided for in sect. 6 of the Act which I have read. It is said that that section is not merely a section empowering what was then the Wirral Railway Co. to enter into agreements for supply, but is a section which must be read as a prohibiting section, prohibiting the company from entering into agreements otherwise than in accordance with that section. I may say, in passing, that the section, in my view, is merely an enabling section, and to regard it as a prohibiting section is, to my mind, to treat it as having a purpose quite foreign to any purpose which it has. It is not a saving section or a prohibiting section at all; it is a pure enabling section. But it is then said that, that being what I may call the electrification code relating to the Wirral Railway, when you find, in sect. 47 of a general Act of Parliament, a provision conferring general powers upon railway undertakings in relation to obtaining supplies of electricity, you must apply the rule *generalia specialibus non derogant*, and read the powers conferred by that section in such a way that they will not extend the powers conferred by sect. 6 of the special Act or do away with what are said to be the implied prohibitions contained in that section. It seems to me that that argument is based upon a misconception. Sect. 6 of the Act of 1900, as I have said, is, according to its language, and according to the recital in the preamble which refers to it, an enabling section, and nothing more. I can see no room for the application of the maxim to a case where, under a special Act dealing with a particular matter, a power is given and a general Act follows it, giving, in general terms, power to companies or concerns, of which the one dealt with in the special Act is one; and that appears to me to be exactly what is happening in this case. Under sect. 6 of the Act of 1900, certain limited powers in regard to taking electricity from supplying companies or bodies were given to the Wirral Railway. Under sect. 47, extended powers were given to all railways which fall within the requirements of sect. 47, and I cannot see how the maxim *generalia specialibus non derogant* can apply to such a case. In fact, the only way in which the argument can be made to have any semblance of attractiveness is by treating sect. 6 as a prohibiting section, and by then saying that you must not read an enabling section in a general Act as overriding a prohibition in the special Act. Had sect. 6 been a section containing some sort of prohibition, there would have been some force in that argument, but, once it is appreciated that it is in fact nothing of the kind, the argument appears to me completely to fall to the ground.

I should here say, lest it be thought that I have overlooked the point, that the arguments with regard to the "undertaking" do not, in my opinion, derive any support from the Railways Clauses Act, 1863, Part V, to which I referred earlier in this judgment. The next matter, and I think the last one with which I need deal, is this: it is said that the power conferred by the section in the words "so supply electricity to be used for any purposes of such undertaking, whether within or without such district or area of supply," does not extend to a supply for haulage purposes, because it is said that the existence of a power of supply for haulage or traction purposes within and without the area is an essential before the power can be exercised, and that the words "so supply" refer back to a supply for such haulage or traction purposes, that, accordingly, there was no necessity to give a further power to supply for haulage or traction purposes, and that therefore the words "so supply electricity to be used for any purposes of such undertaking" must be read as meaning "for any purposes of such undertaking other than the purposes of haulage or traction." It seems to me that that would be to do quite unwarranted violence to the language of the section. First of all, I have given my reasons for thinking that the supply for haulage or traction, which is a condition of the section coming into operation, that is, the power to supply and the *de facto* supply for haulage and traction, is not necessarily a supply for haulage or traction outside the area at all. Next, it seems to me that, as a pure matter of English, the word "so" in this context refers back, and refers back only, to "within their district or area of supply," because that is the kind of supply with which the section is dealing, and those are the only words which really qualify the word "supply" at the beginning of the section. Further, when the legislature says, "to be used for any purposes of such undertaking," I see no justification for reading the words "any purposes" in any sense other than that which they would naturally bear. That argument again is one which, in my opinion, has no foundation.

I have endeavoured to deal with all the arguments which have been put forward, and, in my opinion, on the true construction of sect. 47, and on the facts of this case, the section applies, the judge was perfectly right, and this appeal should be dismissed with costs.

ROMER, L.J.: I agree entirely. SIR WILFRID GREENE, M.R., has dealt so fully with all the arguments that were addressed to us in support of the appeal that I feel I cannot myself usefully add anything.

MACKINNON, L.J.: I agree, and I agree with every word which has been used by both my learned brethren.

Appeal dismissed, with costs.

Solicitors: *Robins, Hay & Waters*, agents for *E. W. Tame*, Town Clerk, Birkenhead (for the appellant); *Alexander Eddy* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

BRITISH SUGAR MANUFACTURERS, LTD. *v.* HARRIS (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Finlay, J.), **June 22, 23, 1937.**]

Income Tax—Business—Deduction—Percentage of net profits payable to another company in consideration of giving benefit of experience.

By an agreement made between the appellant company and two other companies, those two companies were to be entitled in each of four years to receive between them and in such proportions as they should mutually agree upon 20 per cent. of the net profits of the appellant company in consideration of their giving to the appellant company the full benefit of their technical and financial knowledge and experience and giving to the appellant company and its directors advice to the best of their ability respectively on all questions of or relating to manufacture and finance and disposal of the appellant company's products. The appellant company was not to be liable to pay any remuneration to the directors nominated by one of the other companies beyond their fees as directors and their travelling and other expenses. The net profits were to be arrived at after payment of all expenses of the appellant company and after providing for interest on debentures, but before making any provision for depreciation. The appellant company claimed A that a payment made under the agreement was an admissible deduction in computing the appellant company's profits for the purpose of assessment under Sched. D, Case I:—

HELD: the payment was a distribution of profits and was not an admissible deduction.

[EDITORIAL NOTE. The judgment in this case proceeds upon the statement B in the judgment of the Privy Council in the *Pondicherry* case (2) that "a payment out of profits and conditional upon profits being earned cannot accurately be described as a payment made to earn profits." This was later explained in *Adamson* v. *Union Cold Storage Co., Ltd.* (4) to refer to a case where profits have to be ascertained after providing for all outlays incurred in earning them. No doubt the apparent differences in the decisions in the decided authorities C can be explained by the different meanings ascribed to the word "profits," as suggested by LORD MAUGHAM in *Indian Radio & Cable Communications, Ltd.* v. *Income Tax Comr.* (6).

AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, 50, 51, Nos. 215-226, 255-260.]

D Cases referred to:

(1) *Last* v. *London Assurance Corpn.* (1885), 10 App. Cas. 438; 28 Digest 58, *297*; 55 L.J.Q.B. 92; 53 L.T. 634; 2 Tax Cas. 100; *varying* (1884), 14 Q.B.D. 239.

(2) *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1931), 58 L.R. Ind. App. 239; Digest Supp.

E (3) *Howe (Earl)* v. *Inland Revenue Comrs.*, [1919] 2 K.B. 336; 28 Digest 111, *683*; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289.

(4) *Adamson* v. *Union Cold Storage Co., Ltd.* (1931), 146 L.T. 172; Digest Supp.; 16 Tax Cas. 293.

(5) *Tata Hydro-Electric Agencies, Ltd. (Bombay)* v. *Income Tax Comr.*, [1937] 2 All E.R. 291; Digest Supp.

F (6) *Indian Radio & Cable Communications Co., Ltd.* v. *Income Tax Comr.*, [1937] 3 All E.R. 709; Digest Supp.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing an appeal against an assessment made upon the appellant company under Sched. G D, Case I, for the year 1931/32 in respect of the profits of its trade and holding that the payment referred to in the judgment was a distribution of profits, and was not an admissible deduction in computing the appellant company's profits for the purpose of assessment under Sched. D, Case I. The facts are set out in the judgment.

H *Cyril L. King, K.C.*, and *Frederick Grant* for the appellant company.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

FINLAY, J.: I have arrived at the conclusion that, on the authorities as they stand, I ought not to differ from the decision of the special commissioners, but I will add this, that, if I had to consider this case entirely unfettered by authority, I should, I think, have arrived at the conclusion that the argument urged by Mr. King was right.

The case is a case stated by the special commissioners, and it has reference to an appeal of a company called British Sugar Manufacturers, Ltd., against an assessment. The actual year before the commissioners A was the year 1931/32, and the actual point can be stated quite concisely. There was an agreement made between this company and the British and Allied Investments Corpn., Ltd., and a company called the Skoda Works. I agree with the observation made by the Attorney-General, that, if that agreement is looked at, it shows that there was a consider- B able amount of joint adventure in this thing, but the actual question which arises can, I think, be more or less isolated. It arises on cl. 11 in the agreement, which I will read :

> In each of the four years [the four years are set out] Skoda Works and the corporation shall be entitled to receive between them and in such proportions as they shall C mutually agree upon 20 per cent. of the net profits of the company in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience and giving to the company and its directors advice to the best of their ability respectively on all questions of or relating to manufacture and finance and disposal of the company's products : provided that the company shall not by reason of this clause be liable to pay any remuneration to the directors nominated by Skoda Works beyond their fees as directors and their travelling and other expenses. Such net profits shall be arrived at after payment of all expenses D of the company and after providing for interest on the said debentures but before making any provision for depreciation and in case of any dispute as to the amount of such net profits the certificate of the auditors for the time being of the company shall be final and binding on all parties.

There it seems to be quite clear what they are doing. They are saying that the Skoda Works and the corporation have rendered and are render- E ing services to the company, and that, in consideration of those services, Skoda Works and the corporation are to receive remuneration. The remuneration is expressed to be 20 per cent. of the net profits of the company. Then the manner in which the net profits are to be arrived at is defined. It is to be after payment of all expenses of the company F and after providing for interest on the said debentures, but before making any provision for depreciation. It is not exactly the income tax computation, but it is quite intelligible what has to be done. One has to arrive at the net profits, and then, when one has arrived at them, in the manner indicated here, 20 per cent. is to be paid to these two companies G as consideration for their services. I did not understand the Attorney-General to question the fact that, if the companies had been remunerated, not by a share of profits, but by some fixed sum (say, instead of saying 20 per cent. of the profits, they had said £10,000 each year was to be paid to the two companies), in that case the £10,000 would be a deduction H from the profits of the company, and, of course, assuming that the other companies were liable to income tax, would fall to be brought in as sums earned in the course of their business by the other companies. The reason why I should myself, untrammelled by authority, have arrived at the conclusion that Mr. King was right here is that it seems to me that the truth of the thing here is that this is truly remuneration for services done, and that the fact that it is to be 20 per cent. of the profits is really only to apply a measure to the remuneration.

Several of the authorities do not cause me any difficulty. The start of this particular line of cases is *Last* v. *London Assurance Corpn.* (1). Of course, the decision of the majority of the House of Lords must be taken to be correct. That is perhaps not inconsistent with a feeling of some sympathy with the reasoning which ultimately did not prevail, the reasoning of BRETT, M.R., and COTTON, L.J., in the Court of Appeal, and the reasoning of LORD BRAMWELL in delivering a characteristically emphatic dissenting opinion in the House of Lords: but the view which prevailed in that case is, I think, probably best got by looking at the judgment of LINDLEY, L.J., at p. 244. What he says is this:

> I cannot myself hold as a matter of fact that these bonuses are in any way mere expenses incurred in earning the receipts of the company. Of course I see that the larger the bonus held out to people who effect policies, the greater is the inducement to insure with the company. But these bonuses are not like the expenses of management or anything that must be necessarily incurred for the purpose of carrying on the business. I cannot see how the fund for division can be regarded as spent in earning itself. In my view the fund which is divided partly among the shareholders and partly among the policy-holders is the excess of the earnings over the expenses incurred in earning that excess.

I think that that case is pretty clearly distinguishable. It seems to me that there is a real difference between the position of the participating policy holder who, every 5 years, or every 7 years, whatever it happens to be, gets his share of the profits, and the position of a person who is entitled to remuneration by way of a share of the profits. But, when one comes to a later case, which the Attorney-General cited, I do feel a very great difficulty. I am, of course, conscious of the fact that a decision of the Privy Council does not technically bind me, but I think that one must attach the greatest weight to the decisions of the Privy Council, and certainly not less weight when one finds that the decision of the Board was delivered by LORD MACMILLAN. In *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (2), there was an elaborate discussion of this point. It is not necessary to go into the details of the case. It all arose with reference to a payment which had to be made in India. The point, so far as it is relevant for my purpose, is sufficiently seen by reading a passage of the decision of the Board, at p. 251:

> Question (*d*) relates to the quantum of the assessment. The statute permits the assessee in computing the profits or gains of any business carried on by him to deduct "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." The Pondicherry Co. is taken bound in the convention with the French Minister to "make over" to the Colonial Government "one half of the net profits" of the undertaking arrived at in the manner prescribed in the convention. It is claimed for the company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The court below has unanimously negatived this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits.

That sentence appears to me (and, indeed, Mr. King, with his usual candour, did not really seek to deny it) to be precisely in point, and, if accurate, to cover the other case. Mr. King said that that no doubt was so, but that the statement was too broad, and he said that one could see that it was too broad if one looked at two later cases, which I shall, of course, not fail to look at. Lord Macmillan goes on :

> It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point, and the revenue is not concerned with the subsequent application of the profits.

That case related to the Indian Act. It is perhaps useful at this point to call attention to the English Act. The matter depends upon Sched. D, Cases I and II, r. 3 :

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation : . . . (*l*) any annual interest, or any annuity, or other annual payment payable out of the profits or gains.

It is not necessary, of course, to review the authorities with regard to that. As to (1), it is perhaps worth while remembering *Howe* (*Earl*) v. *Inland Revenue Comrs.* (3), where the matter is discussed.

So much for the *Pondicherry* case (2). So far, it appears (and indeed, as I say, I do not think that it was questioned) that that case, or rather the manner in which the case is put by Lord Macmillan in delivering the judgment of the Board, covers the present. But my attention was called to other cases. The first to which it is necessary to refer is *Adamson* v. *Union Cold Storage Co., Ltd.* (4). The matter actually decided seems to me to be remote from the present, but it is worth looking at the opinions in the House of Lords, and particularly the opinion of Lord Macmillan, who said, at p. 331 :

> As reference has been made to the case of the *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comr.* (2), an Indian appeal before the Privy Council in which I took part, I should like to point out that the circumstances there under consideration differed entirely from those which the House has been considering in the present appeal. We were reminded very properly by the Solicitor-General that these cases all turn upon their particular circumstances, and in that case the convention under which the payments were made provided as follows : " The company undertakes on its part to make over to the Colonial Government during the whole duration of the concession one-half of the net profits which shall be arrived at " in a manner which is then set out in detail, provision being made for the deduction of all outgoings, such as rates and taxes, and so on.

I desire to point out at this point that I think that the positions in the *Pondicherry* case (2) and the present case, though not the same, are fairly close, because, in the *Pondicherry* case (2), it might, it seems to me, have been said with great force that the real profits of the company were to be got at only after deducting this sum (half the profits) payable over to the French authorities. Lord Macmillan goes on :

> In that case, therefore, the ascertainment of profits preceded the coming into operation of the obligation to pay, and when the profits had been ascertained the obligation was to make over one-half thereof to the French Colonial Government. The obligation was conceived in language entirely different from the language which your Lordships have been considering in the present appeal, where there is a common form obligation in a lease to pay rent. When, therefore, in the passage

> referred to by the Attorney-General in the *Pondicherry* case (2) I said that "a payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits," I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them. Here the question is whether or not a deduction for rent has to be made in ascertaining the profits, and the question is not one of the distribution of profits at all.

A That is said, and truly said, to be an explanation of an observation made by LORD MACMILLAN in the *Pondicherry* case (2), but the explanation does not seem to me to touch the principle for the present purpose. What he is there pointing out is that what he said in the *Pondicherry* case (2) has no application to the *Union Cold Storage* case (4), which was B a case of a rent to be reduced in certain particular circumstances. When he says: "I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them," what he there says appears to me, as indeed his original statement in the C *Pondicherry* case (2) appears to me, precisely to apply to the present case.

Then in *Tata Hydro-Electric Agencies, Ltd.* (*Bombay*) v. *Income Tax Commissioner, Bombay Presidency and Aden* (5), at p. 296, there is a passage of some little importance in the judgment of the Board delivered by LORD MACMILLAN:

D

> Their Lordships recognise, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case, their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellant company. They were certainly not made in the process of earning its profits; they were not payments to creditors for goods supplied E or services rendered to the appellant company in its business; they did not arise out of any transactions in the conduct of its business. That the company had to make those payments no doubt affected the ultimate yield in money to it from its business, but that is not the statutory criterion. The company must have taken this liability into account when it agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellant company in consideration of its acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits F in the conduct of the business. If the purchaser of a business undertakes to the vendor, as one of the terms of the purchase, that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business.

That case does not seem to me to contain anything to qualify the view G which LORD MACMILLAN had expressed in the *Pondicherry* case (2).

There is a passage which requires consideration, and which, I confess, when I first considered it, rather shook me, and made me think that I might, after all, be able to give effect to what I have already indicated would have been my view, but I do not think that it goes far enough. H LORD MAUGHAM, delivering the decision of the Board in the case of the *Indian Radio and Cable Communications Co., Ltd.* v. *Income Tax Comr.* (6), said this:

> Their Lordships have had the advantage of a learned argument on behalf of the appellant company, but they have found themselves unable to come to a conclusion different from that of the High Court. It may be admitted that, as Mr. Latter contended, it is not universally true to say that a payment, the making of which is conditional

> on profits being earned, cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word " profits " in more than one sense. If a company, having made an apparent net profit of £10,000, has then to pay £1,000 to directors or managers as the contractual recompense for their services during the year, it is plain that the real net profit is only £9,000. A contract to pay a commission at 10 per cent. on the net profits of the year must necessarily be held to mean on the net profits before the deduction of the commission, that is, in the case supposed, a commission on the £10,000.

I should perhaps add that Lord Maugham refers, at the end of the decision, to the *Pondicherry* case (2), which he says was distinguishable :

> though that case no doubt throws light on the nature of the problem which has to be solved in the present case. It should perhaps be added that a sentence in the judgment in that case has been explained, if explanation were necessary, by Lord Macmillan in the subsequent case of *Adamson* v. *Union Cold Storage Co., Ltd.* (4).

That decision of the Board does indicate that there may be cases in which it is possible to say that a share of the profits paid by way of remuneration is, nevertheless, a sum to be deducted in arriving at the profits, and the apparent inconsistency which arises, of course, from that mere statement may be solved, as indeed it was solved by Lord Maugham, by saying that " profits " may be used in two different senses. In the one sense, it is the profits before the deduction is made ; in the other sense, it is the profits after the deduction is made. Quite manifestly, you cannot take into account the deduction, in arriving at the sum from which the deduction is to be made. That difficulty, it is indicated by Lord Maugham, in delivering the judgment of the Board, may be solved in that way. I have hesitated as to whether that did not enable me to decide this case in favour of the appellant, but, having regard to the passage in the judgment in the *Pondicherry* case (2), having regard to the fact that the explanation subsequently given by Lord Macmillan of that passage does not seem to me to qualify its weight as applied to the present case, I have arrived at the conclusion that I ought not, in that state of the authorities, to hold that the deduction here claimed can be allowed.

The result is that the conclusion arrived at by the special commissioners will be affirmed, and the appeal dismissed with costs.

Appeal dismissed, with costs.

Solicitors : *Godden, Holme & Ward* (for the appellant company) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

INDIAN RADIO AND CABLE COMMUNICATIONS CO., LTD. *v.* INCOME TAX COMMISSIONER, BOMBAY PRESIDENCY AND ADEN.

[PRIVY COUNCIL (Lord Maugham, Sir Shadi Lal, Sir George Rankin), **March 9, 11, April 8, 1937.**]

A *Privy Council—India—Income tax—Deduction—Trade expenses—Agreement to pay half net profits to another company in consideration of operation and control of that company's business—Indian Income-tax Act*, 1922 (XI *of* 1922), *s.* 12 (2).

The appellant company carried on in India the business of communication by wireless and another company carried on the business and B undertaking in India of communication by cable. By an agreement entered into in Feb., 1932, by the two companies, the future operation and control of both businesses were to be conducted until Dec., 1944, by the appellant company. As consideration the appellant company was to pay to the other company (*a*) £90,000 payable by four equal quarterly payments in each year, and (*b*) one-half of the net profits of the appellant C company for each of its financial years, payable as to 80 per cent. by such payments on account from time to time as the directors of the appellant company should consider justifiable, and as to the balance within 14 days after the appellant company's accounts should have been adopted by the shareholders at their annual general meeting. "Net profits" meant the profits for each year remaining after deducting from the gross revenue of the appellant company all ordinary expenses D properly chargeable to revenue and depreciation, but before making any allowance for income tax and before placing any sum to reserve:—

HELD: the half share of the net profits payable under the agreement was not a proper deduction to be allowed in computing the profits of the appellant company for the purposes of income tax and super-tax under the Indian Income-tax Act, 1922.

E **[EDITORIAL NOTE.** It would seem that this case follows the same line of reasoning as *Tata Hydro-Electric, Ltd.* v. *Income Tax Comr.*, [1937] 2 All E.R. 291, and that the payment may be regarded as part of the consideration on the acquisition of a business. The payments here made are treated as the consideration for carrying on a joint adventure over a period of years, and thus are a payment for an opportunity of earning profits and not a payment for the purpose of producing the profits.

F As TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28 pp. 42-45, 50, 51, Nos. 215-226, 255-260.]

Cases referred to:

G (1) *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1931), 58 L.R. Ind. App. 239; Digest Supp.

(2) *Adamson* v. *Union Cold Storage Co., Ltd.* (1931), 146 L.T. 172; Digest Supp.; 16 Tax Cas. 293.

APPEAL from a judgment of the High Court of Judicature at Bombay H (SIR JOHN WILLIAM FISHER BEAUMONT, C.J., and RANGNEKAR, J.), dated Mar. 28, 1935, upon a reference by the respondent under the Indian Income-tax Act (XI of 1922), s. 66 (2). The facts are set out in the judgment of their Lordships delivered by LORD MAUGHAM.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the appellant company.

A. M. Dunne, K.C., and *Hubert Hull* for the respondent.

Lord Maugham : This is an appeal from a judgment and order of the High Court of Judicature at Bombay, dated Mar. 28, 1935, whereby the High Court, upon the hearing of a case referred to it by the respondent under the provisions of the Indian Income-tax Act, 1922, s. 66 (2) (referred to below as " the Act "), answered the question of law raised thereby adversely to the contention of the appellant company. The question of law that was referred to the High Court arose in the course of the assessment of the income of the appellant company chargeable with income tax and super-tax for the year of assessment ending on Mar. 31, 1934, and was as follows :

> Whether the half share of the net profits, payable by the assessee company [meaning the appellant company] under cl. 5 of the agreement dated Feb. 19, 1932, viz. Rs.3,35,861, is a proper deduction to be allowed for the purposes of arriving at the amount on which this company should be assessed for the purposes of income tax and super-tax, within the meaning of sect. 10 (2) (ix).

It should be added that the material subsection of the Indian Income-tax Act, 1922, is sect. 12 (2), which, after providing that the tax shall be payable under the head " other sources " in respect of income, profits and gains of every kind, enacts as follows :

> Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee.

The appellant company is incorporated and registered in Bombay under the Indian Companies Act, 1913. Prior to the date of the agreement of 1932, out of which the present problem arises, the appellant company carried on in India the business of communication by wireless, whilst a company known as Imperial and International Communications, Ltd. (which it will be convenient to call the Communications Company) owned or controlled two companies called Eastern Telegraph Co., Ltd., and Eastern Extension Australasia and China Telegraph Co., Ltd., which carried on the business and undertaking in India of communication by cable. The radio business of the appellant company and the cable business in India of the undertakings of the two companies controlled by the Communications Company (called below the combined undertaking) were to a certain extent competitive, a circumstance which led to the agreement next to be stated. The Communications Company held not less than half the issued share capital of the appellant company, which no doubt facilitated the negotiation of the terms. By the agreement, which was dated Feb. 19, 1932, and made between the Communications Company and the appellant company, it was recited that the parties had agreed that the future operation and control of the business in India of the combined undertaking could be conducted more conveniently and to their mutual advantage if possession of the combined undertaking was given to the appellant company and the business was conducted by the appellant company in connection with its wireless undertaking. By cl. 3 it was provided that (subject to certain conditions precedent which were satisfied) the Communications Company should, on a date to be appointed, deliver to or otherwise place the appellant company in possession, for the purposes of the agreement, of all plant, machinery, instruments and apparatus, fittings, furniture, stationery and stores (thereinafter referred to as "the plant") at Bombay and Madras owned or held by the A Communications Company in connection with the business in India of the combined undertaking, and from the appointed date the appellant company was authorised to use the plant for the purpose of carrying on and conducting for the period of the agreement the business in India of the combined undertaking (exclusive of the Karachi business as B defined in the agreement) in conjunction with the wireless undertaking of the appellant company. Clause 4 provided that the agreement should determine on Dec. 31, 1944, or earlier on notice given by either party that it was ceasing to carry on business. The consideration to be paid by the appellant company under the agreement was set out in cl. 5 in the C following terms:

> The Radio Company shall as and from the appointed date pay to the Communications Company:
>
> (*a*) The sum of £90,000 which represents an assessment of the expenses proportionate to the traffic of the combined undertaking emanating in India exclusive of the Karachi business, of the maintenance by the Communications Company of its communications system throughout the world exclusive of India. The said sum D shall be payable by four equal quarterly instalments on Mar. 31, June 31, Sept. 30, and Dec. 31 in each year and each instalment shall be remitted to London by and at the expense of the Radio Company within six weeks after the date on which the same shall become payable.
>
> (*b*) One-half of the net profits of the Radio Company for each of its financial years which shall be payable to or at the direction of the Communications Company and paid in rupees in Bombay as follows:
>
> E (1) as to 80 per cent. thereof by such payments on account from time to time as the board of directors of the Radio Company shall consider that the finances of the Radio Company justify.
>
> (2) As to the balance thereof within 14 days after the date on which the balance sheet and profit and loss account of the Radio Company for such financial year shall have been passed and adopted by the shareholders of the Radio Company at their annual general meeting. Provided that if the aggregate of such payments on account F shall exceed the actual amount of the half share in the net profits of the Radio Company as finally ascertained for such financial year the excess paid shall be refunded by the Communications Company to the Radio Company on demand.
>
> For the purpose of subcl. (*b*) of this clause the expression "net profits" means the profits for each year remaining after deducting from the gross revenue of the Radio Company from all sources (except as hereinafter mentioned) the aggregate amount of all terminal and transit charges payable to government and other administrations and telegraph companies, royalty payable to the Government of India, G and all ordinary expenses in connection with the entire undertaking properly chargeable to revenue and depreciation at the usual rates hitherto adopted by the Radio Company but before making any allowance for income tax and before placing any sum to reserve.
>
> Provided—(i) That the sum of £90,000 payable under subcl. (*a*) of this clause shall be treated for the purpose of this clause as an ordinary expense in connection with the undertaking properly chargeable to revenue.
>
> H (ii) That if government shall levy from the Radio Company income tax on the half share of the net profits payable to the Communications Company under subcl. (*b*) of this clause the Radio Company shall be entitled to deduct the amount of the tax so levied and paid from the share of the Communications Company in the net profits of the Radio Company before payment of that share to the Communications Company.
>
> (iii) That in ascertaining the annual gross revenue of the Radio Company from all sources income derived from investments made by the Radio Company by way

> of reserve fund or any other fund established out of profits shall be excluded from such revenue.
>
> (iv) That all accounts shall be kept and payments made in rupees except the said sum of £90,000 which shall be payable and paid in sterling.

There were other provisions, of which the following are the most important for the present purpose. By cl. 6, the Communications Company guaranteed that the plant referred to in cl. 3 thereof should be handed over in good working order to the satisfaction of the chief engineer of the appellant company. By cl. 7 (*a*) the Communications Company undertook :

> so to uphold and maintain the communications including cables, land lines and radio services from time to time belonging to it outside India, and shore ends and cable connections therefrom to the cable offices in Bombay and Madras, as to keep its system in good working order and up to the standard of efficiency required for fast communications, Act of God, governments and peoples, civil commotions, strikes and lockouts alone excepted. (*b*) [The Communications Company was] to permit [the appellant company] to receive and retain the total receipts derived from the cable and wireless traffic emanating in India, less rebates and outpayments to other administrations and companies, save and except receipts derived from cable traffic for the Persian Gulf and Iraq only, entrusted to the Communications Company by the Indian Government Telegraph Department at Karachi.

By subcl. (*d*), the parties agreed that, during the period of the agreement, there should be the closest co-operation between them in the conduct of the business of their respective undertakings in so far as they related to communications with and through India, and so also that the control of the said business of wireless in India and of the combined undertaking in India (exclusive as aforesaid) should be conducted by the appellant company free from interference by the Communications Company. By subcl. (*e*), if, during the period of this agreement, the appellant company should duly perform and observe the stipulations on its part therein contained, the Communications Company would allow the appellant company for the purposes of the agreement to use, hold and enjoy the plant and other premises delivered and transferred to it by the Communications Company, free from any interference or disturbance by or on behalf of the Communications Company : provided, however, that, if any of the said plant or premises should become unnecessary for the purpose of the cable business to be carried on by the appellant company, that company would hold and dispose of the same under the directions and on behalf of the Communications Company. There followed provisions imposing on the appellant company obligations to carry on the business in India of the combined undertaking to the best possible advantage, to maintain in satisfactory condition and repair the plant transferred to it, to renew the plant when necessary, to insure, and to hand over the same and any renewals to the Communications Company in satisfactory condition and repair at the determination of the agreement. The appellant company was to permit the Communications Company to receive and retain the total receipts derived from the cable and wireless traffic of the Communications Company and its subsidiaries, including the combined undertaking, emanating at any place outside of India and also the receipts derived from cable and wireless traffic for the Persian Gulf and Iraq entrusted to the Communications Company by the Indian Government Telegraph Department at Karachi, less refunds, rebates to governments and out-payments to other administrations and companies. Clause 11 provided that the Communications Company should forthwith after the appointed date execute in favour of the appellant company (*a*) an underlease of certain premises whereof the Communications Company was the lessee, for a term expiring on Dec. 31, 1944, and at a rent equal to that payable under the lease held by the Communications Company, and (*b*) a lease of certain premises at Madras whereof the Communications Company was the owner for a term expiring on Dec. 31, 1944, at a nominal rent, the said underlease and lease to contain clauses enabling the Communications Company to re-enter upon the premises the subject thereof upon the termination of the said agreement. In pursuance of the agreement, possession of the plant and premises of the combined undertaking was given to the appellant company.

For the year 1933/34 ended Mar. 31, 1934, the appellant company was assessed by the income tax officer of the companies circle, Bombay, to income tax on a total income of Rs.18,86,366 derived from business and securities. The only question now in dispute with regard to the assessment is whether, in computing the profits of the appellant company's business, the appellant company was entitled to deduct the sum payable to the Communications Company under cl. 5 (*b*) of the agreement, namely, one-half of the net profits of the appellant company for the financial year in question, which was stated to amount to Rs.3,35,861. (The deduction of the £90,000 payable under cl. 5 (*a*) was allowed.) The income tax officer having refused to allow the said payment as a deduction, the appellant company appealed to the assistant commissioner of income tax, who, by his order dated Feb. 22, 1934, held that the said deduction had been correctly disallowed. The appellant company thereupon required the commissioner of income tax to draw up a statement of the case and to refer it, with his opinion thereon, to the High Court of Judicature at Bombay. The question above set out was accordingly referred to the High Court. The judges held that the question so referred must be answered in the negative. In that court, as before their Lordships, the contention was that the one-half of the net profits of the appellant company for the year in question was in the nature of rent payable under the agreement for the right to use the plant of the Communications Company in connection with the cable business in India of the combined undertaking. SIR JOHN WILLIAM FISHER BEAUMONT, C.J., and RANGNEKAR, J., declined to accept that contention.

Their Lordships have had the advantage of a learned argument on behalf of the appellant company, but they have found themselves unable to come to a conclusion different from that of the High Court. It may be admitted that, as Mr. Latter contended, it is not universally true to say that a payment, the making of which is conditional on profits being earned, cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word " profits " in more than one sense. If a company, having made an apparent net profit of £10,000, has then to pay £1,000 to directors or managers as the contractual recompense for their services during the year, it is plain that the real net profit is only £9,000. A contract to pay a commission at 10 per cent. on the net profits of the year must necessarily be held to mean on the net profits before the deduction of the commission, that is, in the case supposed, a commission on the £10,000. Their Lordships do not think that there is, in the present case, any sufficient ground for holding that the sum in question is of the nature of a rent. It is not described as a rent, nor does the agreement contain several of the clauses which a lease of plant of such a character would naturally contain. Circumstances of greater importance are that the sum payable may be small or great or nothing—a most unusual feature in the case of rent—and that it is impossible to presume or infer that the half share of profits is being paid only as rent, or as a similar payment, in consideration merely of the use of the plant the subject of the licence in cl. 3 of the agreement. The sum is in truth made payable as part of the consideration in respect of a number of different advantages which the appellant company derives from the agreement, and not all of them can be shown to be of a purely temporary character. The agreement as a whole is much more like one for a joint adventure for a term of years between the appellant company and the Communications Company than one for a lease for that peroid. Speaking generally, receipts in respect of business emanating from abroad are to be retained by the Communications Company, while receipts arising in India are to be retained by the appellant company, and that irrespective of whether the messages are sent by cable or by wireless, and the net profits of the appellant company are to be divided. Nor is it wholly immaterial to note that, at the date of the agreement, the appellant company was, and that it apparently still is, in some measure controlled by the Communications Company.

Their Lordships recognise the difficulty which may often exist in deciding whether expenditure not in the nature of capital expenditure has been incurred solely for the purpose of making or earning " income, profits, or gains," and they agree that it may be impossible to formulate a test which will always suffice to discriminate between the expenditure which is and that which is not allowable for the purpose of income tax; but, in the present case, they have little hesitation in coming to the conclusion that the proposed deduction is not allowable. To avoid misconception, it is proper to say that, in coming to this conclusion, they have not taken the view that the case is governed by the decision in *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1), though that case no doubt throws light on the nature of the problem which has to be solved in the present case. It should perhaps be added that a sentence in the judgment in that case has been explained, if explanation were necessary, by LORD MACMILLAN in the subsequent case of *Adamson* v. *Union Cold Storage Co., Ltd.* (2).

A For the reasons above stated, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed, with costs.

Solicitors: *E. F. Turner & Sons* (for the appellant company); *The Solicitor, India Office* (for the respondent.)

B [*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

HUNT *v.* RICE & SON, LTD.

C [COURT OF APPEAL (Greer, Slesser, and Scott, L.JJ.), **July 13, 14, 1937.**]

Practice—Amendment of pleadings—At trial—Leave to amend—Allegation of breach of statutory duty—R.S.C., Ord. 28, *r.* 1.

A builder's labourer was engaged in digging a trench 6 ft. deep in connection with the erection of a block of flats. The sides of the trench were not secured by boards. Owing to the unsuspected existence of an D old drain near one side of the trench, that side fell in, and the labourer was fatally injured. His widow commenced an action under the Employers' Liability Act, 1880, and Lord Campbell's Act. Shortly before the trial, it was discovered that the defendant company had, at the time of the accident, had certain hoisting apparatus and cement-mixers upon the site. At the beginning of the trial, the plaintiff sought leave to amend her statement of claim by alleging the presence of this E machinery, and a breach, on the part of the defendant company, of a statutory duty, imposed by the Building Regulations, 1926. The plaintiff, at the time of making this application, offered to give the defendant company an adjournment, and to pay any costs occasioned thereby. The judge refused to allow any amendment, and gave judgment in favour of the defendant company. It was stated that the plaintiff had had an opportunity of asking for such an amendment when F interrogatories relevant to the amended case were disallowed:—

HELD: (i) (*per* SLESSER and SCOTT, L.JJ.): the amendment sought was one which was essential in order for the real issues in the case to be before the court, and should have been allowed; it was, moreover, one which would not have caused the defendant company any injustice for which it could not have been compensated by way of costs.

G (ii) (*per* SCOTT, L.J.): when a plaintiff proposes to allege a breach of statutory duty, that is a strong additional reason for allowing an amendment.

[**EDITORIAL NOTE.** It is well settled that an amendment of the pleadings should be allowed unless it will entail injustice to the other side. This case does not extend that rule, but it does suggest that where the effect of the amendment is to H set up a breach of statutory duty, it should in practically every case be allowed. The reference to the case of *Fanton* v. *Denville* (1) must be read subject to the decision of the House of Lords in *Wilsons & Clyde Coal Co., Ltd.* v. *English*, p. 628 *ante.*

AS TO AMENDMENT OF PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 258-260, para. 425; and FOR CASES, see DIGEST, Practice, pp. 97-108, Nos. 829-934. See YEARLY SUPREME COURT PRACTICE, 1937, pp. 426-433.]

Cases referred to:

(1) *Fanton* v. *Denville*, [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; 147 L.T. 243.

(2) *Laird* v. *Briggs* (1881), 19 Ch.D. 22; Digest, Practice, 109, *961*; 45 L.T. 238.

(3) *Golding* v. *Wharton Saltworks Co.* (1876), 1 Q.B.D. 374; Digest, Practice, 66, *565*; 34 L.T. 474.

(4) *Australasian Steam Navigation Co.* v. *Smith & Sons* (1889), 14 App. Cas. 318. A

(5) *Claparede & Co.* v. *Commercial Union Association* (1883), 32 W.R. 151; Digest, Practice, 105, *905*; *revsd. on other grounds, sub nom. Clarapede & Co.* v. *Commercial Union Association*, 32 W.R. 262.

Appeal from a judgment of MacKinnon, L.J., dated Jan. 26, 1937, B and reported in [1937] 1 All E.R. 576.

A. S. Comyns Carr, K.C., and *Michael O'Sullivan* for the appellant.

Gilbert J. Paull for the respondent company.

Greer, L.J.: In this case, the appeal is in the form of an application C for a new trial, which, I suppose, would be on the basis that the judge misdirected himself in failing to find, upon the evidence, that there was negligence on the part of the contractors in failing to make themselves aware of the nature of the ground adjoining the trench which they were opening for the purposes of erecting a new building. They knew, D it is quite clear, that they were putting a new building on a place where there had been an old building, put to various uses, and a building which would necessarily require that there should be drainage, and, in those circumstances, on the evidence as it stands, I think that it was incumbent upon the contractors, before they dug this trench, and E worked the hammer upon it in the places where they did, to satisfy the judge that there was some excuse provided by the facts in evidence for their having failed to make an examination of the adjoining ground before they dug the trench, in order that they might be quite satisfied that there was no risk of the trench falling in. If the appellant had been F in a position to say: "I ask for judgment on the ground that I have proved a case under the Employers' Liability Act," I should have had some difficulty in saying that the judge was wrong in refusing, at the time it was asked, to amend the pleadings so as to raise the statutory claim in regard to the regulations. That is my own view. I think the G judge would have been entitled to say to himself: "Since the issue of the writ, before they wrote the letter, there was ample opportunity for this point to be raised, and, inasmuch as it was not raised, I do not think, exercising my judgment as a judge of first instance, that I ought to amend the pleadings." But the position is quite different now, when H we are ordering a new trial. We have on many occasions, in ordering new trials, given both parties leave to amend their pleadings in order to raise such a case as they think they will be justified in raising to meet the case which has been made in the Court of Appeal. For my own part, I think we ought, without prejudicing the result of the new trial, to give both parties the opportunity of amending the pleadings, and also necessarily of calling such further evidence, on their amended case, as they may be advised will assist them in the argument which they will put forward. I mean by that that, if the defendant company is able to show that it had such instructions from its architect as justified it in saying A that it need not examine the ground, then that might possibly be an answer to the allegation of negligence. No such evidence was given in the present case, and, if we had had to decide whether there should be judgment for the plaintiff on the claim under the Employers' Liability Act, we would have had to give judgment on the case as it now stands, B but, by the notice of appeal, all that is asked for is a new trial, and we think that the appellant is entitled to a new trial, on the ground that there was evidence which, if it was alleged in some way other than it was at the trial, would be conclusive evidence of negligence, and the judge, therefore, misdirected himself. For these reasons, I think there should C be a new trial, upon the terms as I have stated.

SLESSER, L.J.: I agree. In this case, I find it necessary to add a few words, because, although I agree with the result arrived at by GREER, L.J., I am not quite sure that I entirely agree with his reasons D with regard to the amendment which is here sought. First of all, it is to be observed that this claim is made both at common law and for the more limited amount allowed under the Employers' Liability Act. With respect to the Employers' Liability Act, the liability, which otherwise might be excluded by the doctrine of common employment, for the negligence of a E fellow workman may be maintained, notwithstanding the common law position if the case falls within the provisions of the statute. In my opinion, there is reason to suppose that this case may be one, though I am expressing no concluded opinion upon the point as there is to be a new trial, where there has been personal injury caused to the workman F by reason of a defect in the works used in the business of the employer, namely, a deficiency in the trench, in that it was not properly timbered, and that, in order to satisfy sect. 2 (1) of the Act of 1880, the defect therein had not been discovered or remedied, owing to the negligence of a person in the service of the employer. Again, I abstain from expressing G any concluded opinion upon that point, but I agree with GREER, L.J., that the judge has misdirected himself in this, that, when the matter is considered from that point of view, I do not think that he has taken sufficiently into consideration the fact that the fellow-workman (there being here, it is to be assumed on that basis, a defect in the works) did fail H to take steps mentioned in sect. 2 (1), and so, under the principle in *Fanton* v. *Denville* (1), would make the employer liable, although the employer himself would not otherwise be liable if he had selected a competent workman, who, on one occasion, possibly, was unskilful. That is the case with regard to the Employers' Liability Act, and there I entirely associate myself with what GREER, L.J., has said.

Where, with respect, I am not quite in agreement, though the result of the matter does not really arise, is in this : I think that, apart from the reasons with which I agree, as we are ordering a new trial, the question of the amendment of the pleadings does not arise as a separate question, because all matters are to be open at the new trial. I should have been inclined myself, if it makes any difference, in any event, to have allowed A the amendment here sought, though possibly on terms which we are not now called upon to consider. The amendment which is sought is this, that under the Building Regulations, 1926, made under the Factory and Workshop Act, 1901, the regulations apply to all premises on which machinery is temporarily used for the purpose of the construction B of a building :

> Provided that nothing in these regulations [except a paragraph which is not here material] shall apply to premises on which the only machinery worked by steam, water or other mechanical powers consists—(*a*) of machinery which is not used for hoisting purposes and is outside the area of the building under construction, or (*b*) of portable tools such as drills or rivetters. C

At the time when these pleadings were drawn, it was apparently thought that there was no evidence of any machinery which was being used for hoisting purposes, or any other machinery being used except the portable tool which contributed to this disaster, which is excluded by para. (*b*). Now, however, it is said that there is evidence that there was machinery D used for hoisting purposes, and, secondly, that there were cement-mixers upon this work. The plaintiff, before the trial of the action, wrote a letter to the defendant company, intimating a desire to raise this matter by amendment. The necessity for the amendment itself arises only in this way : The plaintiff had already pleaded that there was a failure of E duty on the part of the employer, but it was necessary affirmatively to make that failure of duty, in so far as it was based upon a breach of a regulation made by statute, dependent upon the proof that the premises on which the building was being constructed were not excluded from the regulation by the absence of the machinery in the F manner stated in the regulation ; in other words, the plaintiff had to prove affirmatively that there was machinery which was used for hoisting purposes, or other machinery. For that purpose, it was necessary to plead that issue of fact, and that only. The plaintiff invited the defendant company on Jan. 22, 1937, to permit that amendment to be made : G

> Will you please note the plaintiff intends to rely upon the breach of statutory duty [and they set out the regulation]. The plaintiff alleges there were present in the area of the building and/or buildings in course of construction, machinery driven by mechanical power, including machinery used for hoisting purposes and/or machine or machines generally known as cement-mixers and pneumatic drills and hammers. In the circumstances, counsel on behalf of the plaintiff will accordingly H apply to the judge for leave to amend the statement of claim.

It is really, in my view, almost idle to suggest that, although two years had elapsed, these contractors, working on a large building, with the aid of their plant book, which we know from the evidence they possessed, and other material at their disposal, could not tell whether they did or did not use a mechanical hoist upon this building. I think that, even if an adjournment had been asked for and agreed, that, at any rate, would have dealt with any possible difficulty. I cannot really see that in substance there was any reason at all, in those circumstances, why this important question should not have been open to the court. The importance of it is this, that, under the decision in *Fanton* v. *Denville* (1), if the foreman was able to satisfy the judge, apart from the regulation, that he had done everything that was reasonably necessary in his opinion, he being a competent person, the employer, apart from the Employers' Liability Act, at common law could not have attributed to him the negligence of the foreman. On the other hand, if the regulation is to apply, then the position is this, that, under reg. 46, the provision of which is this, "When necessary, in all excavations, timber struts, waling planks and boards shall be provided and used," the question of the decision of whether or not it was necessary would rest with the court, and not merely with the opinion of the fellow-workman. That might conceivably make a great deal of difference, so that a really important issue was being raised by this amendment.

Now, as I read the law, there is authority for saying that, in these circumstances, notwithstanding that primarily the judge has a discretion in granting an amendment, there may be occasions when the amendment really causes so little difference to the parties in the conduct of the case, being really almost in the nature of a formality, and when the absence of the amendment would cause injustice, in that the real issue in the case would not be determined, that the Court of Appeal ought to grant such an amendment. I will cite only two authorities for that proposition. One is the case of *Laird* v. *Briggs* (2), at p. 28. It having been argued that, if a party asks for the amendment refused by the judge, he is appealing on the question of discretion, and the Court of Appeal will not overrule the discretion of the court below, unless it will result in a serious injustice, SIR GEORGE JESSEL, M.R., says this:

> I take it that every injustice is serious, and that the use of that word by JAMES, L.J., in *Golding* v. *Wharton Saltworks Co.* (3), simply means that the Court of Appeal will not interfere in a trivial matter.

Again, in *Australasian Steam Navigation Co.* v. *Smith & Sons* (4), the judgment of the Privy Council, delivered by LORD BRAMWELL, contains these words at p. 320:

> Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties.

In my view, in this case the amendment, whether the defendant company had or had not a mechanical hoist upon its premises at the time of the accident, or a cement-mixer, is a question which could have been raised without any injustice to it, and might very readily, by a little inquiry, have been answered, and I do think, for the reasons I have stated, that, outside the Employers' Liability Act, it is an amendment which ought to have been allowed, for the purpose of raising the real question between the parties.

For these reasons, I agree, both for the reasons stated by Greer, L.J., and because, in any event, I should have been inclined to have granted an amendment, in order to raise the question of the breach of regulation under the Factory Acts, that this appeal succeeds, and a new trial ought to be ordered.

Scott, L.J.: With the reasons given by both my brothers for ordering a new trial, and with their conclusions, I agree, and add nothing. On the subject of the amendment asked of the judge at the trial, whilst I agree with what Slesser, L.J., has said, I want to add one or two further observations. That amendment was asked for at the beginning of the trial before the opening of the plaintiff's counsel, and, therefore, did not depend at all on any evidence that was given at the trial. It was an amendment, therefore, which depended entirely on the form of the action as it then stood, and on the history of the case up to that date. The action was begun in Apr., 1935, and the first day of the trial was Jan. 25, 1937. It is obvious from that that the case had been slow in being brought to trial; it means that there had been some delay. We were also told that there had been an opportunity at which the plaintiff might properly have asked to make the amendment at an earlier stage, namely, when interrogatories, which would have been relevant to the amended case, were disallowed by the master. I assume, therefore, that, when the application was made, the plaintiff was *in mora* and in mercy, but, none the less, I think the amendment ought to have been made by the judge at that time on terms, and, in regard to terms, the letter to which my brother, Slesser, L.J., has referred not only offered an adjournment, but also offered to pay the costs of, and occasioned by, the amendment. That offer was repeated, the plaintiff's counsel adding that an adjournment could be had, if necessary, at the trial. What was the judge's duty, on that request being made? In my view, the rule itself, R.S.C., Ord. 28, r. 1, indicates it in plain terms. It says:

> The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

In considering amendment, it always seems to me very important that lawyers ought to look at these things a good deal through the eyes of the litigant, and we ought to try to make justice appear reasonable to the litigant. If the giving to the litigant of the kind of assistance that that rule means involves a hardship on the other side, that ought to be met by costs, and it is only if it cannot be met by costs that the case becomes one of difficulty. In the Annual Practice, at p. 461, upon that rule, in addition to the passage Slesser, L.J., has quoted, there is a passage quoted from Brett, M.R., in *Clarapede & Co.* v. *Commercial Union Association* (5), at p, 263 :

> However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

In this particular case, it seems to me to be obvious that here there could have been no hardship incapable of being compensated by an adjournment, if an adjournment was wanted, and an appropriate order in regard to costs. Therefore, on those grounds as stated by me, I think that the order ought to have been made, and made almost as of course. That being so, I do not regard the granting of it, or the refusal of it, as a mere matter of discretion with which the court ought not to interfere. I think that it was a matter of justice that the amendment should be allowed ; but, over and above that, there is a further consideration here. The particular amendment that was asked for was leave to allege a breach of a statutory duty. That in itself raises a different class of question, because the state is interested in the performance of statutory duties. Under the Factory and Workshop Act, 1901, s. 79, it is provided :

> Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous . . . he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous ; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Redgraves's Factory Acts, 14th Edn., p. 106, gives a list of the certificates under which "building construction and structural work in connection with buildings" appears as one of the certificates. Sect. 105 (1) of the Act provides :

> The provisions of this Act with respect to—(i) Power to make orders as to dangerous machines (sect. 17) ; (ii) Accidents ; (iii) Regulations for dangerous trades ; (iv) Powers of inspectors (sect. 119) ; and (v) Fines in case of death or injury (sect. 136) ; shall have effect as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building were included in the word "factory" [with the consequential results].

Then you get the regulations to which Slesser, L.J., has referred, with the final provision in reg. 46 :

> When necessary, in all excavations, timber struts, waling planks and boards shall be provided and used.

The effect of those provisions, taken together, is this, that there is a public duty to carry out fencing in trenching wherever it is necessary, and a breach of that obligation is a breach of a public duty. Consequently, in my view, where the plaintiff brings to the attention of the court a proposal to allege that the defendant has been guilty of a breach of a statutory duty in that way, it is a strong additional reason for allowing the amendment to be made. All the more so in a case where, as here, the great bulk of the evidence, and the great bulk of the questions, in the case will be identical on the issues already joined and on the new issue.

For those reasons, I am clear in my mind that it was an amendment that ought, on principle, to be made at once.

Solicitors: *Musson & Co.* (for the appellant); *Charles St. A. Butcher* (for the respondent company).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

JOSSELSON *v.* BORST (GLIKSTEN, third party).

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **July 14, 15, 1937.**]

Choses in Action—Assignment of covenant of indemnity—Validity—Effect of limited release—Notice to one of two covenantors—One covenantor bankrupt—Bankruptcy Act, 1914 (*c.* 59), *s.* 118—*Law of Property Act*, 1925 (*c.* 20), *ss.* 81, 136.

Landlord and Tenant—Lease—Assignments with indemnity against rents and covenants—One assignment to limited company—Assignment to original lessee of benefit of subsequent covenant of indemnity on the liquidation of company.

In 1923 a lease was granted to the defendant and his brother, B. B., who were in partnership. In 1927 the partnership was dissolved, and the lease, as part of the terms of the dissolution, was allotted to B. B., who formed a limited company, B. B., Ltd., to which the lease was duly assigned. In 1930 B. B., Ltd., went into liquidation. In 1931 the liquidators sold the lease to G., the third party in these proceedings, but the assignment was made, by the direction of the third party, to R. B. B., the son of B. B. The covenant of indemnity in this assignment was given by R. B. B. and the third party to the company and the liquidators. Both B. B. and R. B. B. were adjudicated bankrupt before 1936. In 1936 the company acting by the liquidators assigned the benefit of the covenant of indemnity to the defendant, and the defendant released the company and the liquidators from the covenant "except in so far as is necessary to enable" the defendant to enforce the assigned covenants. Notice of this assignment was given to the third party only and not to R. B. B. The rent under the lease falling into arrear, the lessor sued the defendant, as an original lessee, and the defendant brought in the third party alleging a right to indemnity under the assignment of the benefit of the covenant in 1936. For the third party it was contended that (*a*) the assignment of 1936 was an assignment by one only of joint covenantees and could not operate to assign the benefit of the covenants, (*b*) notice of the assignment had only been given to one of the joint covenantors and the requirements of the Law of Property Act, 1925, s. 136, had not been complied with, (*c*) the assignment of 1936 purported to be an assignment of a right of action sounding in damages and not of a debt, (*d*) on the construction of the assignment, the third party was under no liability by reason of the release of the covenant therein contained:—

Held: (i) by virtue of the Law of Property Act, 1925, s. 81, the claim for indemnity must be treated as a joint and several claim, not as merely a joint claim.

(ii) by virtue of the Bankruptcy Act, 1914, s. 118, it was not necessary to join or to give notice to a covenantee who had since become bankrupt.

(iii) the claim was for a debt, not for liquidated damages.

(iv) the assignment properly construed was effective to assign the benefit of the covenants.

Semble: It is necessary that the notice under the Law of Property Act, 1925, s. 136, be given to all solvent debtors or covenantors, where there are joint debtors or covenantors.

Decision of Singleton, J., *affirmed.*

[EDITORIAL NOTE. The liability under the covenants of a lease and for the rent as between successive assignees is provided for by a chain of indemnities. If one of the assignees is a limited company and goes into liquidation, the chain is broken and it becomes impossible for the original lessee to escape from his continuing liability under the lease. For this purpose it is usual upon such an event to take an assignment of the benefit of the covenant of indemnity and so bridge A the gap caused by the company ceasing to exist. The validity of this assignment in its usual form is here upheld. Other important questions also arise in the particular circumstances of this case. Under the Law of Property Act, 1925, s. 136, replacing the Judicature Act, 1875, s. 25, express notice of an assignment has to be given to the debtor or covenantor, and it would seem that in the case of joint covenantors the notice should be given to all covenantors, but this point is avoided B here by the bankruptcy of one of them. It follows from the Bankruptcy Act, 1914, s. 118, that notice may be dispensed with in the case of a bankrupt covenantor. The point under the Law of Property Act, 1925, s. 81, is of interest. Under that section unless the deed expresses a contrary intention, a covenant with A. and B. is to be construed as a joint and several covenant. It was, however, unnecessary to consider this fully as the court were satisfied that it was possible to construe C the covenant as a several one under the general rule of law upon the point.

As to Assignments under the Law of Property Act, 1925, s. 136, see HALSBURY, Hailsham Edn., Vol. 4, pp. 427-437, paras. 792-804; and for Cases, see DIGEST, Vol. 8, pp. 442-445, Nos. 189-204.]

Cases referred to:

D (1) *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182; 12 Digest 504, *4132*; 67 L.J.Ch. 454; 78 L.T. 666.

(2) *Slingsby's Case* (1587), 5 Co. Rep. 18b; 12 Digest 30, *74*.

(3) *Anderson* v. *Martindale* (1801), 1 East, 497; 12 Digest 30, *78*.

(4) *Sumner* v. *Powell* (1816), 2 Mer. 30; 12 Digest 26, *46*; *affd.* (1823), Turn. E & R. 423.

(5) *Sorsbie* v. *Park* (1843), 12 M. & W. 146; 12 Digest 25, *43*; 13 L.J. Ex. 9; 2 L.T.O.S. 125.

(6) *Pirie* v. *Richardson*, [1927] 1 K. B. 448; Digest Supp.; 96 L.J.K.B. 42; 136 L.T. 104.

(7) *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (1915), 84 L.J.K.B. 861; 2 Digest F 172, *387*; 112 L.T. 991.

(8) *Read* v. *Brown* (1888), 22 Q.B.D. 128; 1 Digest 13, *107*; 58 L.J.Q.B. 120; 60 L.T. 250.

(9) *Addison* v. *Cox* (1872), 8 Ch. App. 76; 8 Digest 465, *362*; 42 L.J.Ch. 291; 28 L.T. 45.

(10) *Western Wagon & Property Co.* v. *West*, [1892] 1 Ch. 271; 8 Digest 430, *79*; G 61 L.J.Ch. 244; 66 L.T. 402.

(11) *Ellis* v. *Torrington*, [1920] 1 K.B. 399; 8 Digest 431, *86*; 89 L.J.K.B. 369; 122 L.T. 361.

Appeal by the third party from a judgment of Singleton, J., dated Feb. 5, 1937.

H On May 7, 1923, the plaintiff granted a lease of 38, Barbican, in the City of London, to the defendant and his brother, Benjamin Borst, then trading in partnership. In 1927 the partnership was dissolved and on Dec. 9, 1927, the above lease was assigned to B. Borst, Ltd., a company formed by Benjamin Borst. This company went into liquidation and the lease was sold by the liquidators to the third party to these proceedings, L. Gliksten, but assigned by his direction to R. B. Borst on Dec. 1, 1931. A covenant of indemnity with respect to the rents and covenants was given by L. Gliksten and R. B. Borst to the company and the liquidators. The benefit of this covenant of indemnity was in 1936 assigned to the defendant by the company acting by the liquidators. Notice of this assignment was given to the third party, L. Gliksten, but not to R. B. Borst. At that time both B. Borst and R. B. Borst were undischarged bankrupts. Rent under the lease being then due and unpaid this action was brought against the defendant, one of the original lessees, the other being, as above stated, bankrupt, and the defendant brought in the third party, L. Gliksten, one only of the covenantors in the covenant of indemnity in the assignment of Dec. 1, 1931, the other covenantor being bankrupt. At the hearing before SINGLETON, J., it was contended that the assignment of the covenant of indemnity in 1936 was void as being an assignment of a thing incapable of assignment. SINGLETON, J., held that this aspect of the case was governed by *Re Perkins* (1) and that this submission failed. It was also contended that the Law of Property Act, 1925, s. 136, required notice of the assignment of the covenant in 1936 to be given to both covenantors; and upon this submission, SINGLETON, J., held that the notice to one covenantor perfected the title as against him and gave a right to sue him, and that, in any event, no good purpose could be served by giving notice to a bankrupt. His Lordship also rejected certain objections to the form of the assignment of the covenant of indemnity in 1936. The material parts of that deed (which dealt with the liabilities in respect of a number of leasehold premises) were as follow. The assignment was made between B. Borst, Ltd. (in liquidation), of the first part, the liquidators of the second part, Borst Bros., Ltd., described as "the first assignees," of the third part, and Mr. Theodore Borst, the defendant in these proceedings, who is described as "the second assignee," of the fourth part. It included the following recitals:

> And whereas by the several further leases or underleases the dates and partied of and to which are stated in the second and third columns of the second schedule hereto the premises mentioned in the first column of that schedule were demises to the second assignee and Benjamin Borst for the terms and at the rents stated in the fourth and fifth columns of that schedule.
>
> And whereas by the several assignments the dates and parties of and to which are stated in the sixth and seventh columns of the first schedule hereto the first assignee assigned to the company the several premises demised to him as aforesaid for all the residue of the terms created by the leases or underleases by virtue of which the same were held subject to the payment of the rents and the performance of the covenants therein contained.
>
> And whereas by the several further assignments the dates and parties of and to which are stated in the sixth and seventh columns of the second schedule hereto the said second assignee and the said Benjamin Borst assigned to the company the several premises demised to them as aforesaid for all the residue of the terms created by the lease or underleases by virtue of which the same were held subject to the payment of the rents and the performance of the covenants therein contained.
>
> And whereas the company has not been finally dissolved nor have the liquidators been released from liability.
>
> And whereas the company and the liquidators have agreed with the first assignee and the second assignee to assign to the first assignee and the second assignee respec-

tively the benefit of the said recited several covenants of indemnity in consideration of the respective releases and indemnities hereinafter contained.

The operative part was as follows:

4. In pursuance of the said agreement and in consideration of the covenant by the second assignee hereinafter contained the company acting by the liquidators A hereby assigns to the second assignee all and singular the full benefit and advantage of the several covenants for the payment of the rent reserved by and performance of the lessees' covenants and indemnities by the said Lazarus Gliksten and Reginald Benjamin Borst contained as hereinbefore recited in the hereinbefore-mentioned assignments the dates and parties to which are stated in the eighth and ninth columns of the second schedule hereto together with the right to enforce the same and to recover all damages costs and other sums of money due or to become due thereunder to hold the same unto the second assignee absolutely.

B 5. The second assignee [Mr. Theodore Borst] hereby releases the company and the liquidators and each of them and each of their estates and effects from all claims and demands under or in respect of the covenants on the part of the company contained or implied in the assignments the dates and parties of and to which are stated in the sixth and seventh columns of the second schedule or in any of such assignments save and except in so far as it is necessary to enable the second assignee to enforce the covenants and indemnities hereinbefore assigned to the second assignee.

6. The second assignee hereby covenants with the company and the liquidators C and severally with each of them that he the second assignee will indemnify the company and the liquidators and each of them and each of their estates and effects against all liability in respect of any present or future claim of the second assignee and Benjamin Borst or either of them against the company and the liquidators or any of them under or in respect of all or any of the said covenants by the company with the second assignee and the said Benjamin Borst contained or implied in the said assignments the dates and particulars of and to which are stated in the D sixth and seventh columns of the second schedule hereto and against all other liability (if any) in respect of the assignment contained in cl. 4 hereof and further that the second assignee will on demand pay the remaining half of any legal costs properly incurred by the company and the liquidators or any of them in respect of the negotiations for execution and carrying them into effect of this assignment.

Roland Burrows, K.C., and *Sir George W. H. Jones* for the appellant E (the third party).

W. P. Spens, K.C., and *Ernest Hancock* for the respondent (defendant).

Burrows, K.C.: The assignment of 1931 is of a joint covenant to three joint covenantees, the company and the two liquidators. The assignment of 1936 is an assignment by one of three joint covenantees, and F therefore does not operate to assign the covenant at all. The rights of the covenantee may be either joint or several, but cannot be both. [Counsel referred to *Slingsby's Case* (2), *Anderson* v. *Martindale* (3), *Sumner* v. *Powell* (4), and *Sorsbie* v. *Park* (5).] This is not a contract within the terms of the Law of Property Act, 1925, s. 81. It G is a covenant to do something for the benefit of the landlord; it is not directly for the benefit of the covenantee. Sect. 81 is not an alteration of the general law of contract; it is a canon of construction. [Counsel referred to *Pirie* v. *Richardson* (6), and *Schmitz* (*Schmidt*) v. *Van Der Veen & Co.* (7).] Notice of the assignment was H given to only one of the two joint covenantors; the requirements of the Law of Property Act, 1925, s. 136, were not fulfilled. There is no question here of an equitable assignment; under the statute the whole title passes. Notice to one covenantor is insufficient. [Counsel referred to *Read* v. *Brown* (8).] The Bankruptcy Act, 1914, s. 118, provides that the bankrupt need not be joined; but notice must still be given. The date of the bankruptcy being before the assignment, the joint liability still exists, and can be enforced against the estate of the bankrupt. [Counsel referred to *Addison* v. *Cox* (9).] The plaintiff must have a cause of action, and that is obtained by giving notice, which must be given to both joint contractors. Sect. 118 does not apply until you can show a cause of action under the Law of Property Act, 1925, s. 136. This assignment purports to assign the whole covenant; so far as the first part is concerned, it is wholly bad, being an assignment for a mere claim for damages, which cannot be assigned to a person who has no interest in the property. The respondent has no rights of property in this lease; he purchased a mere right to sue. [Counsel referred to *Western Wagon & Property Co.* v. *West* (10), *Re Perkins, Poyser* v. *Beyfus* (1), and *Ellis* v. *Torrington* (11).] In any event, upon the true construction of the assignment, there is no liability upon the appellant. He was bound only to indemnify the company, and, by cl. 5, the company is released from all claims.

Spens, K.C.: The Bankruptcy Act, 1914, s. 118, makes it clear that a bankrupt need not be joined. The test is, from whom would the assignor have been entitled to claim the debt. Could he have brought his action against this defendant at the date when the writ was issued? In every assignment of a lease, there is an implied joint and several covenant by the assignees in the form of the Law of Property Act, 1925, Sched. II, Pt. IX. [Counsel referred to *Perkins*' case (1).] [He was stopped by the court.]

Burrows, K.C., in reply: Implied covenants do not apply when there are express provisions in the contract. The court must construe the document as found, and may not put upon it a construction that it cannot bear.

GREER, L.J.: In this case, an action was brought by a landlord against the original lessee, Mr. Theodore Borst, under the terms of a lease according to which he was liable to pay the rent reserved by the lease, and the plaintiff recovered judgment against the defendant, Mr. Theodore Borst. The latter alleged:

> Under an agreement of July, 1936, I was entitled to be indemnified by a Mr. Gliksten by reason of the terms contained in that deed.

The case depends, in my judgment, entirely upon the application of three statutory provisions to the facts in this case. The first one to which I desire to refer is the Law of Property Act, 1925, s. 81, which reproduces an earlier section which I think was contained in the Conveyancing Act, 1881. The section is in these terms:

> A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves, and where made

> after the commencement of this Act shall be construed as being also made with each of them.

I understand that to mean that, where, before the Act, you have a joint covenant with two people in respect of an obligation to do any act, after the passing of the Law of Property Act, 1925, s. 81, that is to be construed as being made binding on each of the contracting parties, that is to say, it has ceased to be merely a joint contract, and has become a joint and several contract.

If that is so, it was admitted by Mr. Burrows in his argument that the authorities which he cited in regard to what the law was before the provisions of sect. 81 of the Law of Property Act came into force would not be applicable to this case, because, if the covenant is to be deemed to be a separate covenant with each of the covenantors, then that separate covenant can be relied upon after the passing of the Act of 1925; and, if that be so, I am clearly of opinion that we must treat the claim for indemnity, which is a claim against two people, as if it were not merely a joint claim, but as if it were also a several claim against each of them, and one to be enforced against each of the contracting parties. Then, as is well known, by the Law of Property Act, 1925, s. 136, reproducing the relevant section in the Supreme Court of Judicature Act, 1873, it is provided:

> (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (*a*) the legal right to such debt or thing in action.

What is transferred under sect. 136 is the legal right which is involved by an undertaking which is a several undertaking of one of the two parties, and I do not understand how it can be contended, in those circumstances, that the assignment is not covered by sect. 136, because what is obtained by the assignment is that which, in the hands of the assignor, if there had been no assignment, would have been a good cause of action against the assignee.

What is said in this case is that, not only are there two persons liable under the covenant, not only are there two covenantors, but also there are two covenantees, and there must be notice to both the covenantors, and there must be something which entitled the covenantee to say, "I can sue in my own name quite independently of the other covenantee." That raises the question as to the effect of the Bankruptcy Act, 1914, s. 118, which is in these terms:

> Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt.

That means, in the present case, that one of the covenantors, who had not become bankrupt, could be sued without joining the other one, who had become bankrupt, and the effect of it is that the old rule with regard to joint contracts, which gives rise to a plea of abatement, has no application when one is dealing with the question where one of the covenantors has become bankrupt.

For these reasons, I think that neither the first point, which was made by Mr. Burrows, nor the second point, has any validity at all, nor is either entitled to prevail in this case. I deal later with the third point. A

With reference to the fourth point, that is a separate point, dependent upon other considerations. Counsel says that, if you look not merely at cl. 6 of the deed of 1936, but if you also look at cll. 5 and 6, you find, as a result of looking at those clauses alone, that they emasculate cl. 6 so as to produce a nullity on the part of cl. 6, so that it has no effect B whatever. The rule as to the construction of a document involves the proposition that the document ought to be so construed as to give validity to it, if it can be so construed, without unduly straining the words used in the contract. In order to construe cl. 6, it is quite true that you must look at the other clauses, but you must look also at the C recitals, and you must look at cl. 6 with a view to coming to the conclusion, if you possibly can, that it is intended to mean something, and not intended to mean nothing. The words which have been cited by Mr. Spens from *Re Perkins, Poyser* v. *Beyfus* (1), at p. 190, apply, in my judgment, to the present case: D

> The release contained in the deed, although couched in very general terms [as the release in this case was] must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part.

The construction which Mr. Burrows has asked us to put upon the deed is such as would nullify entirely the effect of cl. 6 of the deed, and, for E that reason, I decline to accept the construction which Mr. Burrows asks the court to put upon it.

For these reasons, I think the judge was right in his conclusions. In a very careful and considered judgment, he came to the right conclusion, I think, in allowing the claim which was made as against the third party, F Mr. Gliksten, and awarding as against him the total amount of the rents.

I regard cl. 6 as meaning two things. The clause is in these terms:

> The second assignee hereby covenants with the company and the liquidators and severally with each of them that he the second assignee will indemnify the company and the liquidators and each of them and each of their estates and effects G against all liability in respect of any present or future claim of the second assignee and Benjamin Borst or either of them against the company and the liquidators or any of them under or in respect of all or any of the said covenants by the company with the second assignee and the said Benjamin Borst contained or implied in the said assignments the dates and parties of and to which are stated in the sixth and seventh columns of the second schedule hereto.

H

One of the matters which had been undertaken by Mr. Gliksten was that he would in fact pay the rents as they became due, and not merely that he would indemnify in reference to matters which could only be treated as matters of indemnity, namely, the performance of the covenants. Having undertaken that he would in fact pay the rents as they became due, and not having paid those rents, I think that he is liable to the defendant (the plaintiff in the third-party proceedings) in respect of the rents as and when they fell due. They are liquidated sums, and they do not sound in damages at all; the claim is for a debt which the third party had undertaken that he would pay.

A For these reasons, I think that Mr. Burrows' contention that this is a case concerned with damages and not with debt is one that ought not to be accepted, and it therefore follows that all the points which have been made with such learning and ability by Mr. Burrows fail, and the judge's judgment must stand.

B

SLESSER, L.J.: I agree. This was an action brought by one Josselson, the landlord, against Theodore Borst, his tenant jointly with his brother Benjamin Borst, under a lease of May 7, 1923, for a period of 21 years, the claim consisting of a number of claims for quarters' rent C extending from Sept. 29, 1934, to June 24, 1936, with certain payments on account credited, an amount altogether of £1,000, together with certain insurance premiums. As to that sum, judgment was given against Mr. Theodore Borst by the court, but he claimed to have a right under the contract, to which I shall refer, to be indemnified, and for D that purpose he brought in, by the third-party proceedings, the present appellant.

It is not necessary, I think, for the purposes of the present case, to follow the tortuous proceedings of the Borst family. It is sufficient to say that most of them display an aptitude for multiplying their entities E in the form of limited companies, and that several of them and their companies appear to have been not very successful. At any rate, as a result of the changes of relation between the Borsts and their businesses —Mr. Theodore Borst and Mr. Benjamin Borst, the co-lessees, having parted in 1927, and Mr. Benjamin Borst having sought comparative F immortality by causing to be formed a limited company known as Benjamin Borst, Ltd., he having himself at some point become bankrupt —this company, Benjamin Borst, Ltd., became associated with a Mr. Gliksten, who is the third party in these proceedings; and Benjamin Borst, Ltd., entered into an agreement with Lazarus Gliksten by which G Mr. Gliksten was to purchase the company's leasehold interest in the premises upon certain terms and conditions. With that arrangement we are not here concerned, and I understand that the purchase in fact was never completed. But there was an assignment, important for the purpose of this case, which was made on Dec. 1, 1931, between Benjamin H Borst, Ltd. (in liquidation), Mr. Evans and Mr. Agar, who were the liquidators of the company of the second part, and Mr. Lazarus Gliksten and Mr. Reginald Benjamin Borst, who is the son of Mr. Benjamin Borst. With regard to that document, it states that Mr. Gliksten has requested and authorised the company and the liquidators to assign the lease to Reginald Benjamin Borst, and therefore, when we come to look at that document, we find it stated in accordance with the arrangements made that, on the direction of the purchaser, that is to say, Mr. Gliksten, who was about to purchase the premises, the contract is entered into by Mr. Benjamin Borst and all the parties thereto.

The particular document which we have here to consider is the indemnity on July 13, 1936, and it is upon that document that Mr. Burrows says that, through its deficiencies (and he points out four defects which he describes as fatal), Mr. Theodore Borst can no longer rely in order to obtain his indemnity for the amount which he has had to pay to Mr. Josselson. The object of the assignment of that date and of the indemnity is obvious. It is to short-circuit the remedies which Mr. Theodore Borst would otherwise have to pursue, and to make Mr. Gliksten immediately and directly liable to him, without recourse to any further proceedings.

On the face of that document, it would appear clear that Mr. Borst had received the required indemnity. Clause 4, dealing with Mr. Theodore Borst, who is described as the second assignee, says:

> In pursuance of the said agreement and in consideration of the covenant by the second assignee hereinafter contained the company [Benjamin Borst, Ltd.] acting by the liquidators hereby assigns to the second assignee all and singular the full benefit and advantage of the several covenants for the payment of the rent reserved by and performance of the lessees' covenants and indemnities by the said Lazarus Gliksten and Reginald Benjamin Borst contained as hereinbefore recited in the hereinbefore-mentioned assignments.

The first point which is made by Mr. Burrows is this. He says that the agreement of Dec. 1, 1931, is in its terms a joint agreement, that is, that the liquidators and the company acknowledge the covenant—"the purchaser and the assignee hereby covenant with the company and with the liquidators"—and that, therefore, to assign effectually that covenant, it was necessary that the liquidators, as well as the company, should be the assigning parties; whereas he points out that, by cl. 4 of the later agreement, the assignment is by the company, acting by the liquidators, and not by the liquidators. Such an argument might have been very impressive if it were the fact that the earlier document were joint, and not several; but, as has been pointed out by Greer, L.J., by the operation of the Law of Property Act, 1925, s. 81, it is provided specifically that a covenant made with two or more jointly, to pay money, or to pay debts, or to do any other act for their benefit:

> shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person . . . and shall be construed as being also made with each of them.

This creates, therefore, a several liability.

Although it is not necessary to decide the point, except upon the assumption which Mr. Burrows asks us to make, that this covenant was not made for their benefit within the meaning of the section, a view which I do not accept; speaking for myself, I think that the agreement itself in its terms is several, and not joint. It is a question of the intention of the parties, as expressed by the written document, and, as I read the various obligations which are placed upon the company and the liquidators, who are named persons, respectively, I come to the conclusion that the intention of the contracting parties was to place separate and several obligations on both of them. If there were no other reason for coming to that conclusion, I should find it quite clearly established by reason of the fact that the duration of the obligation on the two parties is different. The obligation on the company is until it is finally dissolved. The obligation in the case of the liquidators is until they are released from all liability, and those two matters, both their rights and the obligations, point, in my mind, to separate obligations, involving separate legal rights and duties.

Therefore I am clearly of opinion, both on the construction of the agreement and by reason of sect. 81 of the statute, that these are several obligations. Since that is so and since (as Mr. Burrows does not dispute) by cl. 4 of the assignment of July 13, 1936, the company is bound through its liquidators, it follows that the point that, as only one party to a joint obligation was mentioned in the assignment, therefore that which was assigned was different from that with which the assignor was concerned, fails.

The second point which Mr. Burrows makes, as I understand it, is this. There were, it will be remembered, two persons concerned, namely, Gliksten and Reginald Borst, and it is said that a notice of the assignment, they being the obligees, should be served upon both of them, and that in fact the uncontradicted fact is that Gliksten alone received notice of the assignment, and, therefore, that the notice is bad, and, in consequence, the assignment is invalid. I think that that argument might have considerable force, for there is no doubt that, as far as Gliksten and Borst were concerned, they were jointly, and not severally, bound, were it not for the operation of the Bankruptcy Act. Mr. Reginald Borst, in company with some other unfortunate people in this case, was a bankrupt, and, that being so, his position is affected by the provisions of sect. 118 of the Bankruptcy Act, and in such a case it is provided:

> Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt.

The difference which is alleged here between Mr. Spens' view, on the one hand, and Mr. Burrows', on the other, is this. As I understand Mr. Spens' argument, he says that the effect of the obligation arising on the notice is procedural or adjectival, that is to say, it is dealing, not with title, but with the right to promote the action, and that, had it not been for the notice, so that the assignment was brought within the compass of sect. 136 of the Law of Property Act, reproducing similar provisions in the Judicature Act, 1873—were it not for that notice, it might well have been the case that the assignee would have to have sued in the name of the assignor, and that the matter, as I say, is really adjectival, and that, in so far as the language of sect. 136 speaks of the express notice in writing being given to the person from whom the assignor would have been entitled to claim, in so far as the claim now is made only against Mr. Gliksten, which power to claim only against Mr. Gliksten is conferred by sect. 118 of the Bankruptcy Act, for otherwise, being a joint debt, it would have been necessary to claim against both, it is sufficient for notice to be served upon the person against whom the claim is made, and who is to be sued.

In my opinion, that argument is a sound one. I do not think that the interesting and almost metaphysical consideration, that one has to establish a complete title in both the parties liable, and both the debtors, before one can get them into the position in which the person serving the notice can elect to sue only the one or the other, is sound. I think that the proper view is that stated by Mr. Spens, that it is necessary, in such a case, to serve the notice only on that person against whom the claim is made, and whom it is sought to sue, in order to take advantage of sect. 136 of the Law of Property Act—assuming always that otherwise in law there is a good case against that person alone, which here there is, by reason of the operation of the Bankruptcy Act.

As to the third point, I need say nothing, except that I agree with Greer, L.J., that here you have a several covenant partly sounding in damages and partly a specific claim for the rent in debt, which was the actual claim here made, altogether apart from any claim for other breaches of covenant, a claim for which he would not be liable, in so far as they fell to be indemnified.

Finally, as to the fourth alleged fatal point, that is to say, that the whole indemnity is nugatory, one would hesitate to come to such a conclusion, if only for the reason that, as I understand it, this agreement has had the approval which was necessary, in so far as the liquidators are parties, of the registrar of companies, and has received the careful consideration of drafting counsel. That in itself, of course, would not be conclusive, but makes one hesitate, as one would indeed hesitate in any event before one assumed that such a contract as this is nugatory. But Mr. Spens has satisfied me that the indemnity which is referred to in cl. 5, releasing the company and the liquidators from all claims and admissions on the part of the company or implied in the assignments, brings in by implication the indemnities which are set out in the Law of Property Act, 1925, Sched. II, Pt. IX, inserted by operation of the section appropriate to that schedule, and that it is right, therefore, to read into the earlier contract that they will "save harmless and keep indemnified the conveying parties and their estates and effects." That being so, the complete indemnity is established to my satisfaction against Mr. Gliksten and Mr. Reginald Borst in cll. 4 and 5. Clause 6 may be given a meaning, in that, as regards the liquidators, they being the named persons, the indemnity may act to indemnify the liquidators against liabilities in their personal capacity, and, as regards the company, if it were the fact that it had been necessary to sue in the name of the company, rather than using the name of the assignees, for want of proper notice, or for some other reason, it might well have been necessary to indemnify the company for the costs which might have followed upon an unsuccessful suit, or even possibly a successful suit directed against it. There is therefore a residuary matter in which it may be necessary to indemnify the company, other than the general indemnification given by Mr. Gliksten by the assignment, and given originally by the company to Mr. Theodore Borst.

For these reasons, I agree that all these four alleged points prove, on examination, to be quite innocuous, and that this appeal fails.

SCOTT, L.J.: I concur in the conclusions arrived at by the other members of the court.

Appeal dismissed, with costs.

Solicitors: *Bishop & Fenton-Jones* (for the appellant); *W. R. J. Hickman & Randall* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

BALCHIN *v.* BALCHIN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Langton, J.), **July 16, 1937.**]

Husband and Wife—Maintenance—Application by wife—Genuine offer of home by husband—Application dismissed—Lapse of year—No steps taken by wife—Fresh application—Fresh offer of home—Finding that offer untrue—Order for maintenance—Validity.

In May, 1936, a wife, who at the time was living separate from her husband, applied to a certain bench of justices for maintenance on the ground of desertion and wilful neglect to maintain. The justices dismissed the summons, having found that the husband was then making a genuine offer to take his wife back and provide her with a home, and that she was unreasonably refusing to accept that offer. In May, 1937, the wife applied to another bench of justices who were fully aware of the circumstances relating to the former order. The husband made a new offer to take his wife back, but the justices found that he was not telling the truth when he made the offer, and that it was an offer which the wife was not obliged to entertain. The justices accordingly made an order for maintenance. The husband appealed on the ground that it was for the wife to show that some new circumstance had arisen to justify her in bringing the new case, and she had taken no steps in the interval between the first and the second applications:—

HELD: the justices' findings in May, 1937, constituted a fresh set of facts, and the justices were entitled to come to the conclusion to which they had come.

[EDITORIAL NOTE. At one time the courts were inclined to place particular stress upon the acts of parties at the time of the separation in deciding the rights of the wife as to maintenance. This was based upon the legal definition of desertion. Since the Act of 1925 has provided the wife with a remedy in cases of wilful neglect to maintain, the position has changed, and the courts are now entitled to form their decision upon the facts at the time of the application, and this decision cannot be pleaded as *res judicata* upon a later application.

As to Wilful Neglect to Maintain, see HALSBURY, Hailsham Edn., Vol. 10, pp. 838, 839, para. 1340; and for Cases, see DIGEST, Vol. 27, p. 557, Nos. 6124-6128.]

Case referred to:
(1) *Ellis* v. *Ellis* (1929), 93 J.P. 175; Digest Supp.

Appeal on behalf of the husband, Albert John Balchin, from an order made by the justices for the borough of Maidenhead on May 10, 1937, adjudging him guilty of wilful neglect to provide reasonable maintenance for the wife, Millicent Balchin, and ordering him to pay 15*s.* weekly for her support. A similar application, made one year previously to the neighbouring bench at Burnham, was refused. The grounds of appeal were (i) that there was no evidence upon which the justices could find that there had been wilful neglect to maintain, (ii) that the decision of the justices was against the weight of the evidence, (iii) that the justices were wrong in law in their decision, (iv) that the matter was *res judicata.*

The facts are set out in the judgments.

Victor Williams for the appellant.

A. A. Gordon Clark for the respondent.

Sir Boyd Merriman, P.: This is an appeal from the justices of Maidenhead, who made an order against the husband, appellant, for a sum of 15*s.* a week maintenance in favour of his wife, on the ground that the husband has wilfully neglected to maintain his wife. In May, 1936, the wife, who at the time was living separate from her husband (I use a neutral word), applied to the Burnham justices for maintenance, on the ground of desertion and wilful neglect to maintain. That summons was dismissed on this ground. After an adjournment to enable the parties to consider their position, the justices found that the husband was then making a genuine offer to take his wife back and provide her with a home, and that she was unreasonably refusing to accept that offer. At that date, therefore, it was established by a court of competent jurisdiction that she was voluntarily absenting herself from cohabitation with the husband, and was not entitled to maintenance. In May, 1937, the matter went before another bench of justices, who were fully apprised of the circumstances relating to the former order, and in spite of that they decided to award 15*s.* on the ground that the husband had been guilty of wilful neglect to maintain. Now, this appeal started by Mr. Williams telling us that the point he really wished to argue was one of *res judicata.* It struck both of us that that as an argument must be impossible, in the circumstances, because the question whether the wife was wilfully absenting herself from home, whether the husband was making a genuine offer to take her back, whether she was unreasonably refusing in May, 1937, could not in the nature of things, without going into further details, have been finally decided for all time in May, 1936. It is unnecessary to enter into all the discussions which took place in the course of the argument. It emerged that the real point was this, that a court of competent jurisdiction having decided that the wife was wilfully absenting herself in May, 1936, it was plainly for her to show that some new circumstance had arisen to justify her in bringing this case in 1937. We have the justices' note and we have reluctantly allowed Mr. Williams to supplement it by an argumentative affidavit on the part of the solicitor as to the course which the case took below. The only new fact that emerged in that affidavit was this, that, whereas nothing at all is said about the interval between May, 1936, and May, 1937, in the justices' note, except some rather obscure reference to the husband's mode of life, which may, or may not, relate to that period on the face of the note, the affidavit of the solicitor states categorically that the wife admitted that between May, 1936, when the decision of the Burnham justices was given, and the date when she took out this summons, she had done nothing which changed the state of things which was found to have existed in 1936. I say at once, that, if what we were discussing was a preliminary point whether, that fact being admitted, and there being nothing else before the justices, the summons was, on the date when it was taken out, mis-conceived, I think there would be a great deal to be said for that point. I say no more about it. I think then the situation would be *mutatis mutandis* that which is described in the case of *Ellis* v. *Ellis* (1) to which Mr. Williams referred. But that is not the position which presents itself to us. This was not dealt with on any such preliminary point at all. What happened was this. The case was fully contested by the parties, who gave their evidence. The husband made, in face of the Maidenhead court, an offer to take his wife back, while at the same time refusing to take her children, and, as LANGTON, J., pointed out very forcibly in the course of the argument, an offer made in 1937 must be a different thing from the offer made in 1936, if for no other reason than this, that the man has in the meanwhile for 12 months—365 days and nights—been living apart from his wife, which is quite plainly a thing that requires to be judged afresh. When that is made the test as to whether there were new circumstances or not, as now plainly appears from the justices' reasons, then one has to judge this matter not as at the date when the summons was issued, but on material which was submitted to the justices. The justices have found, having seen the parties, that the husband was not telling the truth when he made this offer, and that, therefore, it was not the sort of offer which called for acceptance or refusal on the part of the wife; in other words, they have found upon evidence that in May, 1937, at the date of the hearing, if not at the date of the complaint, the state of things was not that the husband had made a genuine offer, which the wife had unreasonably refused, but that the husband had made a colourable offer, which had no substance or reality behind it, and which the wife was not obliged to entertain. In other words they have found circumstances which, in my opinion, justify them in saying that she had brought to an end the state of wilfully abstaining from cohabitation desired by the husband, which wilful abstention in turn suspends her right to claim maintenance. If that is so, they were justified in holding that, as from the date of the hearing, at any rate, the wife was entitled to enforce her right to claim maintenance. That being so, the appeal in my opinion must be dismissed.

Langton, J.: I agree. In May, 1936, this matter came before the Burnham justices. The husband made an offer of a home. The Burnham justices were satisfied that the offer was *bona fide*, and they refused the wife's application for maintenance. In May, 1937, having taken no step in the interval, the wife came before the Maidenhead justices and made a fresh claim for maintenance. She came into court on that occasion with an exceedingly heavy handicap, because she had not approached her husband in any way in the interval. In spite of that handicap, the justices at Maidenhead have come to a very definite conclusion which they have expressed quite clearly in their findings. They say this, referring to what happened before them:

> The husband made an offer to his wife to provide a home for her but not for her children. The justices were of opinion that the offer was not a *bona fide* one. That they believed the evidence of the wife and not that of the husband.

Upon those findings, which constitute a completely fresh set of facts, the justices were, in my opinion, entitled, and indeed right, to come to the conclusion to which they have come in this case. I agree the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Jackson & Jackson*, agents for *Winter-Taylor & Woodward*, High Wycombe (for the appellant); *Edridge, Son & Marten* (for the respondent.)

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

PLUNKETT *v.* PLUNKETT.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P., and Langton, J.), **July 16, 1937.**]

Husband and Wife—Maintenance order—Application to discharge or vary—Undertaking by husband's parents to make voluntary allowance—Decree of divorce in favour of wife—Cesser of allowance.

At the hearing in Oct., 1935, of a summons by a wife in respect of arrears of maintenance, due under a maintenance order for 30*s.* per week made by consent in Feb., 1931, the justices made a committal order to be suspended on payment of £50, the justices accepting an offer by the husband's parents to pay £50 of the arrears and an undertaking to make the husband an allowance of 15*s.* per week, and further varied the original order by reducing the weekly payment ordered from 30*s.* to 15*s.*, "which sum is to be paid by the parents of the complainant (the husband) they having given an undertaking so to do." In July, 1936, the wife was granted a decree *nisi* of dissolution on the ground of the husband's adultery. The decree was made absolute in Feb., 1937. The husband thereupon applied to discharge or vary the maintenance order, basing his application on the facts of the dissolution of the marriage and of the inadequacy of his wages to support his present wife and their two children. The justices refused the application, stating that they saw no reason to alter the present order. Thereafter the husband's parents ceased to pay the allowance of 15*s*. The husband appealed on the grounds (i) that the circumstances in which the parents gave a voluntary undertaking to the court to pay 15*s*. a week had undergone a complete change by reason of the alteration in the status of the parties, and (ii) that the order for 15*s*. per week was excessive, having regard to the husband's means and responsibilities :—

HELD : until the parents' undertaking to pay 15*s*. a week to the husband was shown to be unenforceable, it was a circumstance which the justices were entitled to take into account in assessing the husband's means to pay. The justices were perfectly right in refusing to vary the order.

[**EDITORIAL NOTE.** This appeal is decided upon the footing that the liability of the parents of the husband under their undertaking can be enforced. If it had been shown that that liability was not enforceable in law, or probably that, although it was enforceable in law, it was not recoverable by reason of the want of means of the parents, it would appear that the magistrates ought to vary the order.

AS TO VARIATION OF ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345 ; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 568, Nos. 6237-6256. See also STONE'S JUSTICES' MANUAL, 1937, pp. 940-942.]

Case referred to :

(1) *Bragg* v. *Bragg*, [1925] P. 20 ; 27 Digest 565, *6242* ; 94 L.J.P. 11 ; 132 L.T. 346.

APPEAL on behalf of the husband, John Edward Plunkett, from the refusal of the Carlisle Justices on Apr. 2, 1937, to vary a maintenance order for 30*s*. per week, made by consent on Feb. 6, 1931, in favour of Martha Muriel Plunkett, his wife. At the hearing on Oct. 14, 1935, of a summons by the wife in respect of arrears of maintenance, the justices made a committal order to be suspended on payment of £50, the justices accepting an offer by the parents of the husband to pay £50 of the arrears, and an undertaking to make the husband an allowance of 15*s*. per week, and further varied the original order by reducing the weekly payment ordered from £1 10*s*. to 15*s*., " which sum is to be paid by the parents of the complainant (the husband) they having given an undertaking so to do." On July 13, 1936, the wife was granted a decree *nisi* of dissolution on the ground of the husband's adultery. The decree was made absolute on Feb. 15, 1937. The husband thereupon applied to discharge or vary the maintenance order, basing his application on the facts of the dissolution of the marriage and of the inadequacy of his wages, viz., £2 5*s*. 3*d*. per week, to support his present wife and their two children. The justices refused the application, stating that they saw no reason to alter the present order. Thereafter the husband's parents ceased to pay the allowance of 15s. per week.

The husband appealed, on the grounds (i) that the circumstances in which the parents gave a voluntary undertaking to the court to pay 15*s*. per week had undergone a complete change by reason of the alteration in the status of the parties, and (ii) that the order for 15*s*. per week was excessive, having regard to the husband's means and responsibilities.

William Latey for the appellant husband.

The respondent wife did not appear and was not represented.

Sir Boyd Merriman, P.: In this case we grant leave to appeal out of time. Having heard the appeal, as things are at present, speaking for myself, I am satisfied there is no ground for interfering with the justices' order.

The material facts are: in 1931 there was an order by consent against the husband for 30*s*. a week maintenance. That, in turn, was varied on Oct. 14, 1935, when the parents of the husband undertook to pay £50 arrears in respect of a much larger sum, and pay for the future 15*s*. a week, provided the 30*s*. was reduced to that sum. On the face of it—and I say no more than this—that appears to be an enforceable undertaking against the parents given manifestly for good consideration and entered into with a court of competent jurisdiction. I agree that the order is somewhat unfortunately worded, but I have no doubt that it is in fact an order upon the husband, though it refers to the undertaking given by the parents. It has, in fact, always been so treated, and the present application to review, and the present appeal against refusal to review, are based upon the assumption that this is an order upon the husband. At present the only two circumstances which have been put forward to justify a reduction of the sum are that the marriage has been dissolved since Oct., 1935, and that the parents are refusing to pay. It is quite plain, under the decision of this court in *Bragg* v. *Bragg* (1), which has been consistently followed, that a mere dissolution of marriage does not of itself operate to dissolve a maintenance order. The question whether that change of status between the spouses does or does not vacate the parents' undertaking is a matter which will fall to be decided by any court before whom it is sought to enforce this undertaking. I say no more than this, that the magistrates at the present moment are not obliged to act merely upon a statement that the parents are refusing to pay. If and when it has been decided that this undertaking of the parents is not enforceable, and that there are no means of making them put the husband in funds to pay this 15*s*. a week, it will be open to the husband to allege before the justices that that is fresh evidence upon which he may be entitled, if the rest of the facts so justify him in doing so, to ask them to reduce the order, but, so long as the undertaking is not shown to be unenforceable, it is quite plainly a circumstance which the justices are entitled to take into account in assessing the husband's means to pay. If there is an undertaking by the parents to provide the sum which the justices are ordering for the purpose of the wife's maintenance, it is perfectly plain that that is evidence of means to pay. So long as there is not shown to be any change of circumstances, it seems to me that the justices are perfectly right in refusing to vary this order, and this appeal must be dismissed.

Langton, J.: I agree, and would even go a little further. The order of Oct. 14, 1935, proceeded entirely upon an undertaking by the parents of the complainant to pay a weekly sum of 15*s*. It has not been shown, indeed I cannot see that any evidence was adduced before the magistrates to show, that that undertaking was not still enforceable. Unless and until it is shown that the order is unenforceable, it is difficult to see what change of circumstances there could be which would justify the order being varied or set aside. In any event, I very much doubt whether, at the present stage of the proceedings, this order still being in A existence and the undertaking not having been shown to be unenforceable, this court has any right at all to make an order compelling the magistrates or directing the magistrates to take any course other than the one they have taken. When that matter is cleared up, whether the undertaking is enforceable or not, then, and then only, will the time come when this B matter will have to be considered. I agree that the appeal must be dismissed.

Appeal dismissed, without costs.

Solicitors: *Pickering, Kenyon & Co.*, agents for *Clutterbuck, Trevenen & Mawson*, Carlisle.

C [*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

TERRENE, LTD. *v.* NELSON.

[CHANCERY DIVISION (Farwell, J.), **July 12, 13, 14, 15, 1937.**]

D *Sale of Land—Warranty—Action for breach—Information given by vendor—Reliance on information by purchaser—Evidence of intention—Caveat emptor—Innocent misrepresentation.*

In the particulars of an estate supplied to an intending purchaser, it was stated that the estate included *inter alia* an inn and farm let at a rent of £193. The vendor intimated that he had had an offer of E £250 a year, but had been unwilling to disturb the tenant. It was further stated that the estimated income from electric light supplied to the houses on the estate was £193. The electric light was generated from turbines, one of which had no meter. The vendor's agent had estimated the number of units generated, and, calculating at a flat rate, had arrived at the estimated income. In fact, the electric light was supplied at varying rates. It was further stated that there was a small F revenue from water supplied to houses on the estate. No mention was made of the fact that the local authority supplied this water, and that it had to be paid for. In an action for damages for breach of warranty after completion of the sale of the estate, the purchaser relied on the facts (i) that the offer of £250 a year had been made some years previously, and not recently as the purchaser had supposed, G (ii) that the electric plant did not generate as much electricity as estimated, and (iii) that no mention had been made of the outgoings in respect of water. There was no suggestion of fraudulent representation:—

HELD: apart from some special arrangement or some special evidence of intention, of which there was none here, a vendor does not guarantee or warrant the correctness of information given. The court would not H allow damages for breach of an innocent misrepresentation under the guise of a breach of warranty.

[EDITORIAL NOTE. Generally speaking the court is prone to find that statements made upon an offer of property for sale are mere puffing and not meant to be warranties. They do not displace the general rule of *caveat emptor*, and it is for the purchaser to make proper inquiry. It is otherwise of facts particularly within the knowledge of the vendor such as the actual payment of rents by the tenants.

As to Representations by Vendor, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 299-301, paras. 508, 509; and for Cases, see DIGEST, Vol. 40, pp. 46-50, Nos. 287-322.]

Cases referred to:

(1) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 35 Digest 54, *486*; 82 L.J.K.B. 245; 107 L.T. 769.

(2) *Nocton* v. *Ashburton* (*Lord*), [1914] A.C. 932; 35 Digest 55, *493*; 83 L.J.Ch. 784; 111 L.T. 641.

(3) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; 35 Digest 14, *79*; 70 L.J.K.B. 533; 84 L.T. 549.

Action for damages for breach of warranty. The facts are set out in the judgment.

Lionel L. Cohen, K.C., and *G. P. Slade* for the plaintiff company.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the defendant.

Farwell, J.: At the end of 1934 and the beginning of 1935, the defendant, Mr. Driver Ralston Nelson, was the owner in fee simple of an estate known as the Sawley Abbey Estate in the county of Yorkshire. He then desired, and he had for some time had it in mind, to sell that property. It was a property of just over 2,000 acres. It had a residence on it, though it was not a very large house; it had on it certain cottages, and an inn, known as the Spread Eagle Inn. It had other advantages, in that it had a considerable stretch of fishing on the River Ribble, which is said in the particulars to provide salmon-fishing and trout-fishing. It was, in fact, no doubt, an attractive estate. Mr. Nelson was not anxious that it should be known generally that he was thinking of selling his estate, and, accordingly, he instructed his solicitor, a Mr. Shackleton, to look about for a purchaser, but not to advertise the property in such a way as to call attention to the identity of the owner or that of the property, and said that Mr. Shackleton was not to deal with agents. Mr. Shackleton carried out those instructions; he inserted an advertisement in, I think, *Country Life*, or some other paper, but without giving the name of Mr. Nelson or the name of the property. As a result of that advertisement, Mr. Shackleton was brought into touch with a Mr. Lawrence, whose occupation consists of dealing in real property. He buys and sells real property, and apparently he carried on that occupation in connection with some company, which has since gone into liquidation. In order to facilitate those dealings, in Oct., 1935, a small private company was incorporated, known as Terrene, Ltd., with a share capital of £100 and some quite small sum paid up, in which Mr. Lawrence was a director, being subsequently made the managing director, and two gentlemen, Mr. Marshall and Mr. Hicks-Beach, were the other directors, the two last-named gentlemen being solicitors carrying on business in partnership in the county of London. Terrene, Ltd., did not come upon the scene, at any rate so far as the defendant or his agent was concerned, until a rather later date. As a result of the advertisement in *Country Life*, in the first instance Mr. Shackleton got into touch with a well known firm of estate agents of London, who have also branches

in other parts of the country, Jackson, Stops & Staff, and, in consequence, Mr. Shackleton was brought into touch with Mr. Lawrence. Mr. Lawrence, either on his own behalf or on behalf of the company, Terrene, Ltd., was apparently interested in the estate. In December, particulars were provided to him which gave him the names of the various farms,
A their acreage, and the rents which they produced. Those particulars included the Spread Eagle Inn and the farm, which was said to have an acreage of 60 acres, and the rent of which was £193. Those particulars also contained the statement that the estimated income from the electric light supply was £280. There was reference to the fishing
B rights, and to the rent which the owner was prepared to pay for the shooting. There was then a statement that the lodge and village were lighted by electricity from the owner's plant.

In Jan., 1935, Mr. Lawrence, accompanied by Mr. Belton, who was a manager in the employment of Jackson, Stops & Staff, went down and
C looked over the property. They were met by a Mr. Bleazard, who was the agent, factor, or bailiff of Mr. Nelson, the defendant, and they spent some two days there. They went over the property, and finally they went to see Mr. Shackleton at his office in Bradford. Various letters passed between Mr. Belton, Mr. Lawrence and Mr. Shackleton, and it
D appears, from a letter which was written in January, that Mr. Shackleton passed on to Mr. Lawrence, through Mr. Belton, the information that had been given to him by his client, Mr. Nelson, that Mr. Nelson had been offered £250 a year for the inn, which offer he had not accepted, because he was not prepared to disturb the sitting tenant. No doubt
E that was a statement made with a view to indicating to a possible purchaser that there was quite a reasonable prospect of the rent of the inn being put up if the purchaser desired to do so. There was also information given with regard to the electric light, and with regard to certain water rents. With regard to the electric light, the information given
F was that the defendant had said that the estimated income from electric light supplied was £280 a year. That estimate was arrived at in this way. On the estate, there was certain electric plant. There was a larger turbine, which was operated by the River Ribble, and there was also a smaller plant, which was operated from a reservoir at the
G back of Sawley Lodge. That electric plant was used for the purpose of supplying electricity to the house, Sawley Lodge, to the other house on the estate, to the cottages, and to the inn. The charges made varied, and were not at anything like a flat rate. For instance, in the case of the inn, there was a lump sum of £25 a year paid for light, and for that
H sum the inn could use as much light as was desired. In some cases no charge at all was made, and, in the case of Mr. Nelson and the house he lived in, he did not go through the performance of charging himself and paying himself, so that there was no charge made in respect of the house which he occupied. Some of the cottages paid as high as 9*d.* per unit, whereas others paid at a lower rate. The way in which the

calculation was made was that Mr. Bleazard worked these electric plants. On the larger of the two plants there was a meter. He was in the habit of keeping the readings of the meter, and could thereby ascertain the number of units manufactured in the course of a year. But he could not, in the case of the smaller plant, arrive at anything like an accurate figure, because there was no meter at all on that plant, and no doubt he did A his best to make an estimate. He took the figure of 15,000 units, and calculated at a flat rate of $4\frac{1}{2}d.$ a unit, with the result that he got a sum of £280, and that sum was given to Mr. Lawrence as being an estimate, not necessarily an accurate estimate, of what the electric light would produce. With regard to the water, the position was rather different. B Mr. Lawrence had inquired at an early date what were the outgoings. He was told that the outgoings were £49 a year. Subsequently, he was told that the outgoings were certain tithe rentcharge, which amounted to £14, and a charge from the Ribble Conservators which amounted to some £11. The difference between those two sums and £49 does not C seem to have been explained, and there is an obvious difference. When Mr. Lawrence was told that there was a revenue, but not a very large revenue, from the water supplied by the defendant to the villagers, for some reason or other, which I am quite certain was innocent, a mistake was made. Mr. Lawrence was not informed that the water which was D supplied by the defendant to the village came from the local authority, and that the local authority made a charge for that water, which had to be paid. That charge was not taken into account when Mr. Lawrence was informed of the outgoings, although I think some portion of that charge must have been taken into account for the sum of £49, which E was the original sum given. There is no doubt about this, that there was a mistake made with regard to the charges for water. I think Mr. Lawrence ought to have been told that the water had to be paid for, and that, in calculating the sum which was received from the users of the water supply for the water, they had to put on the other side of the F account the money which had to be paid to the local authority for the water.

In the course of the negotiations, a printed form was sent to Mr. Shackleton which he was asked to fill up, in which he was asked to supply full particulars of "all tithe, tithe rentcharge, tithe annuity or land G tax and all other outgoings other than the usual rates and taxes." Mr. Shackleton, in complete good faith, but not having in mind, or not knowing of, the existence of these charges for water, did not mention them. He was quite obviously a witness whose evidence could be entirely accepted, and he said quite frankly in the witness-box that, if H he had known of them, he would, of course, have told Mr. Lawrence about them. He did not know, and unfortunately Mr. Lawrence was not told, of these charges which had to be paid for water which was taken by Mr. Nelson, and some part of which was distributed among the villagers, who paid him for that water. In those circumstances, Mr.

Lawrence, having been told (and these are the only three matters complained of) that the rent of the inn was £193 a year, but that there had been an offer, which he thought meant a recent offer, to take it at £250 a year, that the revenue from the electric light was estimated at £280 a year and that there was a revenue from the water, and not being told
A that that water had to be paid for to the local authority, proceeded to enter into the contract on Mar. 1, 1935.

By that time, Mr. Lawrence had determined that the contract should be made, not with him, but with the plaintiff company, Terrene, Ltd. The contract was in fact made with that company for the sale of the
B property for £71,000. That sale was not completed to Terrene, Ltd., because in the meanwhile that company proceeded to enter into an arrangement with a gentleman called Fattorini, under which he agreed to purchase the property at a very considerable profit to the plaintiff company, and, in the end, on July 25, 1935, the property was conveyed
C to Mr. Fattorini. Mr. Fattorini, having acquired the property, discovered the fact of the existence of this liability to pay for the water. He also discovered that, in his view, at any rate, the electric light plant was not capable of producing so many units as was stated in the particulars, and, I suppose, having discovered that the offer of £250 a year
D for this inn had been made, not in the immediate past, but some years ago, he suggested that he had been misled by the plaintiff company, and made a claim against it. The plaintiff company, as a retort to that claim, now makes a claim against Mr. Nelson. It is important to see exactly what the claim is. The claim is for damages for breach of
E warranty, and for nothing else. It is not a claim for compensation under a contract; it is not a claim for damages for fraudulent misrepresentation, or anything of that sort. No suggestion of any fraud, or of any fraudulent representation, is made, or could have been made, in this action, I think, in the circumstances. The action is based wholly
F and solely upon breach of warranty.

A warranty may be defined as a stipulation subsidiary to, or collateral to, a principal contract, a breach of which gives rise to a claim for damages, but a breach of which does not affect the principal contract. In order that there may be a warranty, there must be a clear intention on the part
G of both the parties to the principal contract that there is to be a stipulation of a kind which is collateral to the principal contract, and it is most essential, in a case of this sort, to distinguish between misrepresentation, on the one hand, and warranty, on the other. As was pointed out by LORD MOULTON in his opinion in the well known case of *Heilbut, Symons*
H *& Co.* v. *Buckleton* (1), many attempts have been made in the past (and here is, in my judgment, an instance of only another attempt) to get damages for breach of an innocent misrepresentation, which the court will not allow under the guise of a breach of warranty. That is not open to any plaintiff, and, unless it can be shown on reasonably plain evidence, or be properly inferred from the evidence, that both parties intended

that there should be a particular stipulation, such as that which I have indicated, no warranty can be proved, and no damages can be recovered for what is no more than an innocent misrepresentation.

In my judgment, in the case of a sale of real estate, by the very nature of things, it must always be extremely difficult to prove a warranty, in the absence of some very special circumstances. In the ordinary case, a purchaser has to go for his information to the vendor, but, bearing in mind the principle of *caveat emptor*, he is bound to make proper inquiries for himself. But he must, in almost every case, in the first instance, at any rate, seek his information from the vendor, who knows the facts, whereas the purchaser probably does not know them. When a purchaser, with a possible view of making an offer for the property, seeks information from the vendor, the vendor, of course, is bound to the best of his ability to supply him with accurate information. He is not entitled purposely to misrepresent any of the facts in respect of which inquiry is made. If he makes a representation, either knowingly—and in that sense fraudulently—or recklessly, without caring whether the statement made is true or false, which, again, amounts to a fraudulent misrepresentation at law, the purchaser has his remedy in damages, and, in certain circumstances, he may be entitled to be relieved from the contract into which he has entered, if it was induced by such misrepresentation. On the other hand, if the representations made prove to be wrong, but were made in good faith, and innocently, the purchaser has no claim for damages whatever. In certain circumstances, equity may release a purchaser from a bargain induced by innocent representation, but that is another matter. Generally speaking, it is always true to say that an innocent misrepresentation does not give rise to a claim for damages, excepting in the very few and special cases which are to be found mentioned in the opinion of Viscount Haldane, L.C., in *Nocton* v. *Ashburton* (*Lord*) (2). With that I need not trouble. Where a vendor gives information to a purchaser, whether with a view to that purchaser's making an offer for the property or with a view to his entering into a contract to buy the property, he is not guaranteeing or warranting the correctness of that information, apart from some special arrangement, or some special evidence of intention, that that was to be the result of the information's being supplied. I will illustrate what I mean with one case. Let us take a case such as that which came before the Court of Appeal in *De Lassalle* v. *Guildford* (3). Suppose that the owner of a house is minded to sell it, and the prospective purchaser comes along, looks at the house, and says to the prospective vendor : "Are the drains all right ?" If the vendor answers "Yes," and nothing more is said about it, in my judgment it would be extremely difficult, on that evidence alone, and nothing else, to come to the conclusion that there was a warranty. But supposing that, the vendor having said "Yes," the purchaser says, "I am going to rely on that. I shall not have the drains examined on my own behalf, because I am going to rely on your word that they are in proper order," if the vendor then expresses, either tacitly or in words, that he is willing that the purchaser should take that course, and should dispense with an examination on his own account because of the statement made by the vendor, I apprehend the court would find that there was a definite intention on the part of both parties A that the information given as to the drains was to be treated, not as simply a representation, but as a statement upon which the other party could rely, so that he could dispense with an inquiry which he himself otherwise would have made. I venture to think that that is probably the explanation of the case in the Court of Appeal. I think that the B Court of Appeal must have been satisfied that there was an arrangement of some kind, that went beyond a representation, and nothing more.

When I consider this case, it seems to me that the evidence falls very far short of establishing any such special stipulation. Dealing with the C inn, which matter Mr. Cohen very wisely has abandoned in the course of the trial, it is almost farcical to suggest that there was anything like a special stipulation with regard to that representation. It may be that the representation, perhaps unwittingly, was treated by Mr. Lawrence as being a representation that there had been a very recent offer. If so D interpreted, it was not accurate. It is beyond all doubt true that there had been such an offer, but it was made some time ago. To suggest that Mr. Lawrence was taking that as something upon which he could rely, without any sort of inquiry or investigation of his own, or anything of that sort, seems to me to be ridiculous. It is a case of ordinary E information supplied by a vendor—information which, of course, he must, to the best of his ability, give accurately. But to suggest that, because a possible would-be vendor says, "I have been offered a rent for this house larger than that at which it is now let," there is anything in the nature of a warranty, seems to me to be a suggestion which it is F necessary only to state in order to show that it must be bad.

I am bound to say that I take much the same view with regard to the electric light. The figure given in reference to the electric light was an estimate. Everybody knew from the beginning that all that Mr. Nelson's agent was doing was stating what he believed to be a true G estimate of the revenue which could be produced from the electric light. If Mr. Lawrence desired, he could, of course, have had the plant examined for himself. He could have discovered whether it was or was not capable of producing the current on which the calculation was based. He did not do so. But he was not deterred from doing so by anything which H Mr. Nelson did or said. He was given information, and it was for him, if he wanted to do so, to satisfy himself that the calculation was a proper one, made upon a proper basis. He did not do it. The fact that he did not do it was not induced by anything the defendant said or did. To suggest that, where a vendor said; "I estimate," something which was not capable of very close estimation in any event, "the amount produced by " so-and-so " is £x," that alone, and nothing else, was a warranty, and not a representation, seems to me to be quite impossible.

That leaves only the question of the water-rights. That perhaps assists the plaintiff company a little more than does either of the other two matters relied upon. There was undoubtedly a misrepresentation with regard to the water-rights. Mr. Lawrence says that he discovered that this water had to be paid for to the local authority, and he was not told so. I am not imputing anything wrongful to anybody. I am perfectly satisfied, from seeing Mr. Shackleton in the witness-box, that he would have given the information at once, if he had known it himself. I have no doubt that Mr. Bleazard was perfectly truthful in his evidence when he said that he overlooked it altogether. Nevertheless, the position was that Mr. Lawrence was not given accurate information with regard to that one matter. Again, there is nothing, so far as I can see, in the evidence, in the correspondence, or anywhere else, which would lead me to infer that there was any special stipulation made with regard to the water-rights. It was a representation; it was an innocent misrepresentation; but that it amounted to anything like a warranty seems to me to be beyond question.

In my view, to prove a case of warranty, where the principal agreement is an agreement in connection with the sale of real estate, must always be a very difficult thing to do. It is a burden, which the plaintiff takes on, which is not easy to discharge, and, in my judgment, it requires very much more cogent evidence than that which I have in this case to enable such a claim to succeed. I think that the evidence in this case is quite insufficient to establish any warranty at all on any of the matters upon which reliance was placed. In that view of the case, it is unnecessary for me to go into the question as to whether Mr. Belton was agent of one party or of the other, although I may perhaps say that I have little doubt that he was, in fact, the agent of Mr. Lawrence. Therefore, I need not go into the other questions which have been raised in this case, because, on the claim as pleaded, the plaintiff company has, in my judgment, wholly failed to show any real evidence of the existence of the warranty upon which it relies and breach of warranty, which is its only cause of action. In those circumstances, it is unnecessary for me to say anything more about the matter, beyond saying that the action must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Marshall & Hicks Beach* (for the plaintiff company); *Turner & Co.*, agents for *W. B. D. Shackleton,* Bradford (for the defendant).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

THE "KAFIRISTAN."

[House of Lords (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **June 28, 29, July 1, 28, 1937.]**

Shipping—Salvage—Collision—Apportionment of blame—Salvage services by ship in same ownership as ship in collision—Remuneration.

The "Empress of Britain" collided with the "Kafiristan," blame being apportioned by agreement as to three-quarters to the "Empress of Britain" and one-quarter to the "Kafiristan." The "Kafiristan" was badly damaged, and salvage assistance was rendered by the "Beaverford." The owners of the "Beaverford" were also the owners of the "Empress of Britain." The owners of the "Beaverford" claimed salvage:—

Held: (i) the fact that the salving vessel belonged to the same owners as did the colliding ship did not in equity disentitle her from claiming the appropriate salvage remuneration. *Per* Lord Wright: the owner of the salving ship is dissociated from himself as owner of the wrongdoing ship.

(ii) in any event, the Lloyd's salvage agreement executed between the parties, which specifically provided for salvage remuneration in the event of success, removed any doubt that the owners of the salving ship were entitled to a salvage award.

Decision of Court of Appeal, [1937] 1 All E.R. 40, *and of* Bucknill, J., [1936] 3 All E.R. 563, *reversed.*

[EDITORIAL NOTE. The principle that no one can profit by his own wrong was thought to extend to this case, and so prevent a salving vessel in the same ownership as the colliding vessel from receiving a salvage award. The House of Lords have, however, here decided that the principle is wholly inapplicable in such a case; and further that the owners of the salving vessel in such a case were entitled under the Lloyd's salvage agreement to an award.

As to Disqualifications from Claiming Salvage, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 565, 566, para. 855; and for Cases, see DIGEST, Vol. 41, pp. 843, 844, Nos. 7055-7068.]

Cases referred to:

(1) *The Glengaber* (1872), L.R. 3 A. & E. 534; 41 Digest 843, *7059*; 41 L.J. Adm. 84; 27 L.T. 386.

(2) *The Minnehaha* (1861), 1 Lush. 335; 41 Digest 676, *5056*; 30 L.J.P.M. & A. 211; 4 L.T. 810.

(3) *The Capella* (*Cargo Ex*) (1867), L.R. 1 A. & E. 356; 41 Digest 850, *7133*; 16 L.T. 800.

(4) *Melanie* (*Owners*) v. *San Onofre* (*Owners*), [1925] A.C. 246; 41 Digest 850, *7132*; 94 L.J.P. 17; 132 L.T. 567.

(5) *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna*, [1926] A.C. 655; 41 Digest 802, *6624*; 95 L.J.P. 128; 135 L.T. 456.

(6) *Svensden* v. *Wallace* (1884), 13 Q.B.D. 69; 41 Digest 600, *4260*; 53 L.J.Q.B. 385; 50 L.T. 799; *affd.* (1885), 10 App. Cas. 404.

(7) *The Duc d'Aumale* (*No.* 2), [1904] P. 60; 41 Digest 837, *6990*; 73 L.J.P. 8; 89 L.T. 486.

(8) *The Glenfruin* (1885), 10 P.D. 103; 41 Digest 843, *7056*; 54 L.J.P. 49; 52 L.T. 769.

(9) *The Maréchal Suchet*, [1911] P. 1; 41 Digest 676, *5057*; 80 L.J.P. 51; 103 L.T. 848.

(10) *The Clan Sutherland*, [1918] P. 332; 41 Digest 878, *7564*; 88 L.J.P. 26.

Appeal from an order of the Court of Appeal (Greer, Slesser and Scott, L.JJ.), dated Dec. 16, 1936, and reported in [1937] 1 All E.R. 40, dismissing an appeal from a judgment given by Bucknill, J., on Nov. 12, 1936, in the Probate, Divorce and Admiralty Division, and reported in [1936] 3 All E.R. 563, disallowing a claim for salvage made by the Canadian Pacific Railway Co., the owners of the "Empress of Britain" and the "Beaverford." The facts and the arguments are set out in the judgment of Lord Wright.

H. U. Willink, K.C., *R. F. Hayward, K.C.*, and *Vere Hunt* for the appellants.

F. A. Sellers, K.C., and *J. V. Naisby* for the respondents.

Lord Atkin: My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Wright, and, as I entirely agree with it, I find it unnecessary to state in a different form the same reasons for reversing the decision in the court below. I will add only my personal opinion that the reasoning adopted in this case will require that careful consideration be given to the question of claims for salvage for services rendered by a vessel which is itself to blame. I wish, however, to make a few remarks on the effect of the Lloyd's salvage agreement on the claim in this action. It cannot be ignored, for the agreement alone gave any authority to the arbitrator and the umpire to make any award, and to the courts to determine the points of law raised by the umpire's award. When the agreement is examined, the terms appear to make it impossible for the defendants to contend that they are not liable to pay for salvage services, whatever may be the legal position if no agreement is made. The first stipulation is by the owner of the salving ship to use his best endeavours to salve the injured ship and her cargo. For this purpose, he is, by cl. 2, given a licence to use the vessel's gear. The services which he renders under this obligation are to be "rendered and accepted as salvage services upon the principle of no cure no pay." This obviously is intended to prevent any suggestion that they are not salvage services—e.g., that they are simply towage—and, I think, equally precludes the idea that they are not salvage services at all, or, if salvage services, are not to receive any remuneration as such, because the contractor's servants have been to blame for the collision. I asked counsel whether, in such circumstances as the present, the effect of his contention was that the salving owners were under an obligation to use their best endeavours to salve, for breach of which they were liable in damages, but that the other party to the agreement *ab initio* was at no time under any obligation to pay for the contractual services if successful. I think that he admitted reluctantly that this was so, and it leads to a result so fantastic as to seem to me impossible. As far as the agreement is concerned, at this stage, after the accident, the question of fault seems to be irrelevant. Is it possible to imagine the master of the injured vessel saying to the master of the proposed salvor, "I want you to agree to do your best to salve me. You may have to risk your own ship and cargo, and to deviate from your voyage and delay your adventure: but it is under-

stood that, if either you or any vessel of your owners is in any degree responsible for any damage, you will get nothing." The obvious result would be no agreement, no attempt at salvage, other than the ordinary assistance given from humane motives or sense of statutory duties under the Merchant Shipping Act. I think that the suggested defence has no
A place in a claim under an agreement such as this. I am also satisfied that to confirm such a rule as has found favour below would be seriously to impair the encouragement to vessels at sea to render salvage services, which has always been the foundation of the whole doctrine of salvage. I wish to add, in conclusion, that I find nothing in the agreement in its
B present form which in any way makes the master or crew parties to the submission, or gives any jurisdiction to the arbitrator to include any sum for them in his award. It may be a convenient practice that their claim should be considered by the arbitrator, but, unless there is a separate submission, any such award is not binding upon anyone, and
C it may be worth while considering whether the form of agreement should not be altered in this respect.

LORD WRIGHT: My Lords, this appeal raises an important question of the maritime law relating to salvage. It arises out of a collision which took place on June 16, 1935, in the Gulf of St. Lawrence, between
D the Canadian Pacific liner "Empress of Britain," owned by the appellants, and the steamship "Kafiristan," owned by the Hindustan Steamshipping Co., Ltd. The "Kafiristan" was so badly damaged as to require salvage assistance. The "Empress of Britain" stood by for about 6 hours, when the "Beaverford," a vessel also owned by the appellants, came
E up. Other vessels were approaching, including one belonging to the respondent owners of the "Kafiristan." But, at the request of the master of the "Kafiristan," the master of the "Beaverford" took the "Kafiristan" in tow for Sydney, Nova Scotia, and towed her stern first for about 100 miles, when a salvage vessel, the "Foundation
F Franklin," arrived, and duly completed the towage to Sydney. It is not disputed that the "Beaverford" performed services of such a nature as materially to contribute to the safety of the "Kafiristan," and, subject to the question of law to be discussed later, of such a nature as to entitle her to a salvage award.

G On July 13, 1935, Lloyd's standard form of salvage agreement was signed in this country by the appellants and respondents. Under this agreement, an arbitration was held before Mr. Carpmael, K.C., who was appointed by the committee of Lloyd's, in accordance with the agreement recited in his award, dated Feb. 4, 1936, which also recited that the
H appellants salved the "Kafiristan" and her cargo in accordance with the said agreement. When the arbitrator made his award, it had not been ascertained whether either or both vessels were to blame for the collision. The arbitrator was of opinion that, if the "Empress of Britain" were wholly or partly to blame for the collision, the appellants were not entitled to salvage as owners of the "Beaverford," but, if they

were free from blame, they were entitled to £1,850, together with £550 for expenses. Whether the "Empress of Britain" was to blame or not, he awarded to the master and crew of the "Beaverford" £600. By another award he held that the owners of the "Foundation Franklin" were entitled to £3,500.

There were appeals from both awards to Sir W. Norman Raeburn, K.C., A who made an award on July 1, 1936. By that time, it had been agreed that the "Empress of Britain" and the "Kafiristan" were both to blame, the "Empress of Britain" to the extent of 75 per cent., the "Kafiristan" to the extent of 25 per cent. The award recited, *inter alia*, that, as a result of the collision, the "Kafiristan" was so damaged B as to require salvage assistance, and that such assistance was rendered by the "Beaverford," under the agreement dated July 13, 1935, and that Sir W. Norman Raeburn had been appointed by the committee of Lloyd's, under cl. 8 of the agreement, as arbitrator in the appeals. The award, which was in the form of a special case for the opinion of the C court, proceeded to find that the salvage services rendered by the "Beaverford" were rendered under the agreement, and that the parties had settled between them that both vessels were to blame, in the proportions which I have set out above. It then stated that the question for the opinion of the court was whether the fact that the "Empress of D Britain" was partly to blame for the collision disentitled her owners, as owners of the "Beaverford," to a salvage award for the services rendered to the "Kafiristan." He awarded, subject to the opinion of the court, that they were not entitled to any salvage award, but awarded that the master and crew of the "Beaverford" were entitled to an award, E against the owners of the "Kafiristan" and her cargo, of £600. In the alternative, if the court should be of opinion that the owners of the "Beaverford" were entitled to a salvage award, then, in addition to the £600 awarded to the master and crew, he awarded to the appellants £1,850, with £550 for expenses. The award in favour of the master and F crew has not been disputed, and is not in issue in these proceedings.

The special case in due course was heard before BUCKNILL, J., sitting in the Admiralty Division, and he upheld the award. He based his conclusion mainly on the principle, which he held to apply, that no man could profit by his own wrong, and that the wrong, or negligence of which G the appellants had been guilty by their servants on the "Empress of Britain" prevented them from claiming any advantage from the salvage services which others of their servants had rendered from the "Beaverford." In effect he held that the law laid down by SIR ROBERT PHILLIMORE in *The Glengaber* (1) was bad law. He dismissed the contention H that the respondents, by entering into the Lloyd's salvage agreement, had waived their right to dispute salvage.

His judgment was affirmed on appeal by the Court of Appeal, who gave leave to appeal to this House, GREER, L.J., saying that he would welcome the assistance of the House of Lords. GREER, L.J., dismissed the appeal, solely, or at least principally, on the ground that he was bound by authority. He said that it did seem to him that a ship entirely at fault for a collision might properly be encouraged to render salvage services which would more than wipe out the fault which it had already committed. "So far from taking advantage of its own wrong, it is trying to set right that which it has done, which was wrong." *A fortiori* should this be so when the salving vessel is to blame only in a lesser degree. He thought the matter was concluded for him by authority binding on the Court of Appeal which compelled him to decide that the appellants, being owners both of the "Beaverford" and of the "Empress of Britain," could not claim for salvage services rendered by the former vessel, any more than they could have claimed for salvage services rendered by the latter. SLESSER, L.J., accepted the principle that the wrongdoer was disentitled to claim salvage, and held that its application was not affected by the fact that he was claiming salvage rendered through the instrumentality of another of his ships, which was not concerned in the actual collision. He thought that *The Glengaber* (1) was not an authority to be followed. SCOTT, L.J., was of the same opinion, though he thought that the decision was a hardship on the appellants, and that it might be in the general interest that the rule should be altered. From these judgments, this appeal came before your Lordships.

It is to be observed that the only reference in these judgments to the Lloyd's salvage agreement under which the salvage services were rendered, and in accordance with the terms of which the arbitration was held, is by BUCKNILL, J., in the passage I have referred to, in which he dismissed a contention based upon it. Your Lordships were told that, by some consent between the parties, no point based on the agreement was to be taken, and your Lordships were asked to consider the question as if the Lloyd's salvage agreement had never been signed. Your Lordships refused to deal with the appeal on this false and artificial basis. It is the duty of this House to decide actual questions, on the facts of the case which is brought before them. They ought not, whether the parties consent or not, to deal with what is in truth a hypothetical question, that is, a question arising, not on the true facts, but on an artificial and arbitrary selection of the facts. In the present case, the Lloyd's salvage agreement is an essential fact. As I have already said, the services were rendered under it, and the arbitration was held in accordance with its terms, as indeed the award recites. I shall, in the first place, proceed to set out its terms.

The contract was in fact executed in this country, about a month after the collision, by the appellants on the one hand and by the respondents on the other. There was, therefore, no possibility of treating it as an improvident bargain, extorted by the pressure of urgent necessity. There is indeed no suggestion that it is not a valid and binding contract. By cl. 1, the contractor (who would have been the master of the "Beaverford" if the contract had been executed on the spot) agreed to use his best endeavours to salve the "Kafiristan" and her cargo and take them into or other place to be thereafter agreed with the master, providing at his own risk all proper steam and other assistance and labour. The services were to be rendered and accepted as salvage services, on the principle of "no cure—no pay." No fixed sum of remuneration for the services was mentioned, but the amount was to be fixed by arbitration in London. It was provided that the contractor was to be entitled to make reasonable use of the vessel's gear, anchor, and cables, and other appurtenances, during and for the purpose of the operation, free of cost, but was not unnecessarily to abandon or sacrifice the same or any other of the property. Detailed provisions were set out relating to liens, to security, and to the conduct of arbitrations and appeals. The arbitration and appeal in the present case were duly conducted under those provisions. By cl. 13, it was further provided that the master entered into the agreement as agent for the vessel, and the cargo and the respective owners thereof, and bound each (but not the one for the other, or himself personally) to the due performance thereof. The parties to the arbitration and subsequent proceedings, including this appeal, were, accordingly, the owners of the "Beaverford" and the owners of the "Kafiristan" and her cargo. It was agreed that, if the agreement was executed after the salvage services had been rendered, its provisions were to apply *mutatis mutandis*.

The view which has so far prevailed, and which has been urged before your Lordships on behalf of the respondents, is that, according to the law of maritime salvage, the appellants cannot claim any remuneration, because, by their servants on the "Empress of Britain," they were responsible (at any rate in part) for the collision, and that to allow them salvage remuneration for the services rendered by them by means of the "Beaverford" would be to allow them to profit by their own wrong. It is said that the Lloyd's salvage agreement merely provides machinery, and expressly deals with the services as salvage services, and must, accordingly, be governed by the principle which, as just stated, is said to apply to questions of salvage services. The case, it was contended, is indistinguishable, so far as the claim of the shipowners is concerned, from that of a case where a ship, in whole or in part responsible for a collision, performs salvage services, but is held to be not entitled to any award for salvage remuneration. The principle in this latter case was said to have been established by authorities such as *The Minnehaha* (2) and *The Capella* (*Cargo Ex*) (3), and other authorities ever since acted upon. Where the salving-vessel, though belonging to the same owners as the vessel in whole or in part responsible for the collision, was innocent, and came up after the accident, the position, so it was contended, was the same except that the crew of the innocent vessel were not debarred, as were the crew of the vessel which had participated in the collision, from being awarded salvage. Hence, in the present case, the award made in the arbitration in favour of the master and crew of the

" Beaverford " was not disputed, but it was submitted that the appellants were not entitled to any salvage award.

The appellants claimed that these contentions were wrong, and that, both on authority and on principle, as well as under the terms of the Lloyd's salvage agreement, the alternative award of Sir W. Norman Raeburn in their favour, " if the court should be of opinion that the owners of the ' Beaverford ' are entitled to a salvage award," should be upheld. In my opinion, the claims of the appellants are well-founded. I shall consider the question, first, as one of principle, and then refer to the authorities, disregarding, for the present, the agreement.

There is here no dispute that the services rendered by the " Beaverford " were meritorious and contributed to the eventual safety of the " Kafiristan " and to that of her cargo. They were voluntary. There was no such complication as might arise in the case of a colliding vessel. As to that, I think it is clear law that the duty cast by the Merchant Shipping Acts on one of the two colliding vessels, to stand by and render assistance, does not in itself prevent even that vessel, if she renders assistance, from claiming salvage. I adopt the words of Lord Phillimore in *Melanie* (*Owners*) v. *San Onofre* (*Owners*) (4), at p. 262. It is also clear that the policy as to maritime law favours the grant of awards for meritorious salvage, in order to encourage the rendering of salvage services. This policy should particularly apply to the facts of this case, in which, when the " Beaverford " came up, other vessels were supposed to be coming up. If the view put forward by the respondents be correct, the master of the " Beaverford " might well have been tempted to say to himself that his vessel would be debarred from any reward if the " Empress of Britain " was to blame even in a comparatively small degree, and to leave the work to other salvors not subject to any such disability. This course at the least must involve delay while the other salvors came up, and this delay might have serious consequences. But the maritime law of salvage is based on principles of equity. There does not seem to be any reason in equity why the salved vessel (if I may adopt that sort of personification of the ship which, as Lord Sumner said in *Admiralty Comrs.* v. *Susquehanna* (*Owners*), *The Susquehanna* (5), at p. 664, is inveterate in Admiralty cases) should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as does the other colliding vessel. That fact seems to be irrelevant, so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame, in whole or in part, is taken into account. That consideration ought not, it would seem, to affect the evaluation of the salving vessel's services. It receives due effect at a later stage in the transaction. If the other colliding vessel is solely to blame, the owner of the salved vessel, which is blameless, will bring into his account of damages the whole sum awarded to the salving vessel for salvage. It may be that, in such a case, a salvage award in favour of the shipowners is superfluous, and need not be made, on the principle of circuity of action, but the responsibility for the collision is mostly ascertained after the salvage award is made, and, in any case, there may be questions of limitation of liability. Where, however, both colliding vessels are to blame, the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other, so as to ascertain the final balance of account. It is true that the owners of the other colliding vessel are in law responsible for the damages caused by the negligence of their servants, including the amount of any salvage awarded to the salving vessel which they also own, but the equities are best worked out by making the salvage award without regard to the fact of common ownership, leaving the incidence of what is awarded to depend on the relative proportions of blame.

Thus, in the present case, the amount of the award will be borne ultimately by the "Kafiristan" and her cargo to the extent of 25 per cent., and by the appellants to the extent of 75 per cent. This seems obviously a more equitable procedure than to refuse any award at all to the appellants for the services rendered by the "Beaverford." I do not feel that so inequitable a result can be justified by the rubric "that no man can profit by his own wrong," which indeed, in my opinion, is wholly inapplicable. The claim to salvage is not based on the fact that the "Empress of Britain" was guilty of negligent navigation. It is based on a separate fact, that the "Beaverford" rendered salvage services. It is for these meritorious services, and not for the negligence of the crew of the "Empress of Britain," that the appellants claim the right to have salvage awarded. They are not seeking to profit by their own wrong, for which, in the final account, they will make the appropriate compensation, by, among other things, bearing their proper share of the salvage award.

It is, however, said that, if the principle that no man can profit by his own wrong excludes a claim for salvage where the salving vessel is the colliding vessel, as was held in *The Capella* (*Cargo Ex*) (3) and other cases, the same principle should apply where the salving and the negligently colliding vessel belong to the same owner, because the wrong is committed by the person who salves, acting in either case by his servants. I shall assume that the principle there is established. I am doubtful of the logic or equity of it, but do not consider it necessary to express any final opinion about it here, because I do not think it applies logically to, or is proper to be extended to, the case where the salving vessel is innocent of, and wholly unconcerned in, the collision. It is, I think, in accordance with the ideas of maritime law to treat, in a case like this, for purposes of salvage, the vessels concerned as separate entities, and to disregard, at that stage, the aspect of common ownership, and the consequences of the rule of vicarious liability. Thus, the owner of the salving ship is dissociated from himself as owner of the wrongdoing ship. If the rule laid down in *The Capella* (*Cargo Ex*) (3) is at all sound, it is at any rate excluded where the ship which is the instrument of the salvage is a different ship from that which is the instrument of the negligent collision. It is, however, said that such a view would be contrary to the practice observed in these matters, and contrary to that acted upon in the present case by the experienced arbitrators, who decided the matter in accordance with the practice. I find it impossible to give weight to these contentions, for various reasons. In the first place, I have no evidence that cases in which the salving vessel and the negligent colliding vessel belong to the same owners are at all frequent, or capable of founding a practice. No doubt cases where the salving vessel is one of the colliding vessels are more common, and the rule which seems to be recognised there is extended to the present case. But, in any event, the practice of those experienced in maritime law, if it really exists, cannot change the law, any more than the practice of average adjusters: *Svensden* v. *Wallace* (6), at p. 85. The court must decide the question according to the requirements of justice and sound reasoning, and on the basis of such authority as there is to be found in decided cases and books of authority. The earlier decisions of this House give no guidance on the matter, which indeed does not seem to have come even before the Court of Appeal until this dispute. But there is direct authority in the Admiralty Court in support of the appellants' contention. In *The Glengaber* (1), the "Warrior" tug rendered salvage services to the "Glengaber," which had been put in peril by the negligence of another tug, the "Black Prince." There were common owners of the two tugs. Sir Robert Phillimore rejected the objection that salvage could not be awarded to the "Warrior," because some of her owners were also owners of the "Black Prince." He said, at p. 535:

> This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the "Warrior" who are not owners of the "Black Prince," and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief.

That was in 1872, and there is still no authority for the proposition which Sir Robert Phillimore rejected. On the contrary, the accuracy of the principle which he enunciated has, so far as I know, never been contested. Thus, in *The Duc d'Aumale* (*No.* 2) (7), Gorell Barnes, J., at p. 73, referred to *The Glengaber* (1) as being a case where, by improper navigation of a steam tug, a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug rendered assistance to the drifting vessel, and it was held that the owners of that steam tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Later, at p. 74, the judge observed:

> In the case of *The Glengaber* (1), the steam tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty.

These observations were *obiter dicta*. In *The Duc d'Aumale* (*No.* 2) (7), the claim was by owners of the tug which had been jointly responsible with the tow for causing the danger and by the master and crew of the tug. The claim of the tug owners was rejected, on the principle stated in *The Capella* (*Cargo Ex*) (3), and that of the master and crew on the ground that their negligence had caused the peril, the crew being identified with the negligent master, on grounds of public policy which I need not A here discuss, but which seem to me, as at present advised, to be of dubious soundness. There was in that case no question of an independent salving vessel, of the same ownership as the negligent vessel. The importance of the case is that GORELL BARNES, J., a most experienced Admiralty judge, treats *The Glengaber* (1) as good law, and as involving B a different principle, and to be distinguished, from the case of *The Capella* (*Cargo Ex*) (3). GORELL BARNES, J., also refers to *The Glenfruin* (8), and suggests that the view taken in that case by BUTT, J., differs from that of SIR ROBERT PHILLIMORE. In that case, salvage services were rendered to the "Glenfruin" and her cargo by another vessel, C the "Glenavon," which was in part owned by the same persons as those who were owners of the "Glenfruin." The danger which rendered the salvage necessary arose from the unseaworthiness of the "Glenfruin," for which her owners were liable to the cargo owners under the contract of carriage. BUTT, J., awarded salvage to the master and crew of the D "Glenavon," and also, *pro tanto*, to the part owner of the "Glenavon," who had no share in the ownership of the "Glenfruin." But the ground on which the judge refused salvage to the part owners of the "Glenavon," who were also part owners of the "Glenfruin," was that such part owners, under the bills of lading being liable to the cargo owners for the E damages :

> would be liable to reimburse the defendants any amount of salvage which I might award. To avoid what is termed "circuity of action" I must decline to make any award to those plaintiffs.

This view implies that, apart from circuity of action, the claim of the F "Glenavon" would have succeeded in full. The principle that salvage is not recoverable where the salving vessel is to blame for the collision is not based on avoiding circuity of action. Thus, in *The Capella* (*Cargo Ex*) (3), both vessels were to blame, and the damages would, in accordance with the rule before the Maritime Convention Act, 1911, be apportioned in equal parts. G *The Glenfruin* (8) is not, in my opinion, inconsistent with *The Glengaber* (1), nor are the analogous cases of towage contracts, where the common owner of the wrongdoing tug and of the salving tug would generally be liable to repay in damages the full amount of any salvage award, if made in his favour, and paid to him for the H services of the innocent salvor. Thus, in *The Maréchal Suchet* (9), tug owners were claiming awards for salvage services rendered by one of their tugs. The danger was caused by the unfitness and the negligence of that tug while towing the "Maréchal Suchet" under a towage contract. The claim was rejected, because the unfitness and negligence of that

tug constituted a breach of the towage contract. The plaintiff's counsel admitted that, if that were so, they could not claim salvage for the services of three other tugs, belonging to the plaintiffs, which had come up. I do not know the reason for that admission ; it may have been because the case was covered in principle by *The Glenfruin* (8). But
A in that case the masters and crew of the three innocent tugs were awarded salvage. So far as they were concerned, there was no question of circuity of action. If they were to be treated as entitled to salvage, because identified with the three innocent tugs on which they respectively served, it would seem to recognise that, if it were not for the question of breach
B of the towage contract, salvage could properly have been awarded in respect of these tugs, but for the fact that it would obviously have been futile to make any such award. It is only when the salving vessel is to blame for the collision that it seems that not only the members of the crew actually in fault, but also the whole crew, however meritorious
C their services, are debarred. I feel doubt about the equity or policy of so sweeping a rule, but it is not necessary to consider it here. The special case of theft by salvors in the course of salvage operations has often been discussed, as, for instance, in *The Clan Sutherland* (10), where salvors who had either stolen, or, by their remissness, failed to prevent
D their fellows from stealing, were held debarred from recovering salvage, except two lieutenants, who, though by want of proper supervision they had failed to prevent the thefts, were held not debarred altogether, and were given a reduced award in consideration of their very meritorious services.

E Your Lordships were asked to say that the principles laid down by SIR ROBERT PHILLIMORE in *The Glengaber* (1) were bad law. On the contrary, they are, in my judgment, sound in reason, and supported by authority. I may add that they are treated as good law in recognised works on maritime law, as, for example, in KENNEDY ON CIVIL SALVAGE,
F 3rd Edn., p. 92 ; MARSDEN'S COLLISIONS AT SEA, 10th Edn., p. 249 ; ROSCOE'S ADMIRALTY PRACTICE, 5th Edn., p. 141. I quote from the current editions, which do not, in this matter, differ from what the deceased authors wrote.

In my opinion, even if there had not been a Lloyd's salvage agree-
G ment executed between the parties, the salvage would have been claimable. But that agreement seems to me to put the matter beyond doubt. I have already observed that its validity is not, and could not be, contested. It specifically provides for remuneration as salvors in the event of success ; there is no reservation for the possibility that the "Empress
H of Britain" was in whole or in part to blame ; I see no ground for implying any such reservation. In my judgment, in view simply of the agreement, the condition propounded by Sir W. Norman Raeburn in para. 9 of his award, that "the owners of the 'Beaverford' are entitled to a salvage award," must be taken to be established, so that his alternative award, set out in that paragraph, should be upheld.

The appeal should, in my opinion, be allowed, the order of Bucknill, J., and of the Court of Appeal should be set aside, the award in the alternative should be upheld, and the appellants should have their costs of this appeal and their costs in the courts below.

Lord Maugham: My Lords, I am in complete agreement with the opinions of my noble and learned friends Lord Atkin and Lord Wright. It may not be superfluous to add a few words in relation to the "Conventions for the unification of certain rules of law respecting collisions and assistance and salvage at sea," signed at Brussels on Sept. 23, 1910. These conventions were signed on behalf of Great Britain and on behalf of nearly all the maritime countries of the world. Art. 8 of the convention relative to salvage contained this paragraph:

> The court may deprive the salvors of all remuneration, or may award a reduced remuneration, if it appears that the salvors have by their fault rendered the salvage or assistance necessary or have been guilty of theft, fraudulent concealment or other acts of fraud.

I think it useful to state that the proceedings prior to the signature of the conventions contain nothing to suggest that, according to maritime law as understood by countries other than our own, the fault of a ship leading or contributing to a collision *ipso facto* deprived the owners of the ship of a right to remuneration for salvage services.

Steps were taken to pass legislation here carrying into effect, so far as necessary, the convention agreements. The Maritime Conventions Act, 1911, contained a preamble referring to the fact that, at the Brussels Conference of the previous year, two conventions, dealing respectively with collisions between vessels and with salvage, were signed on behalf of His Majesty, and also stating that:

> it is desirable that such amendments should be made in the law relating to merchant shipping as will enable effect to be given to the conventions.

But by some mischance the Act, though it contains five important sections containing provisions as to collisions at sea, and two containing provisions as to salvage, omitted to contain anything dealing with the portion of art. 8 of the convention relating to salvage above quoted. Most of the other countries whose plenipotentiaries signed the conventions have passed the necessary legislation to give effect to the conventions, including that portion of art. 8, and it seems so desirable, as the conventions themselves show, that rules on these topics should be uniform that it may well be expedient to take an early opportunity of remedying this omission. If that had been done in the Act of 1911, this litigation, or the greater part of it, would have been unnecessary, for the circumstances of the case are far from suggesting any shadow of a ground, or any equitable principle, for depriving the owners of the "Kafiristan" of the award for salvage conditionally awarded to them by the arbitrator.

My Lords, I agree with the proposed motion.

Lord Thankerton and Lord Macmillan concurred.

Lord Atkin: My Lords, I would like to say that I hope the important suggestion made by my noble and learned friend LORD MAUGHAM will be considered by the competent authorities.

Appeal allowed with costs.

Solicitors: *William A. Crump & Son* (for the appellants); *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WAY *v.* LATILLA.

Considered. KOFI SUNKERSETTE OBU *v.* A. STRAUSS LD. [1951] A. C. 243

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **June 17, 18, 21, 22, July 28, 1937.**]

Master and Servant—Remuneration—Evidence of contract—Vagueness—Quantum meruit—Basis of assessment.

The appellant alleged that he had made an agreement with the respondent that the appellant should obtain and send to the respondent information relating to gold mines and concessions in West Africa, and that the appellant should introduce concessions for acquisition by the respondent, and that the respondent would protect the appellant's interests in respect of concessions acquired, and give to the appellant the customary, or a reasonable, share in the same, and should pay to the appellant a reasonable sum in respect of information and reports. The appellant claimed damages and other relief, on the ground that the respondent had broken the agreement, in that he failed to give to the appellant a share in respect of certain concessions obtained by the appellant, the profits on the sale whereof amounted to about £1,000,000. The appellant also contended that, if he was entitled to be paid by the respondent only upon *quantum meruit*, the court, in ascertaining the amount to be paid, was entitled, and bound, to have regard to such matters as the parties themselves considered reasonable and usual, namely, what profit was in fact made on the sale, and was not limited to fixing a fee. The respondent contended that there was no evidence of any contract, that there was no agreement sufficiently certain or definite to be enforceable, and that the amount of profit made on the re-sale was not a proper basis for assessing the amount due:—

HELD: (i) there was no concluded contract between the parties as to the amount of the share or interest that the appellant was to receive, and it was impossible for the court to complete the contract for them.

(ii) there was, however, a contract of employment between the parties, which clearly indicated that the work was not to be done gratuitously, and the appellant was therefore entitled to a reasonable remuneration on the implied contract to pay him a *quantum meruit.*

(iii) on the evidence of the parties themselves, the basis of remuneration by fee should be rejected.

(iv) in fixing remuneration for services, the court was entitled to pay regard to the previous conversation of the parties, and, in the circumstances, the appellant was entitled to the sum of £5,000 as a reasonable remuneration, calculated on the basis of some reasonable participation.

Decision in Scarisbrick v. *Parkinson* (2) *applied.*

Order of Court of Appeal set aside, and order of CHARLES, J., *varied.*

[EDITORIAL NOTE. Questions of remuneration for services of an unusual nature are often left in an indeterminate state by business men and their servants or agents; and this case, while not deciding any new law, sets out the opinions of the Law Lords upon the proper practice of the court in fixing such remuneration.

As to Remuneration, see HALSBURY, Hailsham Edn., Vol. 22, pp. 131, 132, para. 219; and for Cases, see DIGEST, Vol. 34, pp. 82-84, Nos. 601-623.]

Cases referred to:

(1) *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; Digest Supp.

(2) *Scarisbrick* v. *Parkinson* (1869), 20 L.T. 175; 12 Digest 166, *1214*.

Appeal from an order of the Court of Appeal, allowing the appeal A of the respondent from the judgment of Charles, J., whereby he awarded the appellant the sum of £30,060, and entering judgment for the appellant for the sum of £600 only. The facts and the arguments are set out in the opinion of Lord Atkin.

F. W. Beney for the appellant. B

D. N. Pritt, K.C., *J. W. Morris, K.C.*, and *Patrick Devlin* for the respondent.

Lord Atkin: My Lords, this is an appeal from an order of the Court of Appeal in an action brought by the appellant, Mr. Way, against the respondent, Mr. Latilla, for remuneration for services in connection with C the obtaining of gold-mining concessions in West Africa. The trial judge, Charles, J., had given judgment for the plaintiff for £30,060, with costs. The Court of Appeal reduced the judgment to £600, and, as £750 had been paid into court, ordered the plaintiff to pay the costs after the date of the payment into court. The trial occupied ten days, D and involved much oral evidence and the consideration of a good many letters and other documents. It appears, however, to be unnecessary, at this stage of the proceedings, to discuss the oral and written evidence in detail, for the dispute between the parties is easy to state, and, in my opinion, to decide. As far as oral testimony is concerned, no diffi- E culty arises, for the trial judge, after, as he says, a close observation of both Mr. Way and Mr. Latilla, came to the conclusion that in any point in which they differed he unhesitatingly rejected Mr. Latilla's evidence and accepted Mr. Way's. The Court of Appeal were not prepared to differ from this appraisement, though they seemed to think that the F judge was too severe in his comments when he stated that Mr. Latilla's evidence was prevaricating, shuffling, and, in some cases, patently untrue. They saw no reason to suppose that Mr. Latilla was not honestly intending to state that which he thought he remembered. It is not necessary to pronounce upon these varying estimates, but I feel bound G to say that, after studying the record of the formal evidence, and the correspondence, quite apart from the judge's personal observation of the witnesses, which must be of great weight, there appears to be ample material to support his considered opinion.

The material facts thus admitted and proved are that the plaintiff H at all material times was general manager of the Ariston mine, at Prestea, in Gold Coast Colony, owned by Gold Coast Explorers, Ltd., in which company the defendant, Mr. Latilla, was interested. In 1927, the company needed further capital, and Mr. Way was recalled home to advise. The company was reconstructed in that year, and the mine was acquired by Ariston Gold Mines, Ltd. Mr. Way was appointed consulting engineer and manager at a salary of £5,000 a year, with 3 per cent. of the net profits, and some further emoluments. In Sept., 1929, he returned to West Africa to resume his duties. While in England he had a discussion with Mr. Latilla as to the advantages of taking any further mines A concessions in the district of the Ariston mine. Mr. Way expressed the view that prospects were very favourable. Mr. Latilla was impressed. "Cannot we get hold of some of this country? It attracts me." Nothing was decided. Mr. Way said that no arrangement was made except that:

> B I was to share with him if there was anything to be made. . . . I think the expression that he used was that we could both make a bit if I was successful in obtaining any vacant ground of a suitable nature.

When Mr. Way returned to the mine, he was at first fully occupied with its affairs. He had written, on Dec. 30, 1927, as to a property called Anfargah, but had received no direct instruction about it. On Sept. 1, C 1928, however, he received a cable from Mr. Latilla, referring to Anfargah, and ending "use best endeavour peg for my account. I will protect your interest." Further telegrams followed. On Sept. 4 there was a telegram stating, "I want obtain concession such ground on strike as you think valuable please act quickly and cautiously." On Oct. 5 D another ran, "Please claim Bogosu for Ariston . . . please secure other concessions on the strike for my personal account: all parties know my intention and approve." On Oct. 8, Mr. Way writes:

> I am in no way raising the question of any interest you are prepared to let me have in this venture as in your first cablegram to me you stated you would protect E my interests and that promise is sufficient for me, and in consequence I am naturally very interested in what you intend doing.

No reply queries the construction which Mr. Way obviously puts upon Mr. Latilla's cable. On the contrary, on Nov. 29, Mr. Latilla writes:

> I feel that as a result of what you have done in securing the properties we may look forward to getting at least a fair share of the plums and rewards.

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Mr. Way at this time was negotiating with the native chiefs for the grant of concessions, and, on Dec. 22, 1928, he entered into an option agreement with the Chief of Himan, under which he secured the option for 3 years over 16 concessions. The terms are immaterial: they were G far from onerous to the option holder. The agreement is entered into by Mr. Way, as attorney for Mr. Latilla, and is signed by Mr. Way. On Nov. 28, a company, Gold Coast Selection Trust, Ltd., was formed, with a nominal capital of £70,000. Mr. Latilla was chairman, and a considerable number of shares was held by a small private company, F.P.H., H Ltd., the shares of which were all held by Mr. Latilla's wife. In the course of the trial, it was conceded by Mr. Latilla's counsel that no distinction need be made between this company and Mr. Latilla himself. On Feb. 26, 1929, Mr. Latilla writes that:

> we have given to a syndicate in consideration of their spending £5,000 on a preliminary examination the right to buy the two Bogosu concessions [two of the 16 concessions above referred to] for £100,000 in cash.

He then proceeds to say that he had given a Mr. Nicolls a letter of introduction to Mr. Way to assist him to make the preliminary examination for his principals:

> By the way these latter are friends and I want you please to understand that although nothing has yet been done as regards definition of interest (and I do not propose to do anything in this matter until you return home) that we shall be benefiting ourselves by rendering Mr. Nicholls any possible assistance.

On Mar. 15, Mr. Way replies: "I note what you say with regard to the matter of my interest but as you rightly put it this can all stand over until I return." In the summer of 1929, Mr. Way returned to England in connection with the affairs of the Ariston mine. The question of these concessions was discussed, and, at an interview of July 29, Mr. Latilla in terms promised Mr. Way a substantial interest in Gold Coast Selection Trust, Ltd., when things improved. This evidence is confirmed by a contemporaneous diary entry, and, though said by Mr. Latilla to be a lie, was believed by the trial judge. In Jan, 1930, F.P.H., Ltd., wrote to Gold Coast Selection Trust, Ltd., offering it, together with a large block of shares in Anfargah Gold Mines, Ltd., the option lease over the whole of one concession, and 80 per cent. interest in the option lease over all the other concessions obtained by Mr. Way:

> The acquisition of the interests in the above concessions are subject to a profit interest which is to be given to Mr. Way details of which are to be agreed.

The consideration was to be £37,500, which was afterwards appropriated as to £35,000 for the shares and as to £2,500 for the concessions. Finally, in Feb., 1933, F.P.H., Ltd., transferred to Gold Coast Selection Trust, Ltd., the remaining 20 per cent. in the concessions for £25,000. In Dec., 1931, the option lease had been renewed for a further 27 years, through the agency of Mr. Powell, the then manager of the Ariston mine. In Dec., 1933, 13 of the 16 concessions were taken up by Gold Coast Selection Trust, Ltd., under the option. In July, 1934, Gold Coast Selection Trust, Ltd., sold 8 of the concessions to the Marlu Gold Mining Area for the sum of £800,000, to be paid by the allotment of 3,200,000 shares of 5*s.* each in the purchasing company. The shares reached a substantial premium.

It is not necessary to discuss the various ways in which the property reached Gold Coast Selection Trust, Ltd., or to understand how the alleged consideration of the first 80 per cent. interest in the options was paid. It would involve a problem, not solved at the trial, of how Mr. Latilla and Gold Coast Selection Trust, Ltd., were apparently claiming, in 1929, that the Gold Coast company was the owner of the concessions, though it received and accepted an offer of them only in Feb., 1930. It is sufficient, for the present purpose, to say that Mr. Latilla, through his ownership of F.P.H., Ltd., derived very large profits from the transaction by which Gold Coast Selection Trust, Ltd., realised part of these concessions. The only further documents that need be referred to are a letter of Apr. 5, 1933, which Mr. Way's solicitor wrote to Mr. Latilla, claiming an interest in the concessions which they put at one-third of the value, and Mr. Latilla's answer, which is as follows:

> your client knows perfectly well that the measure of any interest he was to get was to be determined entirely by my view of the value of his services to the Ariston company and by the degree in which he fulfilled his frequent promises that the mines under his management would make good. It would serve no useful purpose here to recite what has happened but I record that I have no cause to be grateful to your client and am unwilling to recognise any moral claim he may consider he has. He has no legal claim.

All that need be said about the Ariston mine is that Mr. Way was dismissed from his appointment as general manager in Nov., 1930, and, making a claim for damages for wrongful dismissal, succeeded on all points, and obtained an award for several thousand pounds damages. Mr. Way's solicitors, in their reply, styled the suggested answer "fantastic," and so it appears to be. The question now is, what are Mr. Way's rights to remuneration? He originally claimed that there was a completed agreement to give him an interest in the concession, which, by custom, or on a reasonable basis, the court was asked to define as one-third. The trial judge accepted this view, holding that he was entitled to assess a reasonable share, and he accordingly awarded him £30,000, as being roughly 3 per cent. on the sum of about £1,000,000, which he took to represent Mr. Latilla's profits in the transaction. The Court of Appeal rejected this view, and, in my opinion, rightly. There certainly was no concluded contract between the parties as to the amount of the share or interest that Mr. Way was to receive, and it appears to me impossible for the court to complete the contract for them. If the parties had proceeded on the terms of a written contract, with a material clause that the remuneration was to be a percentage of the gross returns, but with the figure left blank, the court could not supply the figure. The judge relied upon the decision of this House in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1). But in that case this House was able to find, in the contract to give an option for the purchase of timber in a future year, an intention to be bound contractually, and all the elements necessary to form a concluded contract. There is no material in the present case upon which any court would decide what was the share which the parties must be taken to have agreed. But, while there is, therefore, no concluded contract as to the remuneration, it is plain that there existed between the parties a contract of employment under which Mr. Way was engaged to do work for Mr. Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr. Way, therefore, is entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit*. It is on the assessment of this amount that I believe all your Lordships differ from the Court of Appeal. The members of the court appear to have acted on the view that Mr. Way had given no evidence as to the value of his services, that the only evidence before the court was the evidence of one or two consulting mining engineers, in particular that of Colonel Lake, on whom the Court of Appeal relied, and that, following this evidence, the proper reward was a fee of 500 guineas. My Lords, this decision appears to me to ignore the real business position. Services of this kind are no doubt usually the subject of an express contract as to remuneration, which may take the form of a fee, but may also take the form of a commission share of profits, or share of proceeds calculated at a percentage, or on some other basis. In the present case, there was no question of fee between the parties from beginning to end. On the contrary, the parties had discussed remuneration on the footing of what may loosely be called a "participation," and nothing else. The reference is analogous to the well known distinction between salary and commission. There are many employments the remuneration of which is, by trade usage, invariably fixed on a commission basis. In such cases, if the amount of the commission has not been finally agreed, the *quantum meruit* would be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But, if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. If the discussion had ranged between 3 per cent. on the one side and 5 per cent. on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration on an entirely different basis, upon which, possibly, the services would never have been rendered at all. That, in fixing a salary basis, the court may pay regard to the previous conversation of the parties was decided by the Court of Exchequer in 1869, in *Scarisbrick* v. *Parkinson* (2), where the terms of an agreement, invalid under the Statute of Frauds, were held to be admissible as evidence in a *quantum meruit*. This seems to me to be good law, and to give effect to a principle which has been adopted regularly by the courts not only in fixing remuneration for services but also in fixing prices, sums due for use and occupation, and, indeed, in all cases where the court has to determine what is a reasonable reward for the consideration given by the claimant. As I have said, the rule applied in fixing the amount of the remuneration necessarily applies to the basis on which the amount is to be fixed. I have therefore no hesitation in saying that the basis of remuneration by fee should, in this case, on the evidence of the parties themselves, be rejected, and that Mr. Way is entitled to a sum to be calculated on the basis of some reasonable participation.

What this should be is a task primarily to be undertaken by the trial judge. He did make an alternative award, and arrived at the sum of £5,000. I see no reason to differ from this. It is true that there is evidence that Mr. Latilla made very large profits. On the other hand, this amount was very favourably affected by this country's financial policy in respect of gold, which was altered some time after the services were rendered. Mr. Way does not profess to have discovered the line of reef on which the concessions lay, and some of them at least were in respect of abandoned workings. These concessions had to be financed for some years, and other interests had to be satisfied. Mr. Way had no reason to contemplate even a participation based on a percentage A of profits. A transfer of a substantial number of shares would have been an adequate satisfaction of any contemplated obligation on Mr. Latilla's part. I think that the sum of £5,000 which the judge appears to have arrived at on consideration of all the necessary factors would be a reasonable remuneration in all the circumstances. I therefore B think that the judgment of the judge should be varied by entering judgment for the plaintiff for £5,000, instead of for £30,000. The plaintiff should have the costs of the action and in this House: there should be no costs in the Court of Appeal. The order of the Court of Appeal granting costs to Gold Coast Selection Trust, Ltd., has not been C appealed against. I desire to say that, in taxing that company's costs, it would not, in my opinion, be right to decide the amount it is to receive merely by treating it as one of two defendants. There can be few costs that have been properly incurred solely because of the addition of this defendant. In this connection I cannot refrain from expressing surprise D at the amount at which the costs of the Lawrence Pountney Syndicate, Ltd., were taxed, viz., £2,252 3*s*. The costs of any separate issue caused by joining this company can have been, relatively, only minute, and costs on this scale, I feel confident, can never have been contemplated by the judge. Unfortunately, there appears to be no remedy which E can be given by your Lordships' House. I am of opinion that this appeal should be allowed, on the terms I have mentioned.

LORD WRIGHT: My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend on the woolsack, and agree with it. I add a very few observations, out of respect to the F very careful judgments delivered in the Court of Appeal. On the main decision at which the Court of Appeal arrived in reversing the judge, I am in full agreement with the Lords Justices. There was, I think, no justification for making for the parties, as CHARLES, J., did, a contract which they did not make themselves. It is, however, clear, on the G evidence, that the work was done by the appellant and accepted by the respondent on the basis that some remuneration was to be paid to the appellant by the respondent. There was thus an implied promise by the respondent to pay on a *quantum meruit*, that is, to pay what the services were worth. My difference with the Court of Appeal turns H on a narrow issue, which is whether the *quantum meruit* should be determined on the footing of a fee as for professional services, or on some other footing. The Court of Appeal took the former view. I cannot, however, with respect, find, on the whole of the evidence in the case, and, in particular, on the discussions between the parties, any sufficient reason for accepting that view. The services of the appellant were, I

think, outside the range of his duties as mining engineer, and were those
of an agent for purchase, who suggests to his principal a transaction,
and negotiates and completes it for him. While it is not unknown that
such services should be remunerated by a fee if it is expressly or impliedly
so agreed, this is by no means necessarily, and would not generally be,
the case. The idea of such a fee being excluded, it follows that the A
question of the amount to which the appellant is entitled is left at large,
and the court must do the best it can to arrive at a figure which seems
to it fair and reasonable to both parties, on all the facts of the case,
One aspect of the facts to be considered is found in the communings of
the parties while the business was going on. Evidence of this nature B
is admissible to show what the parties had in mind, however indeterminately,
with regard to the basis of remuneration. On those facts, the
court may be able to infer, or attribute to the parties, an intention that
a certain basis of payment should apply. This evidence seems to me
to show quite clearly that the appellant was employed on the basis of C
receiving a remuneration depending on results. If he had been unsuccessful,
he would have been entitled to no more than his expenses, but the
respondent had led him to believe that, if the concessions he obtained
were valuable, his remuneration would be on the basis of some proportion
of their value. The realisation of that value was removed from D
the actual services by the lapse of time (during which large sums of
money were expended and adventured), and by many contingencies,
and therefore the proper proportion may be comparatively very small.
though the fruits of success were very large. The precise figure can
be only a rough estimate. If what the court fixes is either too small E
or too large, the fault must be ascribed to the parties in leaving this
important matter in so nebulous a state. But, forming the best judgment
I can, I agree with your Lordships that the figure to be awarded
to the appellant should be £5,000, which is what Charles, J., was
prepared to adopt if his judgment were reversed. F

Lord Thankerton, Lord Macmillan and Lord Maugham concurred.

Appeal allowed with costs, including costs of the action, but excluding costs in Court of Appeal.

Solicitors: *Edwin Coe & Calder Woods* (for the appellant); *Birkbeck,* G
Julius, Edwards & Co. (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

R. *v.* WISBECH, ISLE OF ELY, LICENSING JUSTICES, *Ex parte* PAYNE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Hilbery, JJ.), **July 26, 1937.**]

Licensing—Permitted hours—Extension—" Special requirements of the district "—Licensing Act, 1921 (*c.* 42), *s.* 1 (1).

Certain licensing justices made an order, under the Licensing Act, 1921, s. 1, directing that, during the months of June, July, and August, 1937, sect. 1 (1) of the Act of 1921 should have effect as though " eight and a half " were substituted for " eight " and " half-past ten at night " were substituted for " ten at night." The evidence before the justices was that the majority of the inhabitants, during the summer months in particular, were working in the fields until 10 p.m. in order to supply fresh fruit and vegetables for the markets on the following morning, and that, if the licensed houses in the division were closed at 10 p.m., unreasonable inconvenience was caused to those unable or unwilling to leave their work until that hour. The secretary of the Licensed Victuallers' Association, who gave evidence, said, in cross-examination, that he was asking for the extension because it was " more comfortable for the trade." The applicant sought to have the order quashed, on the ground that it was made without jurisdiction, in that there was no evidence before the justices of any " special requirements of the district " within the meaning of sect. 1 of the Act of 1921 :—

HELD : there was evidence of " special requirements of the district," upon which the justices were entitled to make the order, and there was no discrepancy between that which was comfortable for the trade and that which met the special requirements of the district.

[**EDITORIAL NOTE.** A previous statutory provision, sect. 55 of the 1910 Act, had allowed an extension of hours for persons attending a market or following a lawful trade, and the construction here placed upon the wider words in the 1921 Act is in accordance with the principle thus suggested.

AS TO PERMITTED HOURS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 103, 104, para. 247 ; and FOR CASES, see DIGEST, Supp., Intoxicating Liquors, Nos. 582*a*-582*c*.]

APPLICATION to make absolute a rule *nisi* for *certiorari* granted on Apr. 30, 1937, upon the application of John William Payne, an alderman of the Isle of Ely County Council, directed to the licensing justices of the county of the Isle of Ely petty sessional division of Wisbech, to show cause why an order made by them on Mar. 6, 1937, under the Licensing Act, 1921, s. 1, should not be quashed. The material facts are set out in the judgment of LORD HEWART, L.C.J.

Christmas Humphreys showed cause on behalf of the local justices.

R. P. Croom-Johnson, K.C., and *Gerald Gardiner* in support of the rule.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of *certiorari* to be directed to the licensing justices of the county of the Isle of Ely petty sessional division of Wisbech. The purpose of the rule, if it were successful, would be to quash an order made on Mar. 6, 1937, with regard to licensing premises in that district under the Licensing Act, 1921, s. 1 (1), so as to substitute " eight and a half " for " eight " and " half-past ten at night " for " ten at night " during the months of June, July, and August. The ground upon which it is alleged that that order was made without jurisdiction or in excess of jurisdiction is that there was, it is said, no evidence before the justices of any "special requirements of the district," within the meaning of sect. 1 (1), upon which the justices could exercise their discretion. That section of the Licensing Act, 1921, provides what the permitted hours on week days shall be; that is to say, it lays down a general rule. But that general rule is subject to a two-fold proviso, first of all with reference to the application of the provision within the metropolis, secondly, with regard to the application of the provision outside the metropolis. In the second case, which is the case here involved, the section provides that:

> the licensing justices for any licensing district outside the metropolis may by order, if satisfied that the special requirements of the district render it desirable, make, as respects their district, either or both of [two directions, which are there set out].

Now, it is quite obvious that the purpose of that enactment is to call in and rely upon the local justices, who, according to the Act, are to be satisfied that the special requirements of the district render the substitution of hours desirable. That, I think, is an essential part of the scheme of this legislation. There is a general rule, but that general rule is to be supplemented or corrected by elasticity, based upon the judgment of local justices with regard to the special requirements of the particular locality. It is said here that there was no evidence of anything which could properly be called "special requirements," but I am at a loss to see what better evidence there could have been. The matter is summed up, and, if I may say so, very carefully summed up, by the chairman of the licensing justices himself in this paragraph of his affidavit sworn on June 25. Alderman Southwell, who is the mayor of Wisbech and chairman of the licensing justices in the county of the Isle of Ely petty sessional division, says this:

> In deciding the issue before them they [the justices] appreciated the necessity of satisfying themselves that the special requirements of the district rendered it desirable to make the requested change. They found as a matter of fact that the livelihood of the majority of the inhabitants of our division is obtained by fruit growing and agriculture, and that during the summer months in particular, the said persons are kept working late in the fields, often as late as 10 p.m., in order to supply fresh fruit and vegetables for the markets on the following morning. They further found by a majority that if the licensed houses in the said division are closed at 10 p.m. unreasonable inconvenience during certain summer months is caused to those unable or unwilling to leave their work until that hour.

That is the account of the matter which is given by the chairman of the justices. There is appended to the affidavit of Mr. Payne something which is evidently not a shorthand note, but which is a brief note of the evidence which was heard. Some criticism has been directed to passages of the evidence as contained in that note. In my opinion, upon a fair view of this evidence, it amply bears out the conclusions expressed by the chairman of the justices. According to this note, the secretary of the Licensed Victuallers' Association for that district said, among other things, that the main means of livelihood was fruit-growing and agriculture, and that a grant of the application would be better for the

licensing trade, and that there was a public need for an extension of the permitted hours. He went on to say, according to this note, "I am asking because it is more comfortable for the trade." Some stress has been laid upon that particular answer in cross-examination, but it is quite easy to perceive that the form of that answer may be due to the
A form of the question. The question may very well have been: "Why are you, the secretary of the Licensed Victuallers' Association, taking such a conspicuous interest in this matter?" and his answer is: "I am asking because it is more comfortable for the trade." But, indeed, I see no discrepancy between that which is comfortable for the trade
B and that which answers the public requirements. But his was not the only evidence. A retired farmer of the neighbourhood gave evidence, and, amongst other things, he said this:

> I have mixed with big employers of labour. I have been in this district about 45 years. The principal trade is farming and fruit-growing. It is not so easy to get a drink at 10. If the extension were granted it would be better for them.

C In other words, here is a request for an alteration of hours based upon the habits of the people, which habits in their turn depend upon the nature of their main livelihood. If considerations of that kind cannot lead sensible justices to come to the conclusion that there are "special
D requirements," I do not know what can. Therefore, I am clearly of opinion that this rule ought to be discharged.

DU PARCQ, J.: I am of the same opinion, and for the same reasons.

HILBERY, J.: And I.

Rule discharged, with costs.

E Solicitors: *Godden, Holme & Ward*, agents for *Mellows & Sons*, Peterborough (for the local justices); *Metcalfe, Copeman & Pettefar* (for the applicant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

F

VICTOR WESTON (FABRICS), LTD. v. MORGENSTERNS (A FIRM).

[COURT OF APPEAL (Greer, Slesser, and Scott, L.JJ.), **July 26, 27, 1937.**]

G *Bankruptcy—Deed of arrangement—Assent—Dealing with trustee—Estoppel—Action for debt.*

The defendants executed a deed of arrangement for the benefit of their creditors. The trustee under the deed sent a circular letter to all the defendants' creditors, announcing the deed, and undertaking to pay for goods ordered for current purposes. A statement of account was also asked for. The plaintiff company, which was a creditor, duly
H sent its account, and from time to time supplied to the trustee, and received payment for, further goods. In an action for the balance of the price of goods sold to the defendants before the deed of arrangement, the judge held that the plaintiff company by its conduct was bound by the deed of arrangement, and was estopped, not only from relying upon the deed as an act of bankruptcy, but also from bringing the action:—

HELD: the defendants could not rely upon an estoppel, but the plaintiff company, by its conduct, had assented to the deed of arrangement, and, therefore, could not succeed in the action.

Decision of Finlay, J., [1937] 2 All E.R. 260, *affirmed on other grounds.*

[EDITORIAL NOTE. In affirming the decision of Finlay, J., in this case the Court of Appeal have taken a slightly different view of the effect of the facts of the case. Finlay, J., held that the creditors were estopped from bringing an action upon their claim, whereas the Court of Appeal have held that the true view is that the acts of the creditors in fact amounted to an assent to the deed of arrangement.

As to Assent to Deed of Arrangement, see HALSBURY, Hailsham Edn., Vol. 2, pp. 443-445, paras. 606-608 ; and for Cases, see DIGEST, Vol. 4, pp. 127-130, Nos. 1161-1189.]

Cases referred to :

(1) *Re Stray, Ex p. Stray* (1867), 2 Ch. App. 374 ; 4 Digest 128, *1178* ; 36 L.J. Bcy. 7 ; 16 L.T. 250.

(2) *Re Brindley, Ex p. Taylor, Sons & Co.*, [1906] 1 K.B. 377 ; 4 Digest 129, *1182* ; 75 L.J.K.B. 46.

(3) *Re Mills, Ex p. Mills*, [1906] 1 K.B. 389 ; 4 Digest 127, *1167* ; 94 L.T. 41.

(4) *Re Sunderland*, [1911] 2 K.B. 658 ; 4 Digest 128, *1179* ; 105 L.T. 233.

(5) *Re Michael, Ex p. Michael* (1891), 8 Morr. 305 ; 4 Digest 130, *1189*.

Appeal from a decision of Finlay, J., dated Mar. 9, 1937, and reported in [1937] 2 All E.R. 260.

K. Greer Jackson for the appellant company.

Gerald Gardiner for the respondents.

Greer Jackson : Admittedly the plaintiff company cannot rely upon the deed of arrangement as an act of bankruptcy, but it is submitted that it can sue on a debt outside the deed. The court must decide the intention of the parties ; the plaintiff company never assented to the deed. [Counsel referred to *Re Stray, Ex p. Stray* (1), *Re Brindley, Ex p. Taylor, Sons & Co.* (2), *Re Mills, Ex p. Mills* (3), *Re Sunderland* (4), and *Re Michael, Ex p. Michael* (5).] The defendants cannot raise the point of estoppel, because they were not parties to it—they were neither trustees nor creditors. The onus is on the defendants to show that the plaintiffs did assent.

Gardiner was not called on by the court.

Greer, L.J. : This is an action by Victor Weston (Fabrics), Ltd., for the price of goods sold and delivered to Mr. James Morgenstern and Mr. Max Morgenstern, trading as Morgensterns. The only question to be decided is a question of fact, and, notwithstanding the able and interesting argument to which we have listened from Mr. Greer Jackson, I have come to the conclusion that the decision of Finlay, J., was right, but I am not satisfied that he was right in putting it upon the ground of estoppel. He was, however, right in the result, on the ground that the creditor had assented to the deed and was willing to accept a contribution from the estate by the trustee under the deed. The appellant company received a letter on Dec. 21 in these terms :

> We beg to acquaint you that with the concurrence of the principal trade creditors of Mr. James Morgenstern and Mr. Max Morgenstern of No. 26, High Street, and No. 60, Deansgate, Manchester, silk and woollen merchants, trading as Morgensterns, we are preparing a statement of their affairs to be submitted to you at the earliest opportunity. For the protection of the trade and to ensure the continuity

of the business, which is an old-established one, pending a scheme to be placed before the creditors, a deed of assignment has, with the approval of the principal creditors, been taken to our Mr. Miles. Any orders for goods required for current purposes will be countersigned by or on behalf of the trustee, who will accept responsibility for payment, if so signed, but not otherwise. Kindly forward to us a statement of your account as soon as possible.

A Then a statement of account was forwarded, showing a balance of £136 8*s*. 4*d*. due to the appellant company. In these circumstances, the question arises as to whether, by sending in an account, the appellant company, as a creditor, was not assenting to the appointment of the trustee and to the distribution of the estate by the trustee. If the company had signed the document, it would quite clearly have been B bound, after its signature, to accept a dividend in satisfaction of its claim. It must be remembered that, under the old rule, the payment of a lesser sum would not in law be a sufficient consideration for a debt for a larger amount. As an exception to that rule, the courts adopted the view that, where creditors assent to a deed, that rule with regard C to consideration disappears, and there is good consideration in the assent of the creditors, if they have assented to the deed. I cannot understand the acts of the appellant company as meaning other than this: "I know you are, as you say, appointed trustee. I know you are preparing a statement of affairs; I know you want to include my debt in D that statement of affairs, and I therefore send to you my account, in order that you may deal with it as trustee, as you say." The question of consideration or no consideration does not really enter into it, because, by assenting to a deed of assignment, a creditor is not making a contract with the trustee, he is making a contract for the assistance of himself E and the other creditors who are also assenting to the deed.

I think that the judge was misled by some observations that were made by the courts when referring to the question of estoppel, but the reference to estoppel refers only to the question of whether the creditors are estopped from relying upon their claim. It is quite true that, in the F case of *Re Stray, Ex p. Stray* (1), LORD CAIRNS, L.J., regards the question as to whether there might not be an assent which would prevent the use of the document as an act of bankruptcy, but would not prevent the creditor from relying upon his claim. But the facts are different from those of the present case. In my judgment, the true view of the facts G of this case is that the creditors have said, in effect: "We have no objection to the deed of assignment which you have mentioned in your letter, and are quite willing to go in with the other creditors. We assent to it and send the amount of our debt; therefore, we will expect to receive any dividend that is distributed to the creditors." For that reason, and H not on any ground of estoppel, I think that this appeal fails, and that the judgment of the judge was right.

SLESSER, L.J.: I am of the same opinion. I also disagree with the reasons given by the judge in his judgment, and I therefore think it necessary to add a few words. This is an action brought against the firm of Morgensterns, who admittedly have ordered goods in respect of which the action has been brought, and, unless the particular defence relied upon here is made out, they are liable to the plaintiff company for the price of those goods. In my view, as indicated by Scott, L.J., in the course of the arguments, the sole question is whether the claim of the plaintiff company has been assigned to the trustee, and whether that has precluded the plaintiff company from suing the defendants. I see no real ground in such a case for any question of estoppel. The cases to which we have been referred, *Re Stray, Ex p. Stray* (1), *Re Brindley, Ex p. Taylor, Sons & Co.* (2), and *Re Mills, Ex p. Mills* (3), are dealing with a different subject matter really. No representations have been here made to the defendants, Morgensterns, which, in my view, raise any question of estoppel at all. But I agree respectfully with Greer, L.J., that, for the reasons which he stated, the letter of Dec. 21 is to be regarded, in its literal and in its natural meaning, as passing between commercial men, as an acquiescence in the deed of assignment, and the sending of an account for the claim of the plaintiff company to be dealt with under the deed of assignment, along with the other creditors, is to be regarded as a freeing of the hands of the principal debtor, and an accord and satisfaction, on which he, the principal debtor, can rely.

But it is said that, on the question whether the creditors can recover against the debtor, the relation of the trustee comes in only in order to find out whether or not Morgensterns are still liable. I think that this letter, followed by the sending in of the account, must be taken to have the effect—passing between commercial men—of meaning that the creditors are willing to accept the position which has been notified to them by the trustee, that, with the concurrence of the principal creditors, a statement of affairs would be submitted, and that not only the principal creditors, but also the plaintiff company in this case, were to receive that statement. The letter goes on "For the protection of the estate and to ensure the continuity of the business," and so on, "a deed of assignment has been taken." Then there finally follows a request to send in the statement of account, and that is sent in without any reservation of any kind at all. The appellant company did not indicate that it was not sending it in in relation to the situation which had been pointed out to it by the trustee. For myself, I do not rely at all on the fact that the trustee offers to accept responsibility for payment for any further goods for current purposes, for which he countersigns, because that seems to be neutral in itself, and is an offer which might well have been made to someone in trade relations with Morgensterns who was not a creditor at all. The remainder of the letter, I think, constitutes an invitation, in other words, an accord and satisfaction of the claim.

Scott, L.J.: I agree with the judgments which have been delivered. I do not think that this is a case in which the legal principle of estoppel plays any part at all. Where there is a breach of a contract, so that a cause of action vests in a party, there is accord and satisfaction, in popular parlance. It is easy to say that a party is estopped from taking any further proceedings in his cause of action. The legal meaning of the word "estopped" is the legal answer to a claim in a case in which there is the old defence of accord and satisfaction, and nothing else. Of A course I agree with counsel for the appellant company here that the onus of proof, of satisfying the court that there was accord and satisfaction, is entirely on the defendants, and, if it is established, then it is a good defence. In LEAKE ON CONTRACTS, 8th Edn., p. 679, there is this paragraph :

> B A right of action for a breach of contract cannot be discharged by any performance or tender without the consent and acceptance of the promisee ; for the promisee after breach is entitled to damages or compensation . . . and is not bound to accept any other satisfaction of his legal right. But he may agree to accept satisfaction ; and an agreement to that effect, accompanied by the delivery or performance of what is so agreed upon, discharges his right of action. This mode of discharge is called in technical language an accord and satisfaction.

C At the top of p. 680, one finds this : "Accord and satisfaction may be supported by any legal consideration agreed upon by the parties." On p. 681, there is this paragraph : "Consideration for the accord may be a new contract which is made and accepted in satisfaction." At p. 682, there is this :

> D Upon this principle a composition between debtor and creditor operates in satisfaction of the debts, and affords an answer to an action by one of the creditors upon the original liability ; for such an agreement there is a good consideration to each creditor, namely, the undertaking by the other compromising creditors to give up a part of their claim.

That is exactly what GREER, L.J., said in his judgment in this case. E These passages, I think, accurately state the law, and the only question is whether there was accord and satisfaction in that sense. I entirely agree with what GREER and SLESSER, L.JJ., have said as to the true interpretation of the correspondence by the trustee, appointed by the principal creditors, which correspondence began with the letter of F Dec. 21, and the answer of the plaintiff company in the action, in its covering letter of Dec. 23. This counsel for the appellant company read to us, but it was not before the judge below, but its statement of Dec. 23 was before the judge, setting forth a statement of its account and a statement of the indebtedness of the defendants. I can treat the G answer to the trustee's letter only as an unqualified acceptance of the invitation extended by that letter, and, in my view, that invitation was this, and nothing else, "Will you come into the deed with the other creditors ? If so, please send in your statement of account." For these reasons, I think that there was the accord which the law requires, and H that there was the satisfaction by the trustee's silent acceptance of the company's statement of account as an assenting creditor. When the meeting of the principal creditors, to which the trustee referred in this letter, took place two days later, he would have been in a position to report, "Victor Weston (Fabrics), Ltd., have come into the deed." In my view, that was a satisfaction of the company's right of action in this case. I therefore agree that the judgment of the judge was right in its result.

Appeal dismissed with costs.

Solicitors: *Henry Hilbery & Son* (for the appellant company); *Wigram & Co.* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

Re OSSEMSLEY ESTATES, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 12, 1937.**]

Sale of Land—Conditions of sale—Misleading condition—Land charged with annuity—Time for answer to requisition—Waiver—Law Society's General Conditions of Sale, cll. 9 (4), 31.

The real estate of a testator was by his will subjected to a yearly perpetual rentcharge of £300. Upon the sale of part of the land, thirty years before the present proceedings, part of the purchase money had been paid into court, and this money with certain securities formed a fund in court sufficient to provide for the annuity. Upon the former sale, the land then sold had been declared by the court to be free from the annuity, but no application and no declaration had been made in respect of the testator's other real estate. The land now contracted to be sold remained, therefore, subject to the rentcharge, but could at any time be freed from it by an application to the court. These lands were identified as the blue and the green land. The blue land was made the subject of a special condition, stating that it was "at one time subject to" the rentcharge, but that the purchaser should accept the fund in court as a full and sufficient indemnity. The green land was not stated to be subject to the rentcharge. In the course of the investigation of title, it was discovered that the green land was also subject to the rentcharge. The purchaser then objected that the blue and green lands were still subject to the rentcharge, and contended that the fund did not provide an indemnity. No objection was at this time taken to the fact that the green land had not been mentioned in the special condition. The vendor replied on May 19, 1936, that the position had been fully explained at the time the agreement for sale was entered into, and that the purchaser was bound by the special condition, which was the same as that under which the vendor had purchased. No reply to this answer of the vendor was made until July 14, when the purchaser stated that he had been advised by counsel that the special condition was a misleading one, and intended to take out the present summons. The present summons sought a declaration that the purchaser was entitled to compensation in respect of the fact that the blue land and the green land were still subject to the rentcharge, and that there was no such indemnity as the special condition represented. The vendor relied upon the incorporation of the Law Society's General Conditions, which required an answer to an objection within 7 days, and further contended that, although the rentcharge was still in fact in existence, the fund in court provided in effect a full indemnity, and, by a proper application to the court, the land could at any time be freed from the rentcharge:—

Held: as to the green land there was a misstatement within cl. 31 of the Law Society's General Conditions; but, a complete abstract having been then delivered, the time for a further observation on the vendor's reply of May 19 was, under cl. 9 (4) of the Conditions, 7 days after the delivery thereof, and the purchaser's reply on July 14 was out of time. The reply of May 19 must therefore be considered as satisfactory and barred a claim to compensation.

Decision of CLAUSON, J., [1937] 1 All E.R. 782, *affirmed.*

[**EDITORIAL NOTE.** The judgment in this case is of great interest to conveyancers as it construes the usual condition limiting the time for observations on the replies to requisitions. If as a result of a requisition a supplementary abstract has to be delivered, a question raised upon the supplementary abstract is an original requisition, and the series of limitations for requisitions and answers and objections starts again from the delivery of the further abstract. Upon the question of the misleading condition the Court of Appeal are for all practical purposes in agreement with the court below.

AS TO REQUISITIONS, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 355, 356, para. 603; and FOR CASES, see DIGEST, Vol. 40, pp. 86-89, Nos. 664-694.

AS TO MISLEADING CONDITIONS, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 318, para. 537; and FOR CASES, see DIGEST, Vol. 40, pp. 71-73, Nos. 553-567.]

APPEAL from a decision of CLAUSON, J., dated Jan. 28, 1937, and reported in [1937] 1 All E.R. 782. The facts are set out in the judgment of SIR WILFRID GREENE, M.R.

M. R. C. Overton for the appellant company.

H. O. Danckwerts for the respondent company.

SIR WILFRID GREENE, M.R.: This appeal raises a short but rather unusual question as between vendor and purchaser. By a contract in writing dated Feb. 24, 1936, the respondent company, the vendor, agreed to sell to the applicant company, the purchaser, for the sum of £34,000, a property described in the first schedule to the agreement. By cl. 2 of the contract, the Law Society's General Conditions, 1934, so far as applicable to a sale by private treaty and not inconsistent with the terms of the written contract, were to be incorporated. The property fell into two divisions, two of those divisions being described respectively in the second and third parts of the schedule and edged respectively blue and green on the plan, and the contract contained a clause relating to the title to those lands, which I will call the blue and green lands, which was to begin with a conveyance dated June 15, 1906. Clause 9 of the contract provided that the property described in the second part of the first schedule—that is to say, the blue land—was at one time subject to a yearly rentcharge of £300 charged thereon by a will and codicil there mentioned in favour of Miss Florence Jane Brett and her issue, but with the benefit of the indemnity against such rentcharge provided by a fund in court to the credit of a certain action of *Re Brett, Brett* v. *Le Marchant* (1880, B. No. 2361), and the clause provided that:

> The purchasers shall accept such fund as a full and sufficient indemnity against the said rentcharge and shall not require the property sold to be released therefrom or any further or other indemnity in respect thereof or make any objection or requisition whatsoever in respect of the said rentcharge or the fund in court.

In passing, it is to be noted that that provision applies only to the blue land. The importance of that circumstance will appear when it is realised that the rentcharge in question in fact affected not merely the blue but also the green land.

The General Conditions which were incorporated in the contract contain two clauses which are relevant to this matter. The first is cl. 9, dealing with requisitions. That provides that a purchaser shall, within 14 days after the delivery of the abstract—I am only summarising it—send a written statement of objections and requisitions on the title, the abstract, or the contract—"the contract"—and this is perhaps not unimportant—"as respects matters not thereby specifically provided for"—and subject thereto, the title shall be deemed to be accepted. Then it provides that:

> (2) All objections and requisitions, not included in any statement sent within the time aforesaid . . . shall be deemed to have been waived. (3) The abstract, or the said particulars and information, though in fact imperfect, shall be deemed perfect, except for the purpose of any objections or requisitions which could not have been taken or made on the information therein contained. (4) An answer to any objection or requisition shall be replied to, in writing, . . . within 7 days after the day of the delivery thereof, and if not so replied to shall be considered satisfactory.

Then there is the usual clause making time the essence of that condition. Then cl. 31 provides:

> (1) Measurements and quantities, if substantially correct, shall not be the subject of compensation nor shall any compensation be payable in respect of any mistake in a sale plan, furnished for the purposes of identity, but nothing in this paragraph shall prevent compensation being paid or allowed under the next paragraph where an incorrect statement, error or omission, as to measurements, quantities or otherwise, materially affects the description of the property. (2) Subject as aforesaid, any error, omission, or misstatement in the contract, which may be discovered before completion, though materially affecting the description of the property, shall not annul the sale, or entitle a purchaser to be discharged from his purchase, but (if pointed out before completion and not otherwise) compensation shall be made to or by a purchaser, as the case may require.

Then it provides for the manner of settling compensation, and it provides for the case where the property differs substantially from that agreed to be sold and purchased, and where compensation cannot be assessed. I need not read those provisions.

When the abstract of title was delivered, an examination of it showed that the documents as abstracted did not appear to comprise the green land, but they did disclose the existence of the rentcharge, and whether or not the rentcharge affected the green land was a matter which, at that moment of time, could not properly be discovered. Accordingly, the purchaser sent in a requisition on Mar. 31, 1936, in which, in substance, he complained that the abstracted conveyance of June 15, 1936, which was the document with which the title of the blue and green land was, according to the contract, to begin, was not a good root of title, and he required an abstract of the earlier title, commencing with a good root, or good roots, of title. What transpired on that was that a further abstract was sent, and from the abstracted documents it appeared that the green land was subject to the rentcharge, and that the fund in court referred to in cl. 2 of the contract, which I have read, was not, as the purchaser then claimed, operative as an indemnity against the rentcharge. Having received that supplemental abstract, the purchaser then proceeded to make a requisition, and his requisition was to this effect: "cl. 9 of the contract states that the property edged blue and green on the contract map was at one time subject to a yearly rentcharge of £300, but with the benefit of an indemnity"; then he quotes the contract. He goes on:

> The supplemental abstract now delivered shows that this part of the property purchased still is subject to this yearly rentcharge and that the fund in court referred to does not provide any indemnity against the same so far as this part of the property purchased is concerned.

Then he refers to the two orders which are referred to in the abstract, and he goes on:

> The vendors are accordingly requested to procure the necessary order exonerating this part of the property purchased from this rentcharge under the Law of Property Act, 1925, s. 50 (3), or alternatively to allow the purchasers compensation equivalent to the expense of obtaining such an order (including any sum which may have to be paid into court or otherwise for obtaining the same) and if so required to concur with the purchaser in obtaining the same.

In passing, I wish to call attention to the fact that that requisition contains an inaccurate statement, namely, that cl. 9 of the contract stated that both the blue and the green property were subject to the rentcharge, whereas, in point of fact, the only property stated to be subject to the rentcharge was the blue property.

The reply to that requisition was as follows:

> The vendors' predecessors in title had to purchase subject to this condition and the purchaser was aware of this before the contract was signed. The contract provides that the purchaser shall accept the fund in court as a full and sufficient indemnity against the rentcharge and shall not require the property sold to be released therefrom nor any further indemnity in respect thereof or make any requisition in respect of the rentcharge or the fund in court.

That reply was dated May 19, 1936. Nothing further was done until, having asked for a draft conveyance on July 13, the vendor received a letter, dated July 14, from the purchaser's solicitors, stating that the only outstanding point on the requisition was with regard to requisition No. 11, which was followed by the requisition No. 5, which I have just read, and then stating that they were advised that they were entitled to compensation, and that they would take out a vendor and purchaser summons on the question of the right to compensation unless the vendor was prepared to make a statement under sect. 50 of the Law of Property Act in order to exonerate the land from the rentcharge. The vendor did not accede to that view, and, in consequence, the present vendor and purchaser summons was taken out. The summons asked for compensation in respect of two matters, one was in respect of the blue land and one in respect of the green. In respect of the blue land, which is specifically mentioned in the contract as being subject to the rentcharge, compensation was asked for on the basis that the contract was misleading, and that it suggested, so it was said, that the blue land was no longer subject to the rentcharge, and, further, it was misleading in view of the fact, so it was said, that the purchaser would not get by means of the fund in court such an indemnity against the rentcharge as the contract promised to him. I can get rid of that at once, because the judge held that the purchaser was not in fact misled as to the rent-

charge still affecting the property, as it technically, of course, still did, and he also held that there was an effective indemnity against the fund in court, or the purchaser would get it, because he was in a position, if I understand the judgment aright, to put a stop order on the fund in court. This fund had been set aside in some administration proceedings in connection with and with reference to this particular rentcharge. A
The question whether or not the judge was right in thinking that an effective indemnity could be obtained through the machinery of a stop order has not been discussed before us, because, on behalf of the purchaser, the appellant, Mr. Overton accepted the position that, under sect. 50 (3), the purchaser was in a position to get what really would B
be an effective indemnity against the rentcharge, having regard to this fund in court, and he was not prepared to dispute the correctness of the judge's finding on that branch of the case. The appeal, accordingly, is limited to the matter of the green land.

Now, with regard to the green land, several points arise. First of all, C
it is said that there was, within cl. 31 of the Law Society's General Conditions of Sale, an error, omission, or misstatement in the contract, and that the contract did not state that the green land was subject to this rentcharge. It is, I think, unnecessary for us to decide whether or not the word "omission" in that clause is to be confined to matters D
in respect of which the vendor was under a duty to make a disclosure in the contract. If a vendor is contracting to sell land, his obligation, of course, is to make a good title to the land free from any encumbrance. If there is an encumbrance, his contractual obligation is, by some means or other, to get rid of it, so that the purchaser may have a clean title. E
In the present case, of course, the vendor was not intending to get rid of this defect in the title—namely, the rentcharge—because his intention was to sell subject to that rentcharge and, therefore, he contemplated that the purchaser would be getting land subject to the rentcharge. Now, on that basis, there is, I think, a good deal to be said for the view F
that the omission to refer in the contract to a rentcharge, which the vendor was intending should continue to affect the land in the purchaser's hands, would be an omission within the meaning of this clause; but it is not necessary actually to decide that matter, because, in my opinion, omission to refer to the rentcharge as affecting the green land G
was a misstatement on the true construction of this contract, because what the contract says is that the blue land is subject to the rentcharge. It appears to me that, having said that, and not having made the statement complete, as it should have done—that both the blue and the green land were subject to the rentcharge—the statement was so incomplete H
that it was a misstatement, and therefore I think that the case is one where, *prima facie*, under cl. 31, the purchaser would be entitled to compensation, on the ground that there was a misstatement in the contract, and, of course, that mistake was discovered before completion.

But the matter does not rest there, because it is said that, under cl. 9 of the contract, the purchaser, in the events which have happened, is precluded now from claiming compensation, because, by reason of his conduct in relation to the requisitions and the replies thereto, by cl. 9 he is bound to accept the replies as satisfactory, and that that of necessity deprives him of his right to claim compensation, the argument A being that cll. 9 and 31 must be read together, and must, if possible, be reconciled, and given an operation consistent the one with the other. There is one matter, before I examine that a little more closely, which I can get out of the way, and it is this. It was said by Mr. Overton that the observations—I would rather use a neutral expression—that B the requisition No. 5, sent in on May 8, 1936, which raised the question, in terms, of the rentcharge as affecting the green land, was a case for which no time limit is laid down in cl. 9 of the contract, because what he said was that, with regard to the original requisition No. 11, No. 5 (as I will call it) was an objection or an answer or an observation upon C that reply, but, when that was made within 7 days, there is no time limit set for a further observation on the further reply which was given to it. He says that in order to escape one of the difficulties that confronts him, namely, that the matter of this rentcharge as affecting the green land was not dealt with between May 19, 1936, which was the date of D the vendor's last answer, and the letter of July which I have read. In my opinion, that contention is not a sound one. It appears to me, having regard to the original abstract and the original requisition, that No. 5 was in fact an original requisition on this point, because, when the original No. 11 is looked at, the point of the rentcharge affecting the E green land is not raised, and, indeed, it would have been difficult, if not impossible, to raise it at that stage, owing to the incompleteness of the abstract which had been delivered. As soon as a complete abstract is delivered, a requisition is made, and it appears to me that that was a requisition which had to be made within 14 days after the delivery of F the supplemental abstract. When the reply to that requisition was sent in, the 7 days were allowed to deal with it, and, accordingly, cl. 9 (4) of the Conditions, in terms, applies to the case, because it says that an answer to any objection or requisition shall be sent in writing within 7 days after the day of the delivery thereof. The time, therefore, for G the purchaser's reply to the answer was 7 days after May 19, 1936.

The matter does not end there, because there still remains the substantial question whether, assuming, as I have held, that the purchaser left the matter there without any further observation, he is thereby precluded from claiming compensation under cl. 31. It appears to me, H on the facts of this case, that he is precluded, and for this reason: The particular flaw in the title, namely, the existence of the rentcharge, was one which affected the title, and one which, according to the contract, so far as the contract went, the vendor would be under obligation to remove. The purchaser, quite properly, in his requisition No. 5, called upon the vendor to remove that defect from the title. That was, in its essence, a requisition. One of the principal functions of a requisition is, in the case of a defect in title, to enable the purchaser to point it out to the vendor, and to require him to get rid of it, and that is what the purchaser was doing in requisition No. 5. It is perfectly true that he went on then to add to that an alternative claim, to the effect that the vendor was bound to allow compensation. The vendor replied to that again inaccurately, because his answer was to the effect that, under the contract, the purchaser was bound to regard the fund in court as a full and sufficient indemnity against the rentcharge. That was true about the blue only, and was not true about the green. Nevertheless, the purchaser having done nothing, and never having made any reply to that answer according to the language of cl. 9, or not having made a reply which was considered satisfactory—the answer being an answer referring to and explaining the vendor's position, and the position which he took up with regard to a defect in the title—and the purchaser having treated that, as he could rightly treat it, as subject matter of requisition, when he omitted to carry the objection further, or to preserve his right to claim compensation, which he might well have done if he had replied within the 7 days to the effect that the explanation was not acceptable, and that the purchaser preserved his right to compensation—if he had done that, it appears to me that he would have been entitled to his right to compensation. But he did not do so, and it seems to me that his action brings him within the express language of cl. 9, namely, that the answer to the requisition is to be considered satisfactory. On that footing, it appears to me that he cannot now turn round and claim that everything which was done in the matter of requisitions on this subject was of no importance, and that he is in exactly the same position in the matter of claiming compensation as though the defect was something which he had only just discovered.

In my opinion, the judge was right in dismissing the purchaser's application, both in regard to the blue and in regard to the green, although the reasons which I have given with regard to the green are in some respects, I think, not quite the same as those which appealed to the mind of the judge.

Romer, L.J.: I agree.

MacKinnon, L.J.: I agree.

Appeal dismissed, with costs.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellant company); *Taylor & Humbert* (for the respondent company).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re B. P. FOWLER, LTD.

[CHANCERY DIVISION (Crossman, J.), **July 23, 1937.**]

Companies—Winding up—Fraudulent preference —Recovery of money paid—Set-off—Companies Act, 1929 (*c.* 23), *s.* 265.

A The company being wound up had had business relations with two other companies. Within three months of the commencement of the winding up, the company now in liquidation owed money to the other two companies and the latter also owed money to the former. The company in liquidation paid its debts to the other companies without any claim of set-off in respect of the debts owing by them. These payments were admittedly a fraudulent preference, but the companies B claimed to set off the debts paid by them during the same period against the claim of the liquidator for repayment of the sums paid :—

HELD : no set-off having been asserted or made, the liquidator was entitled to repayment in full.

Re Washington Diamond Mining Co. (1) *explained.*

[EDITORIAL NOTE. The claim here made was based upon the case of *Re Washington Diamond Mining Co.* (1), but that case is shown to have no application to C the facts here. The set-off, if granted, in the circumstances, would in effect give the creditors a preference over others.

AS TO SET-OFF IN WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, p. 683, para. 1138 ; and FOR CASES, see DIGEST, Vol. 10, pp. 939-942, Nos. 6440-6455.]

D Case referred to :

(1) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95 ; 4 Digest 414, *3741* ; 62 L.J.Ch. 895 ; 69 L.T. 27.

SUMMONS by liquidator for repayment of sums alleged to be a fraudulent preference. The company in liquidation had had extensive trading E transactions with the respondent companies, and during the three months before the commencement of the liquidation had paid debts due to the respondent companies and the latter had during the same period paid debts due to the company in liquidation. The liquidator claimed the repayment of the sums paid by the company as being a fraudulent F preference, and his right to this was admitted. The respondent companies, however, claimed to set off the sums which they had paid to the company during that period of 3 months.

A. F. Maurice Berkeley for the liquidator.

R. J. T. Gibson for Wirksworth Quarries, Ltd., and Inns & Co., Ltd.

G

CROSSMAN, J. : In this case, the liquidator of B. P. Fowler, Ltd., makes a claim by summons against the two respondents, Wirksworth Quarries, Ltd., and Inns & Co., Ltd., for a declaration that certain payments specified in the summons made by the company to those two H respondents are an undue and fraudulent preference of those respondents over other creditors of the company under the Companies Act, 1929, s. 265, and are invalid accordingly, and an order for the payment of those sums to the liquidator. The sums which the liquidator claims that he is entitled to be paid by the respondent, Wirksworth Quarries, Ltd., amount to £3,203 17*s.* 2*d.*, and the amount claimed to be paid by the respondent, Inns & Co., Ltd., is £405 3*s*. 3*d*. The only question I am concerned with now is the question whether the respondents are liable for the whole of those sums or are liable only for a less sum, on the ground that they were entitled to a set-off as between debts due to them from the company and debts due from the company to them. The respondents admit that the payments are liable to be set aside to some extent, and they A admit that the first aggregate payment is liable to be set aside, except as to £595 2*s*. 6*d*., and the second aggregate payment is liable to be set aside as to £88 3*s*. 3*d*. The company had considerable dealings with both Wirksworth Quarries, Ltd., and Inns & Co., Ltd. Wirksworth Quarries, Ltd., is the owner of quarries, and it produces road-material, and Inns & Co., B Ltd., is a sand and gravel merchant. In each case, the two respondents supplied goods to the company, and they had become indebted to the company and the company had also become indebted to them. During the three months prior to the commencement of the winding up, which dates from Jan. 13, 1937, when the winding up petition was presented, C payment appears to have been made to these two companies, Wirksworth Quarries, Ltd., and Inns & Co., Ltd., of those sums. There is no doubt about that, and there is no doubt that, in the circumstances, which Mr. Gibson admits, they were, to a very large extent, fraudulent preferences within the meaning of the Companies Act, 1929, s. 265, D which provides that:

> Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. E

The Bankruptcy Act, 1914, s. 44, provides that:

> Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, F a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

The important words are "with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over G the other creditors." I start with the admission that these payments, or a considerable number of them, were made with a view to giving preference to the respondents over the other creditors of the company. Mr. Gibson contends that he is entitled to have deducted from the sums which he is liable to repay to the company, certain sums which he H says he was entitled to set off as against the debt due to the company at the time when these payments were made, and he relied upon *Re Washington Diamond Mining Co.* (1). I find that a very difficult case to follow, because unfortunately, as reported, owing to the omission of certain words throughout the report, it looks as if it were deciding something which it in fact certainly was not deciding at all. What was held there was that:

> In applying the Bankruptcy Act, 1883, s. 48 [now the Bankruptcy Act, 1914, s. 44] to limited companies in pursuance of the Companies Act, 1862, s. 164 [now the Companies Act, 1929, s. 265] the special legislation applicable to such companies must be regarded, and that though a set-off of mutual debts within three months of the bankruptcy of an individual is not a fraudulent preference, such a set-off [these are the words which ought to be in the headnote] one of which is a debt . . . within three months of the presentation of a petition to wind up a company is a fraudulent preference, inasmuch as the right of set-off continues in bankruptcy, but not in winding up.

So that the case does not really apply here at all. All it decided was that you could not have a set-off released to you by the doctrine of fraudulent preference, where one of the debts was a debt for a call on shares. The only point I have to consider is whether, in this case, there was any actual set-off, or position in which there should have been a set-off. Looking at these accounts, I find that there was never any set-off, and that none of these sums was in fact set off, and I do not think that there was really a position—I do not say that they could not have been set off if the right proceedings had been followed—in which any attempt was made to set off, or to treat this as a set-off. If there had been an actual set-off, Mr. Berkeley admits that the liquidator would have had to submit to this deduction in so far as there was an actual set-off. But there never has been a set-off. I find as a fact that there never has been a set-off. In those circumstances, I can treat the respondents only as liable to repay the whole sum, treating the whole sum as being a fraudulent preference. Therefore, I shall made a declaration substantially in the last words of the summons.

Solicitors: *William A. Crump & Son* (for the liquidator); *Smith, Rundell, Dods & Bockett* (for Wirksworth Quarries, Ltd., and Inns & Co., Ltd.).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re C., AN INFANT.

[CHANCERY DIVISION (Luxmoore, J.), **July 26, 28, 1937.**]

Infants—Adoption—Husband and wife—Illegitimate daughter of wife—No blood relationship with husband—Husband and wife each less than 21 years older than infant—"Within the prohibited degrees of consanguinity"—Adoption of Children Act, 1926 (*c.* 29), *s.* 2 (1) (*b*).

A husband and wife sought to adopt, under the provisions of the Adoption of Children Act, 1926, a girl aged 19, who was the illegitimate daughter of the wife. There was no blood relationship to the husband. The husband and wife were each less than 21 years older than the infant:—

HELD: upon the construction of the Adoption of Children Act, 1926, s. 2 (1) (*b*), the phrase "within the prohibited degrees of consanguinity" in that subsection defined the particular degrees of blood relationship between the proposed adopter and the infant proposed to be adopted which must exist in order to confer on the court the power of relaxing the prohibition contained in the subsection, and was not limited to the cases where the parties were of opposite sex. The power of the court to authorise the adoption in the present case was accordingly limited to the case of the wife.

[EDITORIAL NOTE. An adoption order under the Act of 1926 cannot be made where the applicant is under 25 years of age nor where he or she is less than 21 years older than the infant to be adopted. The court may, however, if it thinks fit, make an order in favour of a person less than 21 years older than the infant A where the applicant and the infant are within the prohibited degrees of consanguinity. While the prohibited degrees apply in the case of marriage law only to persons of opposite sex, for the purposes of adoption they must be extended to persons of the same sex.

As to Restrictions on Making Adoption Orders, see HALSBURY, Hailsham Edn., Vol. 17, p. 681, para. 1409; and for Cases on Consanguinity, see DIGEST, B Vol. 27, pp. 41, 42, Nos. 185-201.]

Summons asking for an order authorising the applicants, a husband and wife, to adopt an infant, the illegitimate daughter of the wife, under the provisions of the Adoption of Children Act, 1926.

E. Milner Holland for the applicants: The question is whether the C Adoption of Children Act, 1926, s. 2, applies to the whole of the prohibited degrees or only to consanguinity. The relationships in respect of which the law prohibits marriage are referred to in statutes as "prohibited degrees." For instance, the effect of the Marriage Act, 1835, was to make marriages between persons within the prohibited degrees D void and not voidable. The use of the term "prohibited degrees" has persisted throughout the statutes, as will be seen from the Deceased Wife's Sister's Marriage Act, 1907, Deceased Brother's Widow's Marriage Act, 1921, and the Marriage (Prohibited Degrees of Relationship) Act, 1931, and the last three Acts are together referred to as Marriage (Pro- E hibited Degrees of Relationship) Acts. This is relevant only as showing that the term "prohibited degrees" has been used throughout this legislation to denote persons who may not intermarry. Legitimacy makes no difference to this question. The child here is the illegitimate child of one of the applicants, and it is not natural to give the Act a F construction which would prevent a father adopting his own son or a mother adopting her own daughter. In the ordinary meaning consanguinity does not include affinity, but "prohibited degrees" includes both. The words in the Act of 1926 are limited to consanguinity, and, when the draftsman speaks of the prohibited degrees, he must be taken G to have been using the general term. There can be no reason why one type of prohibition should be admitted and the other excluded.

A. Andrewes Uthwatt for the Attorney-General: The object of the proviso (*b*) of sect. 2 (1) of the Act is to get that difference of age between adopter and adopted child which one usually gets between parent and H child. With regard to the point whether a mother could adopt her own son and not her own daughter, there is no degree set out in the table of kindred and affinity, but certain persons whom a man or a woman may not marry are set out, and the degree is deduced from the person named. When one has deduced the degree, the distinction between male and female disappears entirely. If one discusses the degrees of affinity, difficulties arise. A man may marry his deceased wife's sister, but if he divorces his wife he may not marry her sister. Degrees of consanguinity must be read as not including degrees of affinity. In the case of a joint adoption, the applicants must both be not less than 25 years of age. Each applicant must be 21 years older than the person it is proposed to adopt. Either of the applicants would be ruled out if within the prohibited degrees. There has been a desire to confer a judicial discretion, but it has been put in too narrow a way.

LUXMOORE, J.: In this case, the applicants are husband and wife, and they seek to adopt, under the provisions of the Adoption of Children Act, 1926, a girl aged 19, who is the illegitimate daughter of the wife. There is no blood relationship to the husband. The husband and wife are each less than 21 years older than the infant. The matter came before me in chambers, when the Official Solicitor, appearing on behalf of the infant, submitted that, on the true construction of the Act, no order could be made, either for a joint adoption by the husband and the wife, or for adoption by the wife alone, but he argued, however, that an order for adoption could be made in favour of the husband alone. He informed me that similar cases had been dealt with in chambers in this manner. This result appeared to be so curious and capricious that I thought it advisable that the question of the construction of the Act should be argued in open court. Having regard to the importance of the questions from the public point of view, I requested the Official Solicitor to communicate with the Treasury Solicitor, in order that the Attorney-General might be represented at the hearing. I have had the benefit of argument by Mr. Milner Holland, on behalf of the applicants, and by Mr. Andrewes Uthwatt, representing the Attorney-General.

By the Adoption of Children Act, 1926, s. 1, the court is empowered to make an order authorising the adoption of an infant, who has never been married, upon the application of any person desirous of being authorised to adopt that infant. By sect. 1 (3) the application for an adoption order may be made by two spouses jointly, and except in that case no order for adoption can be made authorising more than one person to adopt an infant. By sect. 2 of the Act, restrictions are placed on the making of adoption orders. Sect. 2 (1) is in these terms:

> An adoption order shall not be made in any case where (*a*) the applicant is under the age of 25 years, or (*b*) the applicant is less than 21 years older than the infant in respect of whom the application is made.

These restrictions are universal, except in cases falling within the proviso to the subsection. The proviso is as follows:

> Provided that, where the applicant and the infant are within the prohibited degrees of consanguinity, it shall be lawful for the court, if it thinks fit, to make the order notwithstanding that the applicant is less than 21 years older than the infant.

The answer to the questions which have arisen in this case depends on the true construction of the phrase "within the prohibited degrees of consanguinity." Ought that phrase to be construed as synonymous with the phrase "within the prohibited degrees of marriage" or as meaning within those degrees of blood relationship which are to be ascertained by reference to the tables of consanguinity. If the former view is correct, the court cannot authorise the adoption by the parent of an illegitimate infant child who is less than 21 years younger than the parent, if the child and the parent are of the same sex, while the court is free so to do if they are of the opposite sex. The court is also free, in the same circumstances, to authorise an adoption by the husband or wife of the parent, provided the infant is of the opposite sex to that of the husband or wife, as the case may be. It is to be observed that the phrase used is "within the prohibited degrees of consanguinity," and no mention is made of the prohibited degrees of affinity, and there is no reference to sex in the subsection. The prohibited degrees of marriage include the prohibited degrees of consanguinity as well as those of affinity. This appears from the Succession to the Crown Act, 1533, s. 3, which contains a recital in these terms:

> And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother, or the stepmother, the brother the sister, the father his son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; (2) which marriages, albeit they be plainly prohibited and detested by the laws of God, yet nevertheless at sometimes they have proceeded under colours of dispensations by man's power which is but usurped, and of right ought not to be granted, admitted nor allowed.

Sect. 4 of the Act says:

> No person or persons . . . shall from henceforth marry within the said degrees afore rehearsed, what pretence soever shall be made to the contrary thereof.

In the Marriage and Consanguinity Act, 1540 (32 Hen. 8, c. 38), the prohibited degrees of marriage are referred to as the Levitical degrees, while in the Marriage Act, 1835, the distinction between the prohibited degrees of consanguinity and affinity is clearly emphasised. The preamble to that Act recites:

> Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable; Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all marriages which shall have been celebrated before the passing of this Act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit which shall be depending at the time of the passing of this Act: Provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity.

Sect. 2 provides:

> All marriages which shall hereafter be celebrated between persons within the

prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever.

"Consanguinity" is defined in the Imperial Dictionary as the relation of persons by blood, the relation or connection of persons descended from the same stock or common ancestor, in distinction to affinity or A relation by marriage. A consideration of the tables of consanguinity and affinity shows that the prohibited degrees of consanguinity include all lineals in the direct line, ascendant or descendant, however far asunder in degree, and all collaterals to the third degree inclusive. I can see no reason for reading the words in the proviso to sect. 2 (1) of the Act B as if they included prohibited degrees of affinity, nor can I see any ground for introducing any question of sex into the proviso. The prohibited degrees of consanguinity are settled by reference to the degrees of blood relationship, and, provided the infant to be adopted is within those degrees, the court has power to authorise the adoption. It is interesting C to note that the proviso to the subsection was inserted by way of amendment into the Act, in its passage through the House of Commons. In its original form the proviso read:

> Where the applicant is related to such infant by blood within the prohibited degrees of marriage, the provisions of subsect. (1) (*b*) shall not apply, and an adoption order may be made subject to the discretion of the court.

D In the debate in support of the amendment, Major Hills said:

> The Bill is mandatory, and so no order can now be made in any case unless the adopter is 21 years older than the infant. No discretion whatever is given to the court. Take the case of two brothers. Suppose that one dies and leaves a child of 6 years of age. Suppose there is a younger brother 25 years of age. No power can allow that brother to adopt his own nephew. That is a case that may occur, E and certainly it ought to be provided for.

Commander Kenworthy pointed out that, in the case of a young aunt, the sister of the mother who had died and left an infant child, it is most natural for the aunt to bring up her nephew or niece:

> In many cases the aunt is a young woman who is not married. It would be rather F hard to prevent an adoption in such a case because there is not a greater difference than 21 years between the aunt and the infant. The adoption cases where there is blood relationship are the very ones for which we should legislate most, and I would not like to see any artificial restriction put upon them.

The proviso was ultimately amended, and incorporated in the Act in its present form. When it was proposed and accepted, it was stated to G be purely a drafting amendment.

I have referred to these matters to show that the policy of the Act appears to have been to relax the universality of the restriction in the subsection in cases where there is a close family relationship, and I can see no reason for importing any limitation as to sex in reference to the H degrees of consanguinity by reason of the use of the word "prohibited." In my judgment, the phrase "within the prohibited degrees of consanguinity," on its proper construction, defines the particular degrees of blood relationship between the proposed adopter and the infant proposed to be adopted which must exist in order to confer on the court the power of relaxing the prohibition contained in the subsection, and is not limited to the cases where the parties are of opposite sex. The female applicant and the infant are within the degrees of consanguinity thus defined. The male adopter is not within any degree of consanguinity with the infant, although he is in a similar degree of affinity. Since the proviso is confined to degrees of consanguinity, the power of the court to authorise the adoption is limited to the case of the female applicant. The court has no power to approve an adoption by the male applicant, either alone or jointly with the female applicant. The male applicant consents to the adoption of the infant by the female applicant alone, and, as the requirements of sect. 2 (4) of the Act are thus satisfied, I authorise, therefore, the adoption of the infant by her mother alone.

Solicitors: *Official Solicitor* (for the applicants); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re DUCE AND BOOTS CASH CHEMISTS (SOUTHERN), LTD.'S CONTRACT.

[Chancery Division (Bennett, J.), **June 22, 23, 24, July 28, 1937.**]

Sale of Land—Title—Investigation—Assent—Assent not in accordance with title disclosed—Conclusiveness—"Sufficient evidence"—Administration of Estates Act, 1925 (*c.* 23), *s.* 36 (7).

A testator by his will gave a freehold property to his son, whom he appointed his executor, upon trust to permit his daughter "to personally use and occupy" the same free of rent, rates and taxes during her life or spinsterhood should she wish to do so, and also charged a sum of £1 10*s.* per week upon that and other property for the benefit of the daughter for life or spinsterhood. The son duly proved the will and in 1932 executed an assent in his own favour as beneficial owner. In 1933 the daughter executed a release whereby she released the freehold property from the sum of £1 10*s.* charged thereon, but did not mention the right to reside therein during her life or spinsterhood. In 1935, the son conveyed the property as beneficial owner and upon a later sale it was contended that by reason of the Administration of Estates Act, 1925, s. 36 (7), the assent was binding upon a subsequent purchaser, and that he must assume that the son was beneficially entitled to the property:—

Held: the words in the Administration of Estates Act, 1925, s. 36 (7), "sufficient evidence" do not mean "conclusive evidence," but only that the assent is sufficient evidence until, upon a proper investigation of title, facts come to the purchaser's knowledge which indicate the contrary.

[EDITORIAL NOTE. This is the first decision on one of the most important links in the chain of statutory provisions passed in 1925 which were intended to obtain for private conveyancing the advantages which had been thought possible only with a system of registration of title. If the decision had gone the other way, it would have gone far to secure those advantages, but, although the hopes of the friends of private conveyancing have not been fulfilled to that extent, the decision is by no means conclusive upon the efficacy of an assent by a personal representative under the Administration of Estates Act, 1925, s. 36. The decision here is clearly one that must be confined to the facts of this case. It will be noticed that the assent contained a recital of the will that was inconsistent with the vesting of the property in the assentee as beneficial owner; and that leaves open the question whether an assent without recitals would have been effective in the circumstances of this case. It is on this point that the words in the judgment "upon a proper investigation of title" are of paramount importance. The subsection here construed requires the purchaser to see that there is no indorsement of any previous assent or conveyance upon the probate. It is quite true that one can inspect the indorsements upon a probate, and the actual grant which is on the front page, without looking at the copy of the will which is inside, but the position will not be clear until the court has decided that, upon such inspection, the purchaser has no notice of the will and that it is a proper investigation of the title to inspect the grant and the indorsements and to ignore the copy of the will.

As to Conclusiveness of Assent, see HALSBURY, Hailsham Edn., Vol. 14, pp. 364-366, para. 681. For the Administration of Estates Act, 1925, s. 36, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 332.]

Cases referred to:

(1) *Ystalyfera Iron Co.* v. *Neath & Brecon Ry. Co.* (1873), L.R. 17 Eq. 142; 11 Digest 171, *489*; 43 L.J. Ch. 476; 29 L.T. 662.

(2) *Lewis* v. *Leonard* (1880), 5 Ex. D. 165; 4 Digest 580, *5323*; 49 L.J.Q.B. 308; 42 L.T. 351.

(3) *R.* v. *Fordham* (1873), L.R. 8 Q.B. 501; 18 Digest 451, *1870*; 42 L.J.M.C. 153.

(4) *Garbutt* v. *Durham Joint Committee*, [1906] A.C. 291; 42 Digest 657, *657*; 75 L.J.K.B. 459; 94 L.T. 525.

(5) *Board of Trade* v. *Sailing Ship Glenpark*, [1904] 1 K.B. 682; 41 Digest 246, *860*; 73 L.J.K.B. 315; 90 L.T. 360.

(6) *Muller Staub Fils* v. *M'Bride & Williams*, [1925] N.I. 7.

(7) *Barraclough* v. *Greenhough* (1867), L.R. 2 Q.B. 612; 23 Digest 236, *2874*; 36 L.J.Q.B. 251.

(8) *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599; 40 Digest 760, *2902*; 71 L.J. Ch. 263; 86 L.T. 246.

(9) *Chandler* v. *Bradley*, [1897] 1 Ch. 315; 40 Digest 761, *2910*; 66 L.J. Ch. 214; 75 L.T. 581.

Vendor and Purchaser Summons under the Law of Property Act, 1925, s. ~~47~~ s.49, for a declaration that the applicant had sufficiently answered the requisitions of the respondent and that the applicant had shown a good title to property in accordance with a contract for sale. The agreed statement of facts and the summons are set out in the judgment.

Gerald R. Upjohn for the applicant.

J. T. Edgerley for the respondent.

Upjohn: With regard to 8, Chain Street, Reading, the will was rightly not abstracted, and the respondents are not affected by anything contained therein. There is an assent dated Apr. 21, 1932, and the vendor says that under the Administration of Estates Act, 1925, s. 36 (7), this is sufficient evidence that the assent was properly made. The evidence does not go far enough to enable the court to say that the assent was made in favour of the wrong person. It was impossible to use the word "conclusive" in the Act, because it is possible to have a purchaser for value who would have had the benefit of sect. 36. In construing some Acts, the word "sufficient" has been construed as meaning *prima facie*, and not as meaning conclusive. The Law of Property Act, 1925, was passed to facilitate the making of title. The provisions of the Administration of Estates Act, 1925, s. 36, were designed for the purpose of enabling title to be made merely by looking at the probate and not requiring the proved instrument to be looked at. If the assent contained no recital, that would be an end of the matter, because it would be sufficient evidence that it was in favour of the right person. The whole difficulty arises because there is an unfortunate recital in this document A where none was necessary, and the question is whether that recital prevents the purchaser from relying on the Administration of Estates Act, 1925, s. 36 (7), and saying that this assent is no longer sufficient evidence that it has been made in favour of the right person. It is for the purchaser to satisfy the court that there is something which dis- B entitles the vendor from relying upon the subsection. The section does not say "unless there are recitals to the contrary." The fact that there was a recital which might make the purchaser suspicious does not affect what the law says. The word "sufficient" in this case means conclusive unless there is an earlier assent through which a purchaser C has claimed. There may be any number of perfectly adequate explanations of the recital. There is nothing to rebut what is *prima facie* evidence in favour of a purchaser, and the court cannot come to the conclusion that the contrary has been proved. [Counsel referred to *Ystalyfera Iron Co.* v. *Neath & Brecon Ry. Co.* (1), *Board of Trade* v. D *Sailing Ship Glenpark* (5).]

Edgerley : I ask the court to hold as a fact upon the assent and the deed of release alone that it is plainly established that as against George Hookham there was a subsisting annuity charged upon 7 and 8, Chain Street, Reading, on Apr. 5, 1933. By reason of the charge of that E annuity upon it, it was settled land at that date. It follows, from the form of words prescribed by the Act in the case of settled land, that the assent is altogether wrong. In view of the special facts, this case is not covered by the Administration of Estates Act, 1925, s. 36. The duties of the purchaser are regulated by the Settled Land Act, 1925, s. 110. F All that sect. 36 establishes is that, where you have a document which is regular on the face of it, it is unnecessary to make further inquiry. But, if a purchaser is shown documents which are irregular, he is put upon inquiry. This equitable charge would not be overreached by a conveyance to a purchaser. This deed of release is not free from being G abstracted under the provisions of the Law of Property Act, 1925, s. 10. It is a dealing with an encumbrance upon property and should be abstracted. Directly the purchaser knew of this deed of release, he had to assume that the charge of the periodical sum was existing down to Apr., 1933, and that is a reasonable inference. Therefore these two H documents told us that down to that date this land was settled land. I disregard the idea that Miss Hookham may have died or may have married. That is answered by the deed of release in which she describes herself as a spinster and gives her address as 7 and 8, Chain Street. In 1933, the land was settled land. The only proper method of making an assent was by the use of the form of assent described in the Settled Land Act, 1925. As regards the construction of the Administration of Estates Act, 1925, s. 36, the legislature must be taken not to have meant "conclusive" by the use of the word "sufficient." In this section, "sufficient" means sufficient for getting the equitable interest off the A title and for relieving the purchaser from the obligation to make inquiries, where all is regularly done. If documents are regular upon the face of them, it is unnecessary to inquire. By reason of the recital, this assent gave us notice of the whole contents of the will. It does not matter whether the document was abstracted or not. The purchaser was told B of these facts and was fixed with knowledge of an equitable interest of which the release has not yet been satisfactorily explained. The Law of Property (Amendment) Act, 1926, has no application to the present case. [Counsel referred to *Muller Staub Fils* v. *M'Bride & Williams* (6), *Garbutt* v. *Durham Joint Committee* (4), *Barraclough* v. *Greenhough* (7), C *Re Handman & Wilcox's Contract* (8), *Chandler* v. *Bradley* (9).]

BENNETT, J.: This is a vendor and purchaser summons issued under the provisions of the Law of Property Act, 1925, ss. 49, 203. The applicant is the vendor, Mr. Nathan Duce, and the respondent D company, Boots Cash Chemists (Southern), Ltd., is the purchaser. The applicant asks for the following relief: a declaration that the requisitions and objections of Boots Cash Chemists (Southern), Ltd., in respect of the title to the property comprised in a contract of sale dated Jan. 6, 1937, have been sufficiently answered by the applicant; E a declaration that a good title to the said property has been shown in accordance with the particulars and conditions of sale; and that Boots Cash Chemists (Southern), Ltd., may be ordered to pay the costs of, and incident to, the application.

The parties have agreed the facts out of which the dispute between F them has arisen. Those facts are set out in an agreed statement of facts. The relevant part seems to me to be as follows:

> By an agreement in writing (hereinafter called the contract) dated Jan. 6, 1937, and made between Nathan Duce (hereinafter called the applicant) of the one part and Boots Cash Chemists (Southern), Ltd. (hereinafter called the respondents) of the other part it was agreed (*inter alia*): (*a*) That the applicant should sell and G the respondents should purchase the fee simple in possession free from incumbrances of and in first all that freehold property being No. 8 Chain Street Reading shown on a certain plan therein referred to (hereinafter called the said freehold property) and secondly the unexpired term of years in all that leasehold property being No. 7 Chain Street aforesaid also shown on the said plan. (*b*) That the purchase price should be £4,500 of which the sum of £450 should be (and was accordingly) paid by way of deposit as therein mentioned. (*c*) That the applicant was selling as H beneficial owner. (*d*) That the applicant's solicitor was Mr. E. Harold Duce of 29 High Street Shoreham-by-Sea Sussex. (*e*) That the purchase should be completed on or before Feb. 5, 1937, at the address therein mentioned. (*f*) That the title to the freehold property should commence with an indenture of conveyance dated May 16, 1894, and the title to the leasehold property should commence with the lease therein mentioned. . . . (2) The applicant duly deduced his title to the said leasehold property and the same has been accepted by the respondents subject to their being satisfied that the deed of release dated Apr. 5, 1933, hereinafter mentioned is not voidable against the applicant. (3) The applicant duly furnished

the respondents with an abstract of the applicant's title to the said freehold property in accordance with the contract. (4) The said abstract disclosed : (*a*) Conveyance dated May 16, 1894, and made between George William Palmer and Samuel Ernest Palmer of the one part and George Hookham of the other part whereby the said George William Palmer and Samuel Ernest Palmer for the consideration therein mentioned as personal representatives and as mortgagees conveyed unto the said George Hookham and his heirs all that messuage shop and premises with the yard and appurtenances thereto belonging situate in Chain Street in the parish of St. Mary Reading in the county of Berks and numbered 8 in the said street formerly in the occupation of John Giles subsequently of John Gooding Cooper and then of Mrs. Savory as tenant thereof bounded on the north and west by property belonging to the said George Hookham on the south by property belonging to Mr. T. H. Kingerlee and on the east by Chain Street aforesaid (being the said freehold property) to hold the same unto and to the use of the said George Hookham in fee simple. [There are certain mortgages which are not material.] (*d*) The will (disclosed only in the abstract of title to the said leasehold property) dated Jan. 20, 1920, of the said George Hookham (hereinafter called the testator) whereby he appointed his son George Edward Hookham to be his sole executor and devised and bequeathed all his freehold and leasehold messuages shops and premises situate and being Nos. 7 and 8 Chain Street Reading unto his said son according to the tenure thereof respectively upon trust to permit his daughter Sophia Hookham to personally use and occupy the dwellinghouse at No. 8 Chain Street aforesaid free of rent rates and other outgoings during her life or spinsterhood should she wish to do so and to pay to her the sum of £1 10*s*. per week during her life or spinsterhood and subject to and charged as aforesaid upon trust for the said George Edward Hookham absolutely. (*e*) Probate of the said will of the testator . . . duly granted to the said George Edward Hookham on Dec. 3, 1931, out of the probate registry on which a memorandum (not disclosed by the abstract) is indorsed " By two assents dated respectively Apr. 21, 1932, the within-named George Edward Hookham assented to the vesting in himself of the freehold and leasehold property being No. 8 and No. 7 Chain Street Reading respectively for all the estate vested in the testator at the time of his death." (*f*) An assent dated Apr. 21, 1932, by George Edward Hookham of Reading in these terms : " Whereas George Hookham late of Chain Street Reading aforesaid furniture dealer (hereinafter called " the testator ") by his will dated Jan. 20, 1920, appointed his son the executor to be the executor thereof and thereby devised and bequeathed all his freehold and leasehold messuages shops and premises situate and being Nos. 7 and 8 Chain Street Reading aforesaid unto his said son according to the tenure thereof upon trust to permit his daughter Sophia Hookham to personally use and occupy the dwellinghouse at No. 8 Chain Street aforesaid free of rent rates and other outgoings during her life or spinsterhood should she wish to do so and whereas the testator died on Oct. 20, 1931, without having altered or revoked his said will which was duly proved by the executor on Dec. 3, 1931, in the Oxford district registry and whereas the executor has duly paid and discharged all funeral and testamentary expenses all death duties and all debts of which he has knowledge or notice and the pecuniary legacies bequeathed by the said will without recourse to the property hereinafter assured now the executor hereby assents to all the property passing under the said will vesting in himself the said George Edward Hookham for all the estate vested in the testator at the time of his death including therein all the freehold property specified in the first column of the schedule hereto for the estate or interest expressed in the second column of the said schedule subject to the mortgage described in the third column of the said schedule.

In the schedule, in the first column is " No. 8, Chain Street, Reading, Berks," and, in the second column, " Estate or interest vested in testator at his death : fee simple." The next document disclosed in the abstract is a further charge, which it is not relevant to consider. Following upon that, there is a deed of release of Apr. 5, 1933 :

Between Sophia Hookham of No. 8 Chain Street in the county borough of Reading spinster of the one part and George Edward Hookham of the same place furniture dealer of the other part whereas George Hookham (hereinafter called " the testator ") late of No. 8 Chain Street aforesaid duly made his will dated Jan. 20, 1920, whereby he appointed the said George Edward Hookham to be the sole executor and devised his freehold and leasehold messuages shops and premises situate and being Nos. 7 and 8 Chain Street aforesaid to his son the said George Edward Hookham and charged the same with the payment of the sum of £1 10*s*.

per week to the said Sophia Hookham during her life or spinsterhood and whereas the testator died on Oct. 20, 1931, and his said will was duly proved by the said George Edward Hookham in the Oxford district registry on Dec. 3, 1931, and whereas the said George Edward Hookham has paid the testator's funeral and testamentary expenses and debts and the legacies bequeathed by his said will and whereas the said George Edward Hookham has assented to the vesting in himself of the said freehold and leasehold properties and whereas the said Sophia Hookham has agreed with the said George Edward Hookham to give such release as is hereinafter contained now this deed witnesseth as follows: In consideration of the premises the said Sophia Hookham as beneficial owner hereby releases exonerates and discharges the freehold and leasehold premises being Nos. 7 and 8 Chain Street aforesaid from all claims and demands in respect of the annuity of £1 10*s.* per week payable during her life or spinsterhood so charged as aforesaid.

The last document is:

Conveyance dated Oct. 26, 1935, and made between the said George Edward Hookham of the one part and the applicant of the other part whereby in consideration of the sum of £2,000 paid by the applicant to the said George Edward Hookham (the receipt whereof was acknowledged) the said George Edward Hookham as beneficial owner conveyed unto the applicant all that the said freehold property to hold unto the applicant in fee simple. (6) The respondents' solicitors duly sent in their requisitions on title all of which have been answered to the satisfaction of the respondents' solicitors . . . with the exception of requisition No. 1 (7). Requisition No. 1 was as follows: As to No. 8 Chain Street "It appears that under the will of G. Hookham, Sophia Hookham became either tenant for life or a person having the powers of a tenant for life under the Settled Land Act, 1925, and therefore she could have required a vesting assent to be executed in her favour by G. E. Hookham the personal representative. If Sophia Hookham elected not to reside in 8 Chain Street she should have concurred in the conveyance to the vendor to release her interest under the will. From the abstract of title it would seem that there has been no such concurrence. G. E. Hookham had no power to vest 8 Chain Street in himself as beneficial owner and manifestly did not sell in course of administering G. Hookham's estate. The title as abstracted is, therefore, defective in this respect." (8) The applicant replied thereto "See copy deed of release herewith," and enclosed a copy of the said deed dated Apr. 5, 1933.

By the deed of that date, Sophia Hookham purported to release the property from her claims in respect of the annuity of £1 10*s.* per week and in respect of nothing else.

After the answers to requisitions, a correspondence passed between the vendor's solicitor and the purchasers' solicitors, and between the vendor's solicitor and a firm of solicitors who had acted for Mr. G. E. Hookham, and between the vendor's solicitor and a solicitor acting for Miss Sophia Hookham. The correspondence makes it clear that the only instrument dealing with her interests under the will of her father executed by Miss Sophia Hookham was the release of Apr. 5, 1933.

Investigation by the purchasers of the vendor's title to No. 8, Chain Street, Reading, has brought the following facts to the knowledge of the purchasers: (i) that, by virtue of the disposition which is contained in the will of George Hookham, No. 8, Chain Street, Reading, became, upon the death of George Hookham on Oct. 20, 1931, settled land by the effect of the Settled Land Act, 1925, ss. 1, 2; (ii) that, under the disposition in the will, Sophia Hookham was a person who, with respect to No. 8, Chain Street, had the powers of a tenant for life; (iii) (and this fact, in my judgment, quite plainly emerges from the correspondence embodied in the agreed statement of facts) that Miss Sophia Hookham had not executed any deed or instrument surrendering or releasing the right she had under her father's will to use and occupy No. 8, Chain

Street, free of rent, rates and taxes during her life or spinsterhood; (iv) that, after Apr. 21, 1932, on which date George Edward Hookham had assented in writing to the vesting in himself of No. 8, Chain Street, namely, on Apr. 5, 1933, Miss Sophia Hookham was a spinster and was living at No. 8, Chain Street.

On these facts, it is, in my judgment, plain that George Edward Hookham was not, on Apr. 21, 1932, a person entitled to have conveyed to him the legal estate in No. 8, Chain Street, and the purchasers know it, and the vendor knows it. The vendor's title depends upon the vesting assent, made on Apr. 21, 1932, by George Edward Hookham in his own favour.

The basis of the vendor's case, and the basis of his claim to the declarations that he asks the court to make, is the Administration of Estates Act, 1925, s. 36 (7). The relevant subsections of that section read as follows:

> (1) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative. (2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased. (3) The statutory covenants implied by a person being expressed to convey as personal representative may be implied in an assent in like manner as in a conveyance by deed. (4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate. (7) An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon.

The applicant is right if, but, in my judgment, only if, the words "sufficient evidence" in sect. 36 (7) have the same meaning as have the words "conclusive evidence." The applicant's whole case rested on this proposition, and, in my judgment, he has not established it. It is a truism that the word "sufficient" is not the same word as, and has not the same meaning as, "conclusive." But, before the Administration of Estates Act, 1925, the words "sufficient evidence" had found a place in Acts of Parliament, and from time to time Parliament has enacted that the certificate of some person shall be sufficient evidence of some fact. There have been decisions upon some Acts that the words have the same meaning as "conclusive evidence." *Ystalyfera Iron Co.* v. *Neath & Brecon Ry. Co.* (1) and *Lewis* v. *Leonard* (2) are instances of such decisions. There are also decisions upon the same words in other Acts to the effect that they have not the same meaning as "conclusive evidence." Of such decisions, *R.* v. *Fordham* (3) and *Garbutt* v. *Durham*

Joint Committee (4) are examples. The fact is that the proper interpretation of the words depends upon the context in which they are placed, and I think that one must find some context of a compelling kind before one can decide that the word "sufficient" has the same meaning as "conclusive." Now, I can find no context in the Administration A of Estates Act, 1925, which affords a foundation for a decision that there ought to be placed upon the word "sufficient" in sect. 36 (7) a meaning which it does not usually bear, still less for a decision that it has the same meaning as "conclusive."

In my judgment, the meaning and effect of sect. 36 (7) are that a B purchaser, when investigating title, may safely accept a vesting assent as evidence that the person in whose favour it has been made was the person entitled to have the legal estate conveyed to him, unless and until, upon a proper investigation by a purchaser of his vendor's title, facts come to the purchaser's knowledge which indicate the contrary. C When that happens, in my judgment, the vesting assent cannot be, and ought not to be, accepted as sufficient evidence of something which the purchaser has reason to believe is contrary to the fact, still less so when, as in the present case, he knows it to be contrary to the fact.

For those reasons, in my judgment, the applicant is not entitled to D the declaration for which he asks, and the summons must be dismissed with costs. Liberty to apply.

Solicitors: *Mills & Morley*, agents for *E. Harold Duce*, Shoreham-by-Sea (for the applicant); *Seaton, Taylor & Co.* (for the respondent company).

E [*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ZETLAND (MARQUESS) AND ZETLAND ESTATES COMPANY *v.* DRIVER AND ANOTHER.

F

[Chancery Division (Bennett, J.), **March 18, 19, June 30, July 1, 29, 1937.]**

Sale of Land—Restrictive covenants—Benefit of land unsold—Covenant to run with land until happening of some specific event—Annexation of benefit—Covenanting parties—Touching or concerning the land—Law of Property G *Act*, 1925 (c. 20), *s.* 56 (1).

A conveyance of shop premises, being a small portion of a large area of settled land, contained the following covenant: "The purchaser to the intent and so as to bind so far as practicable the property hereby conveyed into whosesoever hands the same may come and to benefit and protect such part or parts of the lands now subject to the settle- H ment (*a*) as shall for the time being remain unsold or (*b*) as shall be sold by the vendor or his successors in title with the express benefit of this covenant covenants with the vendor that the purchaser will at all times observe . . ." and in particular that "no act or thing shall be done or permitted on the said land which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood." The vendor having died, the plaintiff succeeded as tenant in tail in possession under the settlement. The purchaser then conveyed the premises in fee to the defendant, who, having notice of the covenant entered into by his predecessor in title, used the premises for the purpose of a fried-fish shop. The plaintiff now sought to enforce the covenant, alleging it to have been broken by such user :—

Held : (i) the plaintiff, not being the original covenantee, not being able to sue under the Law of Property Act, 1925, s. 56 (1), and not being the owner of land to which the benefit of the covenant had been effectually annexed, was unable to enforce the covenant.

(ii) (following *White* v. *Bijou Mansions, Ltd.* (1)) the Law of Property Act, 1925, s. 56 (1), can be sued upon only by a person who, though not a party to the conveyance or other instrument, is nevertheless a person with whom, by that conveyance or instrument, a covenant has purported to have been made, and the covenant here did not purport to have been made with the plaintiff.

(iii) the benefit of a restrictive covenant may be made to run with the land of the covenantee until the happening of some specific event, *e.g.*, the sale of the land.

(iv) upon the true construction of the instrument, on a sale by the covenantee of any portion of the lands for the protection of which the covenant had been taken, the purchaser did not get the benefit of the covenant merely by the conveyance of the land, but required an express assignment from the covenantee or from his successors in title : but, upon change of ownership of the land otherwise than by sale, the benefit of the covenant passed with the ownership of the land. The plaintiff, having obtained ownership of the settled land otherwise than by sale, could have enforced the covenant if it had been properly annexed to run with the land.

(v) (following *Re Ballard's Conveyance* (2)) the benefit of a covenant cannot be annexed to land so as to run with it unless the covenant touches or concerns the whole of the land ; and such a covenant cannot be severed.

[EDITORIAL NOTE. The restriction placed upon the operation of the Law of Property Act, 1925, s. 56 (1), in *White* v. *Bijou Mansions, Ltd.* (1) is here confirmed, and though a person taking the benefit of a covenant need not be named as a party, the covenant itself must at least purport to be made with him. The judgment herein decides for the first time that a restrictive covenant upon land may be limited to operate until the happening of some specific event, such as a sale of the property and, thereafter, shall be effective only if expressly assigned. The difficulty met with in the present case is that the covenant could not be shown to benefit the whole of the land retained by the vendor and for the benefit of which it was expressly entered into. This raises again the question of the severability of such covenants which was before the court in *Re Ballard's Conveyance* (2). Upon this point Bennett, J., follows the previous decision of Clauson, J., and decides against severability.

As to Restrictive Covenants, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 454-458, paras. 827-832 ; and for Cases, see DIGEST, Vol. 40, pp. 310-314, Nos. 2648-2675.]

Cases referred to :

(1) *White* v. *Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269 ; Digest Supp. ; 157 L.T. 105.

(2) *Re Ballard's Conveyance*, [1937] Ch. 473 ; [1937] 2 All E.R. 691 ; Digest Supp.

(3) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 ; 40 Digest 312, *2664* ; 69 L.J. Ch. 652 ; 83 L.T. 186.

(4) *Prior's Case* (1368), cited in *Spencer's Case* (1583), 5 Co. Rep. 16 *a* ; 31 Digest 144, *2798*.

(5) *Renals* v. *Cowlishaw* (1879), 11 Ch. D. 866; 40 Digest 316, *2686*; 48 L.J. Ch. 830; 41 L.T. 116.

(6) *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305; 40 Digest 312, *2665*; 78 L.J. Ch. 753; 100 L.T. 952.

(7) *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter*, [1933] Ch. 611; Digest Supp.; 102 L.J. Ch. 241; 149 L.T. 82.

A (8) *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80; 31 Digest 164, *2968*; 58 L.J. Ch. 83; 60 L.T. 241.

(9) *Drake* v. *Gray*, [1936] Ch. 451; [1936] 1 All E. R. 363; Digest Supp.; 105 L.J. Ch. 233; 155 L.T. 145.

ACTION for an injunction to restrain the defendants from using any B part of the property conveyed to them by a deed of Apr. 2, 1935, as a fried-fish shop and from doing or permitting on the said land any other act or thing in breach of the covenant as set out. The Law of Property Act, 1925, s. 56 (1), provides:

> C A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

Fergus D. Morton, K.C., and *J. Neville Gray* for the plaintiffs.

F. R. Evershed, K.C., and *B. S. Tatham* for the defendants.

Morton, K.C.: All the covenants are negative covenants which attach D to and inhere in the land. The plaintiff was not a party to the particular instruments in question, but he may take the benefit of the covenants, because, by taking the land, he takes it with the benefit of the covenants. The omission of the words "his heirs and assigns" does not affect the fact that this covenant inheres in the land. The covenants are annexed E to the land, and the assignee has a right to sue in his own name. The words used in the present case are apt to make the covenant inure in the land. In the present case, the bargain is expressed in clear terms, and the effect is that the covenants shall inhere in the land and in so much of the land as shall remain unsold. [Counsel referred to *Rogers* v. F *Hosegood* (3), *Renals* v. *Cowlishaw* (5), *Reid* v. *Bickerstaff* (6), *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter* (7), and *Tod-Heatly* v. *Benham* (8).]

The present case falls within the second class of covenants mentioned in *Ballard's* case (2). The present owner has a large extent of land and G the purchaser of the land known as 200 Lord Street entered into a covenant for the benefit of the remainder of the land. If the decision in *Ballard's* case (2) is right, that covenant cannot run with the land at all unless the vendor is in a position to prove, it may be 30 or 40 years later, that every bit of the land is benefited. It is wrong to say that H the covenantee must be able to show that the covenant is for the benefit of every scrap of the property. There is no authority for that proposition. The benefit to the land as a whole is enough. If the intention of both parties is to annex the benefit to a particular piece of land, the presumption is that the covenant touches and concerns that land and the onus is on the person denying that.

Ballard's case (2) was wrongly decided. The covenant in the present case was entered into after Jan. 1, 1926, and the result is that the present marquess is a covenantee and not merely an assigned covenantee. (Law of Property Act, 1925, s. 78.) Sect. 78 should be read in conjunction with sect. 56. The covenant is "to benefit and protect such part or parts as shall for the time being remain unsold." These words annex the A benefit of the covenant to each part of the land: the whole or any part thereof. In this particular case the covenant is severable because it is annexed to each part of the land and the plaintiff is still the owner of part of the estate which remains unsold.

Evershed, K.C.: In the absence of any express assignment of this B covenant in the conveyance, the plaintiff is not entitled to sue upon it. In order that a person may be an original covenantee, he must be named as such, or be a formal party. A restrictive covenant is capable of being an equitable interest in the land, but so only if it can be said to touch and concern the land, and that means that it must directly affect C the land in respect of its occupation or its value. Dealing with the matter in quite general terms, it would be quite preposterous to suggest that a covenant as to the use of property could ever touch or concern land which was not neighbouring or adjoining. It is not necessary to consider whether every square foot of land could be benefited. It is D sufficient if it can be shown that the property is touched or concerned by the covenant. It follows, from the nature of a covenant, that it must be predicated of a covenant which is going to be annexed to land that it is capable of benefiting it. In the present case, the frying of fish at 200, Lord Street could not affect land some distance away. Such E land could not in the least degree be touched or concerned by what the defendant did. There is other land nearby over which the plaintiff has no control. It is a logical absurdity to say that, by using a comprehensive term such as "while part of the Zetland estate remains unsold," the restriction can be made to apply to every small part. The land cannot F be regarded as a composite whole. [Counsel also referred to *Drake* v. *Gray* (9) and *White* v. *Bijou Mansions, Ltd.* (1).]

Morton, K.C., in reply.

Bennett, J.: By a conveyance dated Sept. 10, 1928, and made G between Lawrence Marquess of Zetland, to whom I shall hereafter refer as the first marquess, the father of the first plaintiff, of the first part, Lord Southampton and the Earl of Scarborough of the second part, and David Frederick Goodswen of the third part, the first marquess as tenant for life of certain hereditaments comprised in and settled by a settlement H dated Aug. 2, 1871, in exercise of the power conferred upon him by the Settled Land Act, 1925, conveyed to the said David Frederick Goodswen in fee simple a piece or parcel of land situate at the east end of Redcar in the county of York, delineated and described on a plan drawn on the said conveyance and thereon coloured round with blue.

This piece of land is now known as 200, Lord Street, Redcar. In the said conveyance, the first marquess was called the vendor, and the said David Frederick Goodswen was called the purchaser. The said conveyance contained a covenant in the following terms:

> The purchaser to the intent and so as to bind so far as practicable the said property hereby conveyed into whosesoever hands the same may come and to benefit and protect such part or parts of the lands in the borough township or parish of Redcar in the North Riding of the county of York now subject to the settlement (*a*) as shall for the time being remain unsold or (*b*) as shall be sold by the vendor or his successors in title with the express benefit of this covenant covenants with the vendor that the purchaser will at all times observe perform and keep the said stipulations contained in the second schedule hereto.

The relevant stipulations in the second schedule are those indicated by the letters A and D respectively, and they are as follows:

> (A) That the property hereby conveyed shall not (except with the previous consent in writing of the vendor which expression in this schedule includes where the context admits his successors in title) be used for any other purpose than for the erection thereon of a shop and dwelling-house which and any subsequent alterations or additions to which shall be constructed in accordance with plans and elevations to be deposited by the purchaser at the Zetland Estate office Marske-by-the-Sea before building is commenced for the approval of the vendor such approval not to be unreasonably withheld. (D) That no intoxicating or spirituous liquors shall be sold from the premises and in particular that no part of the land hereby conveyed shall be used for the purpose of a club and that no act or thing shall be done or permitted thereon which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood.

The land conveyed by this deed was a small portion of a large area of land in the borough township or parish of Redcar, which was on Sept. 10, 1928, comprised in the said settlement of Aug. 2, 1871. The parties have agreed as to what were the lands in the borough township or parish of Redcar comprised in the said settlement on Sept. 10, 1928, and they are coloured red on the agreed plan marked "Plan No. 3."

The first marquess died on Mar. 11, 1929, and, on his death, the first plaintiff succeeded to the title, and, under the limitations of the said settlement of Aug. 2, 1871, became entitled in possession as tenant in tail male to the hereditaments therein comprised. On Apr. 2, 1935, the said David Frederick Goodswen conveyed to the defendant Driver, in fee, the hereditaments comprised in the said conveyance of Sept. 10, 1928. Thereafter the two defendants carried on upon the premises the business of restaurant-keepers. The restaurant was not a place patronised by people of fashion. It was an eating-house for the consumption on the premises of, amongst other food, fried fish, and for the sale for consumption on and off the premises of chip potatoes. No. 200, Lord Street, is in an area over which the Redcar Corporation has authority in local government affairs, and there is a bye-law in force in the area it governs which prohibits any one from selling fried fish for consumption off the premises on which it has been fried unless he has a licence authorising him so to sell it. In 1935, the defendants had no such licence. The defendant Driver in the course of the year 1935 made three applications to the corporation for such a licence, all of which were refused, but, in the end, as a result of an appeal to the North Riding quarter sessions in Apr., 1936, he succeeded in getting a licence enabling him to sell fish fried on the premises for consumption off them. The outcome of the grant of this licence was that complaints were made to the first plaintiff's agent. The exact nature of the complaints was not proved, but Lord Zetland discussed the matter with his agent in Apr., 1936. I will state A the conclusion at which he arrived in his own words:

> The conclusion which I arrived at was that the sale of fish by means of an off-licence was detrimental to the amenities of the locality, and, as it seemed to me, also to my own property in that it had always been understood by those who purchased property in that part of the town that it would be developed purely as a residential neighbourhood. B

Lord Zetland in his evidence stated that he then instructed his solicitors on May 25, 1936, to write to the defendants in these terms:

> We are instructed by the Marquess of Zetland who, as tenant for life and estate owner of property in and near Lord Street, Redcar, is entitled to the benefit and advantage of restrictive covenants affecting your premises, No. 200, Lord Street. C The covenants are contained in the conveyance of your property to David Frederick Goodswen dated Sept. 10, 1928. You are committing a breach of covenant by using your premises, or part thereof, for the sale of fried fish, an act which in the opinion of his Lordship is a public or private nuisance and prejudicial and detrimental to him (as successor in title to the late Marquess of Zetland from whom the premises were purchased) and to the owners and occupiers of adjoining property and to the neighbourhood. We are instructed to require you and each of you respectively immediately to cease using the premises for the purposes of frying D fish for sale, or selling fried fish, and to undertake not to use any part of your premises for either of those purposes in future. Failing compliance with this request within one month from the date of this letter, we have to give you formal notice that Lord Zetland intends to apply to the High Court of Justice for an injunction to restrain the nuisance and enforce observance of the covenants.

Lord Zetland in his evidence stated that that letter represented his E opinion in May, 1936, and represented it when the writ in this action was issued, on July 7, 1936. The relief claimed on the writ and in the prayer of the statement of claim is:

> An injunction to restrain the defendants their servants workmen and agents from using any part of No. 200 Lord Street aforesaid for the frying of fish or other substances for consumption off the premises and from doing or permitting on the said F premises any other act or thing which in the opinion of the plaintiffs or other the successors in title of the said Lawrence Marquess of Zetland may be a public or private nuisance or prejudicial or detrimental to the plaintiffs or such successors in title as aforesaid or to the owners or occupiers of any adjoining property or to the neighbourhood.

The action is not an action to restrain a nuisance, but an action to G enforce the negative covenant into which the predecessor in title of the defendant Driver had entered with the first marquess. The only witness called at the trial was Lord Zetland himself. No attempt was made to prove that the defendants were in fact committing a nuisance. Lord Zetland's evidence came to this, that complaints had been made to his H agent, that he discussed the complaints with his agent, and that he formed the conclusion which he stated in the passage I have read from his evidence in chief. It is upon that basis that the relief is claimed in this action, and the question whether the plaintiffs are entitled to the relief is entirely a question of law. One other matter has to be considered before considering the law. The covenant was taken by the first marquess :

> To benefit and protect such part or parts of the lands in the borough township or parish of Redcar in the North Riding of the county of York now subject to the settlement as should for the time being remain unsold or as should be sold by the vendor—

that is the first marquess or his successor in title with the express benefit of the covenant. It is necessary to ascertain the lands for the benefit and protection of which the covenant was taken. As I have already stated, these have been agreed between the parties, and are coloured red on plan No. 3. This plan shows that a small portion of the protected lands was contiguous to No. 200, Lord Street. There was a number of scattered parcels of land, with houses built upon them, towards the north and west of No. 200, Lord Street, in a large area of unbuilt-on land to the south. Some of the land to the south is more than a mile away from No. 200, Lord Street, and between No. 200, Lord Street, and this unbuilt-on land there is a large area of land covered with buildings, and coloured green on the plan, which did not belong to the first marquess on Sept. 10, 1928.

These are the facts which give rise to the questions which have to be decided. There is no doubt that the defendant Driver purchased No. 200, Lord Street with notice of the restrictive covenants into which his predecessor in title had entered with the first marquess, and that No. 200, Lord Street is burdened with the restrictive covenants is not questioned. What is questioned is whether the first plaintiff, the present Lord Zetland, not being the original covenantee, can enforce the covenant. The case was first rested on the effect of the Law of Property Act, 1925, s. 56 (1), and it was argued that, irrespective of any question as to whether the benefit of the covenant was annexed to and ran with the land of the covenantee, the subsection which I have mentioned enabled the first plaintiff to sue upon the covenant entered into with his father, the first marquess. The decision of SIMONDS, J., in *White* v. *Bijou Mansions, Ltd.* (1) is, in my judgment, the answer to this argument. SIMONDS, J., decided that the Law of Property Act, 1925, s. 56 (1) could be called in aid only by a person who, although not a party to a conveyance or other instrument, was, nevertheless, a person with whom, by that conveyance or instrument, a covenant was purported to be made. The first plaintiff was not such a person, and I shall follow SIMONDS, J., and hold that the provisions of the Law of Property Act, 1925, s. 56 (1), do not enable the first plaintiff to sue on the covenant. The case was then based upon the ground that the benefit of the covenant had been annexed to and ran with the land of the covenantee, and that, therefore, the first plaintiff, now the owner of the lands to which the benefit of the covenant had been annexed, could enforce it. The terms of the covenant have first to be construed, so as to ascertain from the language the parties have used what their intentions were, and, when the term of the covenant has been construed, the legal effect of the words used has to be decided. The meaning of the parties is, I think, reasonably clear. The intention of the parties was, first, that, on a sale by the covenantee of a portion of the lands for the benefit and protection of which the covenant was taken, the purchaser was not to get the benefit of the covenant merely by a conveyance of the land. In order that a purchaser from the covenantee might get it, there had to be an express assignment to him of the benefit of the covenant. Secondly, the parties intended that, on a change of ownership of the land otherwise than on the occasion of a sale, the benefit of the covenant should pass with the land. The idea underlying the words was, I think, that the benefit of the covenant should inhere in and run with all the land for the benefit and protection of which it was taken, until there was a sale of it, or of a parcel of it. When there was a sale, the intention was that the benefit of the covenant should no longer inhere in the parcels sold, and that the benefit should not pass without express assignment. So far as I know, the question whether a covenant can be made to run with land until it changes ownership on sale has never been judicially considered, but I see no objection in principle to parties agreeing that the benefit of a restrictive covenant shall run with the land of the covenantee until the happening of some specified event, and that, thereafter, the benefit shall pass only if expressly assigned. In my judgment, therefore, the first plaintiff can enforce the covenant, if it be one which comes within the category of covenants the benefit of which can be made to run with the land at law.

While the present case was being argued, CLAUSON, J., was considering the question as to what were the covenants the benefit of which could be made to run with the land at law in *Re Ballard's Conveyance* (2). CLAUSON, J., decided two points. The first was that the benefit of a covenant was incapable of being annexed to land so as to run with it unless the covenant touched or concerned the land to which it had been annexed. The second was that, if a covenant touched or concerned a part only of the land to which the parties had attempted to annex it, and did not touch or concern every part of it, the attempted annexation failed. He decided that the covenant could not be severed, and he said:

> I asked in vain for any authority which would justify me in severing the covenant, and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though, as regards the remainder of the land, namely, such part as is not touched by or concerned with the covenant, the covenant is not, and cannot be, annexed to it, and accordingly does not, and cannot, run with it. Nor have I been able, through my own researches, to find anything in the books which seems to justify any such course. In *Rogers* v. *Hosegood* (3), the benefit of the covenant was annexed to all or any of certain lands adjoining or near to the covenantor's land, and no such difficulty arose as faces me here; and there are many other reported cases in which, for similar reasons, no such difficulty arose. But the requirement that the covenant, in order that the benefit of it may run with certain lands, must concern or touch those lands, is categorically stated by FARWELL, J., in the passage I have cited, in terms which are unquestionably in accord with a long line of earlier authority.
>
> I would observe that the construction of the document and the intention of the parties to be gathered therefrom are material on the question what is the area of land to which the covenantor and covenantee intended to annex the benefit of the covenant, or, in technical language, what is the land with which the parties intended the covenant to run; but that, on the question whether, in the circumstances of

the case, this covenant is capable of being annexed to, or of running with, the land to which it is sought to annex it, it is necessary, first, to ascertain whether, in fact, the covenant touches or concerns that particular land. If, on the facts, it appears that the covenant does not touch or concern that particular land, the only question which remains is whether, by the law in regard to annexation of a covenant to land, as recognised as long ago as 1368 in the *Prior's Case* (4), such annexation can take place unless it can be predicated of the covenant that it touches or concerns the land to which it is sought to annex it. That is a question of dry technical law, on A which it would not be right, at all events for a judge of first instance, to go beyond settled authority, or, at all events, beyond that which can logically be deduced from settled authority, though, in the result, the intention of the parties to the original covenant may be frustrated. As I have not been referred to, and I cannot find, any authority for the proposition that a covenant which it has been sought to annex to a particular area of land can be enforced by the person seised of that land, not being the original covenantee, in a case where it cannot truly be said that B the covenant touches or concerns the land to which it was sought to annex it, I must hold that the attempted annexation has failed, and that the covenant has not been effectually annexed to the land, and does not run with it.

The covenant which it is alleged has been broken is stipulation D in the second schedule to the conveyance of Sept. 10, 1928, and the breach assigned is that the first defendant has done, or permitted to be done, C on the land thereby conveyed an act which, in the opinion of the first plaintiff, was a public or private nuisance, and was prejudicial or detrimental to the first plaintiff and to the owners and occupiers of adjoining property and to the neighbourhood. The first question to be asked is whether that covenant entered into with respect to the user of No. 200, D Lord Street, can possibly touch or concern all the land coloured red on the plan numbered 3. To touch or concern land, the covenant must either affect the land as regards its mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land: see *Rogers* v. *Hosegood* (3), *per* FARWELL, J., at p. 395. E The covenant in question does not purport to affect the land of the covenantee as regards its occupation, and one look at the plan, I think, makes it apparent that the value of the greater part of what was owned by the first marquess in 1928 could not be affected in the least by anything done on No. 200, Lord Street.

F On these facts, I am bound by the decision of CLAUSON, J., to hold that the attempted annexation of the covenant to the land of the covenantee has failed. Mr. Morton urged that the decision of CLAUSON, J., was unsupported by any authority, and ought not to be followed, but I feel sure that my duty is to follow it, and to leave it to a higher G tribunal to say if the law is otherwise than that which he decided it was. To do otherwise would be only to make the law relating to the enforcement of restrictive covenants more uncertain than it already seems to be.

The result is that the first plaintiff, not being the original covenantee, not being enabled to sue upon the covenant by virtue of the Law of H Property Act, 1925, s. 56 (1), and not being the owner of any land to which the benefit of the covenant has been effectually annexed, has no right to enforce the covenant. No attempt was made to prove that the defendants were causing a nuisance, and so the action fails. There were a number of other points raised by way of defence to the action, points of considerable difficulty, as they seemed to me. The only reason why I do not express any opinion on them is because I desire to say not one more word than is necessary to decide the case. The action fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Frere, Cholmeley & Co.* (for the plaintiffs); *H. E. Griffith & Son*, agents for *Miles, Hutchinson & Lithgow*, Middlesborough (for the defendants). A

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re NORTHCLIFFE'S SETTLEMENTS. B

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 26, 1937.**]

Trusts and Trustees—Appointment of trustees—Appointment of bank—Beneficiaries customers of bank—Overdraft—Power of advancement—Protected life interest—Discretionary trust of income. C

There is no principle whatsoever that would prevent a bank from being appointed a trustee of a settlement merely because one or more of the beneficiaries are customers of the bank and, in fact, have overdrawn accounts with the bank. The judge of first instance having in his discretion refused to make the appointment where the settlement contained a power to make advancements to such beneficiaries at the D discretion of the trustees and having made the appointment where the beneficiaries took a protected life interest and where the income was to be divided between the beneficiaries at the discretion of the trustees, the Court of Appeal refused in the circumstances to interfere with such exercise of the judge's discretion, the position of the beneficiaries being such that the possibility of there being a forfeiture E of the protected life interest was so remote as not to affect the exercise of the discretion in the matter. The fact that the bank are the bankers of the executors of the settlor is also not an absolute bar to its appointment as trustee.

[**EDITORIAL NOTE.** This decision in this appeal is of purely a negative value. There is no principle which prevents a bank from being appointed a trustee of a F settlement merely because the beneficiaries are customers of the bank, and the bank has discretionary powers under the settlement. When that negation of principle has been asserted, the matter remains one for the exercise of the discretion of the court, which, of course, must in every case depend upon the particular facts thereof.

As to Appointment of Trustees, see HALSBURY, 1st Edn., Vol. 28, Trusts, G pp. 80, 81, paras. 168-172; and for Cases, see DIGEST, Vol. 43, pp. 687, 688, Nos. 1185-1205.]

Summons for the appointment of Messrs. Coutts & Co., bankers, as a trustee of certain settlements. The settlor executed eleven settlements, divided into classes as follows. In the first class, Alfred was the tenant H for life with a protected life interest, and there was a power given to the trustees to make, at their discretion, advances out of capital to the tenant for life. In the second class, Alfred had a life interest which was not protected and there was no power of advancement. There were then three settlements in favour of two other beneficiaries. All these settlements contained an ultimate trust for the settlor, but these reversionary interests were settled by a further settlement which gave Alfred a protected life interest and contained a power of advancement in favour of the trustees. Lastly, by a deed of covenant, there was a covenant to pay a large yearly sum to the three beneficiaries, the division of the sum being in the discretion of the trustees. There were at the time of these proceedings three trustees and it was desired to appoint a new trustee. The three beneficiaries were between the ages of 27 and 23, all married, but with no issue. It was proposed to appoint Coutts' Bank as the new trustee, and objection was taken to this on account of the fact that the beneficiaries had accounts with that bank, of which two were largely overdrawn, and also that the bank were the bankers to the executors of the settlor's will. BENNETT, J., refused to make the appointment in the case of settlements where there was a power to make advances to the tenant for life out of capital, but made it in the case of all other settlements.

R. F. Roxburgh, K.C., and *A. L. Ellis* for the appellants, the applicants on the summons, being the principal beneficiaries under the settlements, except one, and two of the three trustees.

Fergus D. Morton, K.C., and *J. L. Stone* for the respondent, the third trustee, the respondent to the summons.

J. H. A. Sparrow for the other principal beneficiary, Harold, who was one of the applicants on the summons, but became a respondent on the appeal.

SIR WILFRID GREENE, M.R.: I have listened carefully to the various matters urged upon both sides in this case, and I can find no reason for interfering with the order of the judge, subject to two of the settlements which stand in a special position. I should say at once that I can find nothing, in the record which we have of the judge's decision, to suggest that he was laying down, or conceived himself to be bound by, some principle applicable to the appointment of banks as trustees, and, in saying what I have to say about this matter, it must not be thought for a moment that I agree that any such principle exists, or that I am endeavouring to lay down any such principle. There is, in my opinion, no such principle, and this case is decided, so far as I am concerned, upon its particular facts, and upon no other ground.

The suggestion having been made that a new trustee should be appointed, there was a difference of opinion amongst the trustees, and, as a result of that difference of opinion, this matter came before BENNETT, J. The applicants on the summons were Sir George Sutton and Mr. Montague Ellis, two of the trustees, and the three children, because at that time all the three children were co-applicants with regard to the appointment which it was desired that the court should make. The respondent was the third trustee, Mr. Arnholz. When the matter came before BENNETT, J., the trustees—in fact the summons so asked—whom the applicants desired that the court should appoint were Messrs. Coutts & Co., bankers, and, so far as the suitability and position of that company is concerned, no question, of course, is raised, or was raised before Bennett, J. But certain objections were taken by Mr. Arnholz to the appointment of the bank in connection with these particular trusts. Bennett, J., paid attention to one only of those objections, and A the one to which he paid attention was this. It was said, and it has been said here, that, as, under certain of the settlements, the trustees have a power to advance to the life tenant out of capital, it would be undesirable that a bank should be trustee, with the certainty of becoming in course of time sole trustee, when the life tenants, or some of them, B were banking at that bank, and had, at any rate according to the facts as they then were before the court, in the case of one of them, an overdraft at that bank. The judge thought that, upon the facts before him, that was a sufficient reason for refusing to appoint Messrs. Coutts as trustees of these settlements, under which Alfred, the eldest son, had a C life interest with a power to make advancements to him out of capital, but he made the appointment in the case of the remaining six.

The original appellants were the applicants on the summons. One of them, Harold, has since decided to go rather a different way from that of the others, and the notice of appeal will have to be amended by D making him a respondent to the appeal instead of an appellant. The circumstances in which that happened I will deal with in a moment. Before us, it is said, on behalf of the two trustees, the applicants, and the other two beneficiaries, that Bennett, J., was wrong when he refused to appoint Messrs. Coutts trustees of the other settlements. It E was suggested that he had wrongly thought himself to be bound by some principle, or was wrongly laying down some rule for himself. I am unable to see that he did that. Then it was said that, if he did not, he exercised his discretion wrongly, particularly in view of the fact that there was not before him any clear evidence as to overdrafts of the F beneficiaries. Before this court we have had that evidence supplemented, and we now know that the two beneficiaries, Alfred and Mrs. Field-Marsham, have at Coutts overdrafts of a very large description, particularly large in the case of the son. Speaking for myself, those facts, which supplement the facts which were before the judge, which G were not, of course, very full, would be quite sufficient to warrant the judge, in the exercise of his discretion, saying that, in the circumstances, it would not be desirable that the bankers should run the risk of being placed in a position of some difficulty if the time ever came for them to exercise their discretion in the matter of advancement. It seems to H me that the judge was exercising his discretion, and, upon the facts before us, I can see no reason at all for interfering with it. Therefore, so far as concerns the application for the appointment of Messrs. Coutts as trustee of the other settlements the application, in my opinion, fails.

That does not end the matter, because there is a cross-appeal. It is desired by Mr. Arnholz that Messrs. Coutts should not be appointed, and that the order of the judge, in so far as it appoints them, should be discharged. The objection with regard to the power of appointment does not apply in the case of certain of the settlements, but there is another objection raised of a general nature, an objection based on the A protected life interest. That objection is this, namely, that, if and when the event were to happen under which Alfred would forfeit his life interest, and the discretionary trust came to be put into force, Alfred, if he had at that time an overdraft, might receive particular consideration by the bankers who had the advantage of having his overdraft with B them. The judge was not disposed to attach to that circumstance any sufficient weight to justify him, in the cases with which he was dealing where that point arose, in treating it as being sufficient ground for refusing the appointment. In my opinion, there is no real substance in the objection, on the facts of the case, in the case of those settlements C as those to which this point is now relevant, for the reason that the possibility of that protected life interest becoming forfeited, though it no doubt exists, is one which, on the facts of this case, I think the court is justified in treating as very remote, and not sufficient to affect its discretion on the matter.

D That really is, I think, the substantial point that is taken with regard to those particular settlements, although there is, of course, a general objection to Messrs. Coutts acting, on the ground that they have another function in connection with the settlor's will, as bankers to his executors. I am quite unable, on the evidence before us, to find in that circumstance E any objection to their appointment.

With regard to one settlement, which is the deed of covenant, he says that in the future one or other of these young people may be overdrawn at Coutts, and Coutts, in deciding the proportions in which they were to divide up the income, might find difficulty in apportioning it without F being embarrassed. That, again, is a matter to which I do not think any importance is to be attached. The judge did not attach importance to it, for this very good reason, that he had before him all the three children concerned, who were consenting parties. As the matter comes before us, although Harold has severed from the other appellants, he G does not wish to raise any objection so far as that is concerned.

Romer, L.J.: Nothing that has been said in argument has led me to think that, in the cases where the judge appointed Messrs. Coutts as additional trustee, he did that which he ought not to have done, or that, in the cases where he refused to appoint Messrs. Coutts as additional H trustee, he left undone that which he ought to have done. He was perfectly right in the decision at which he arrived on all those other points. I want to add only this: I desire to associate myself as strongly as possible with what Sir Wilfrid Greene, M.R., has said as to there being no principle whatsoever that would prevent a bank from being appointed as a trustee of a settlement merely because one or more or all of the beneficiaries happened to be customers of the bank. I say that because Mr. Roxburgh, in opening the appeal, contended that the judge had proceeded upon some such principle, and Mr. Morton, in opening his cross-appeal, as I understood, was really asking us to adopt some such principle, because he asked us to say that Messrs. Coutts & Co. ought not to be appointed as trustees in a case where they might have, in certain circumstances, to exercise a discretionary trust in favour of a class, of which one member happened to be a customer of the bank who had incurred an overdraft. I think it would be a very bad example if it should be thought for one moment that a bank, which as a rule, is asked to act as trustee by people whose affairs it has looked after for sometimes many generations, should not be appointed as a trustee because, as would be the most natural thing to occur, one or more of the beneficiaries happened to have an account with the bank. The result, I should imagine, would be that a bank would never be appointed a trustee if it were thought that any such principle as that existed. I agree with the order that SIR WILFRID GREENE, M.R., has pronounced.

MACKINNON, L.J.: I agree.

Appeal and cross-appeal dismissed.

Solicitors: *Ellis, Peirs & Co.* (for the appellants and the beneficiary, Harold); *Russell & Arnholz* (for the respondent, the third trustee).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

CORBETT *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **July 26, 27, 29, 1937.**]

Income Tax—Sur-tax—Residuary life tenant—Sums credited to residuary life tenant during period of administration.

The appellant was assessed to sur-tax for the year ending Apr. 5, 1935, in a sum which included a sum of £17,073, being the gross equivalent of a sum of £13,600 13*s.* 9*d.*, placed to the credit of the appellant's wife by the executors of her late father's will, under which she was entitled to three-fifths of the residue of his estate for life. The appellant's wife's father died on Apr. 24, 1934, and the residue was not, and could not have been, ascertained till May 7, 1935. There was nothing to show whether the sums were the result of a realisation of capital or income assets, but the income arising from the estate during the period of administration was insufficient to pay the expenses of administration:—

HELD: the sums credited to the appellant's wife did not attract sur-tax, and the assessment on the appellant ought to be reduced accordingly.

[**EDITORIAL NOTE.** Any person interested in residue is not entitled to receive anything from the estate until the residue is ascertained. Any income of the residue before that ascertainment is the income of the executors. The tenant for life of the residue cannot in the ordinary way be charged with sur-tax in respect of the income of the estate until the residue is ascertained and ready for distribution.

AS TO RESIDUARY LEGATEES AND INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 256, 257, paras. 521, 522; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 483*a*, 673*c*, 673*d*.]

Cases referred to:

(1) *Sudeley (Lord)* v. *A.-G.*, [1897] A.C. 11; 23 Digest 463, *5354*; 66 L.J.Q.B. 21; 75 L.T. 398.

(2) *Barnardo's Homes* v. *Income Tax Special Comrs.*, [1921] 2 A.C. 1; 23 Digest 394, *4653*; 90 L.J.K.B. 545; 125 L.T. 250; 7 Tax Cas. 646.

(3) *Marie Celeste Samaritan Society of London Hospital* v. *Inland Revenue Comrs.* A (1926), 43 T.L.R. 23; Digest Supp.; 11 Tax Cas. 226.

(4) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295; 23 Digest 464, *5358*; 36 L.J.Ch. 929; 16 L.T. 695.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing an appeal B against an assessment to sur-tax in the sum of £31,239 for the year ending Apr. 5, 1935, made upon the appellant. The facts are set out in the judgment.

A. M. Latter, K.C., *Lionel Cohen, K.C.*, and *F. H. Talbot* for the appellant.

C *The Solicitor-General* (*Sir Terence O'Connor, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the respondents.

LAWRENCE, J.: This is an appeal against an assessment to sur-tax which included a sum of £17,073, being the gross equivalent of a sum of £13,600 13*s.* 9*d.* placed to the credit of the appellant's wife, by the executors D of her late father's will, under which she was entitled to three-fifths of the residue of his estate for life. The question is whether sur-tax is payable by the husband of a residuary life tenant in respect of the sums credited to his wife in respect of the period between the death of the testator and the ascertainment of the residue. The testator died on E Apr. 22, 1934, and the residue was not, and could not have been, ascertained till May 7, 1935. The sums credited to the appellant's wife were to the extent of £6,000, advances, and to the extent of £7,600 13*s.* 9*d.*, credited to her in account. There is nothing to show whether the sums were the result of a realisation of capital or income assets, but it is clear F that the income arising from the estate during the period of administration was insufficient to pay the expenses of administration. The appellant contends that these credits are no part of the residue, and do not come to his wife as taxable income, and he relies upon *Sudeley (Lord)* v. *A.-G.* (1), *Barnardo's Homes* v. *Income Tax Special Comrs.* (2), and G *Marie Celeste Samaritan Society of London Hospital* v. *Inland Revenue Comrs.* (3). The Solicitor-General, on the other hand, contends that those cases are not decisive; that, although it may be conceded that sums which are shown to be the realisation of capital assets, or which are paid by executors after a considerable period, may not attract sur-tax H when received by the residuary life tenant, *prima facie* a life tenant is entitled to the income only, and, therefore, everything he receives is income, and attracts sur-tax; and that, in the present case, it is clear that the credits are not a realisation of capital assets, because they are debited to an income account, and that they have not been deferred for any such period as would convert them into capital since they have been credited in account as at Apr. 5, 1935, which was before the ascertainment of the residue. In my opinion, the appellant is entitled to succeed. It is true that a residuary life tenant is entitled to be paid, at the time of the ascertainment of the residue, a sum which represents, as between him and the remainderman, his share of the income which has accrued during the period of administration: see *Allhusen* v. *Whittell* (4). He does not receive that as such income, but as a sum equal to the income: *per* Viscount Cave in the *Barnardo* case (2), at p. 669. In the *Marie Celeste Samaritan Society* case (3), Rowlatt, J., pointed this out, and, in my opinion, I ought to follow his decision in that case. It is sought to distinguish it on the grounds that there was no remainderman in existence, and that Rowlatt, J., did not decide that the sum was not income, but merely that it was not such income as was within the category defined in the Income Tax Act, 1918, s. 37 (1) (*b*). In my opinion, these distinctions do not affect the principle. Whether or not there is a remainderman in existence, the Society, being the tenant for life, was not entitled to more than the interest of tenant for life. The income referred to in the Income Tax Act, 1918, s. 37 (1) (*b*), includes all the income now in question, except the income from land which is dealt with in sect. 37 (1) (*a*).

Apart from this decision, however, I see no reason why a residuary life tenant should be in a position for income tax purposes different from that of a residuary legatee, who, though he may, and generally does, receive sums which represent the income, does not incur sur-tax. Nor do I think that the fact that, as between remainderman and life tenant, it is necessary, before ascertaining the residue, to particularise what is to be charged to the life tenant, and what to the remainderman, to meet debts and legacies and pay over to the life tenant the sum based upon this calculation, renders this sum the income of the residue. A residuary legatee is just as much entitled to the income of the personal estate for a period between the death and the ascertainment of residue as is the residuary life tenant. As has been pointed out in the House of Lords in the cases cited, income received during administration is, strictly speaking, the income of the executors, and not of the beneficiaries under the will. The residuary legatee is entitled to the residue only, and, until that residue is ascertained, he is entitled to nothing. When he receives that residue, although it includes the income of the estate during administration, that income does not attract sur-tax. Similarly, the residuary life tenant is not entitled to anything until the residue is ascertained, and it cannot be ascertained until it has been charged with the amounts chargeable against the life tenant and the remainderman respectively in respect of debts and legacies, and with the amount payable to the residuary life tenant for the period from the death to the ascertainment. The appeal will be allowed with costs.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

WORSHIPFUL COMPANY OF CARPENTERS OF THE CITY OF LONDON *v.* BRITISH MUTUAL BANKING CO., LTD.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **June 25, 28, 29, July 29, 1937.**]

A *Bankers—Cheques—Fictitious payee—Forged indorsement—Accounts of company and employee at same bank—Bank having no branches—Statutory protection—Stamp Act*, 1853 (*c.* 59), *s.* 19—*Bills of Exchange Act*, 1882 (*c.* 61), *ss.* 60, 79 (2), 82.

The plaintiffs, as managers of a convalescent home, kept an account with the defendant bank. The plaintiffs employed a secretary of the committee which managed the home, who kept his personal account B with the defendant bank. By a series of frauds, the secretary misappropriated cheques amounting to over £4,000, which were the property of the plaintiffs and which he contrived to have placed to his account with the defendant bank in the following manner. The cheques, which were crossed, were all properly signed by the plaintiffs' proper officers, and in most cases were drawn to people who had supplied goods to the C home, in which cases the secretary forged an indorsement, or procured a forged indorsement of the payee, and paid the cheques into the defendant bank, asking the bank to credit his account with the amount of the cheques. In other cases, the secretary procured cheques to be drawn in payment of forged invoices in favour of fictitious persons, and in these cases the indorsements were similarly forged, and the amounts of the cheques credited to the secretary's account. In an action for D conversion, the defendant bank pleaded: (i) that the payees were non-existent persons, and that the secretary was the bearer of the cheques; (ii) that it had paid the cheques in good faith in the ordinary course of business, and was protected by the Bills of Exchange Act, 1882, and the Stamp Act, 1853; and (iii) that the cheques were crossed, and that it received payment thereof for a customer in good faith, and without negligence:—

E HELD: (i) [MACKINNON, L.J., dissenting] as a receiving bank the defendant bank had been guilty of conversion, and, as it had been found by the judge to have acted negligently, it was not protected by the Bills of Exchange Act, 1882, s. 82. The defendant bank was therefore liable to the plaintiffs for the amount of the cheques converted during the six years prior to the action.

F (ii) each transaction was a separate one, and the bank was not entitled to plead that, as the system had been going on for some time, the cheques received during the six years prior to the action had been received without negligence on the part of the bank.

(iii) [MACKINNON, L.J., making no reference to this point] the Stamp Act, 1853, s. 19, is impliedly repealed by the Bills of Exchange Act, 1882, s. 60.

G (iv) *per* SLESSER and MACKINNON, L.JJ.: a bank can act negligently, and yet be acting in the ordinary course of business.

(v) *per* GREER, L.J.: the Bills of Exchange Act, 1882, s. 60, protects a bank only when that bank is merely a paying bank, and is not a bank which receives the cheque for collection. *Per* SLESSER, L.J.: the defendant bank as paying bank was to be deemed to have paid the cheque in the ordinary course of business, and was protected by sect. 60.

H *Decision of* BRANSON, J., [1937] 1 All E.R. 183, *reversed.*

[EDITORIAL NOTE. BRANSON, J., in the judgment appealed from, and MACKINNON, L.J., in a dissenting judgment, have regarded the question for decision as covered by part of the decision of the Court of Appeal in *Capital & Counties Bank Ltd.* v. *Gordon* (5). That case went to the House of Lords upon other points, but not upon the point here material. By a majority the Court of Appeal have reversed the decision of BRANSON, J., that the Stamp Act, 1853, s. 19, is impliedly repealed by the Bills of Exchange Act, 1882, s. 60; but, also by a majority, they have confirmed his view that a bank can act negligently and yet be acting in the ordinary course of business. Had MACKINNON, L.J., not felt himself bound by the decision in *Capital & Counties Bank Ltd.* v. *Gordon* (5), the Lords Justices in the Court of Appeal would have been unanimous that the bank had been guilty of conversion as a receiving bank and having been negligent could not avail itself of the Bills of Exchange Act, 1882, s. 82. The effect of the Bills of Exchange Act, 1882, s. 60, is left in some doubt by the judgments herein, but the careful analysis by MACKINNON, L.J., of the position leading up to passing of sects. 60 and 82 of the Act seems to support the view expressed by him and by SLESSER, L.J., that a bank may yet be protected by sect. 60, although there is finding that it has acted negligently.

AS TO PROTECTION OF A BANKER PAYING CROSSED CHEQUES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 830-832, paras. 1352, 1353; and FOR CASES, see DIGEST, Vol. 3, pp. 189, 190, Nos. 386-388, and Supp.]

Cases referred to:

(1) *Lloyds Bank, Ltd.* v. *Savory (E. B.) & Co.*, [1932] 2 K.B. 122; [1933] A.C. 201; Digest Supp.; 102 L.J.K.B. 224; 148 L.T. 291.

(2) *Morison* v. *London County & Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 3 Digest 242, *690*; 83 L.J.K.B. 1202; 111 L.T. 114.

(3) *Underwood (A. L.), Ltd.* v. *Bank of Liverpool, Same* v. *Barclays Bank*, [1924] 1 K.B. 775; Digest Supp.; 93 L.J.K.B. 690; 131 L.T. 271.

(4) *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107; 3 Digest 244, *703*; 60 L.J.Q.B. 145; 64 L.T. 353.

(5) *Capital & Counties Bank, Ltd.* v. *Gordon, London City & Midland Bank, Ltd.* v. *Gordon*, [1902] 1 K.B. 242; [1903] A.C. 240; 3 Digest 243, *694*; 72 L.J.K.B. 451; 88 L.T. 574.

(6) *Bissell & Co.* v. *Fox Brothers & Co.* (1885), 53 L.T. 193; 3 Digest 241, *684*.

(7) *Bank of Montreal* v. *Dominion Gresham Guarantee & Casualty Co., Ltd.*, [1930] A.C. 659; Digest Supp.; 99 L.J.P.C. 202; 144 L.T. 6.

(8) *Ex p. Caruthers* (1807), 9 East 44.

(9) *Ross* v. *London County, Westminster & Parr's Bank*, [1919] 1 K.B. 678; Digest Supp.; 88 L.J.K.B. 927; 120 L.T. 636.

(10) *Slingsby* v. *District Bank, Ltd.*, [1932] 1 K.B. 544; Digest Supp.; 101 L.J.K.B. 281; 146 L.T. 377.

(11) *Slingsby* v. *Westminster Bank, Ltd. (No. 2)*, [1931] 2 K.B. 583; Digest Supp.; 101 L.J.K.B. 291, *n.*; 146 L.T. 89.

(12) *Charles* v. *Blackwell* (1877), 2 C.P.D. 151; 3 Digest 237, *665*; 46 L.J.Q.B. 368; 36 L.T. 195.

(13) *Brighton Empire & Eden Syndicate* v. *London & County Bank, Ltd.* (1904), *Times Newsp.*, Mar. 24.

(14) *Lloyds Bank* v. *Chartered Bank of India, Australia & China*, [1929] 1 K.B. 40; Digest Supp.; 97 L.J.K.B. 609; 139 L.T. 126.

(15) *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay & Co., Ltd.* (1906), 95 L.T. 444; 3 Digest 231, *635*.

(16) *Lacave & Co.* v. *Crédit Lyonnais*, [1897] 1 Q.B. 148; 3 Digest 239, *672*; 66 L.J.Q.B. 226; 75 L.T. 514.

(17) *Re Farrow's Bank, Ltd.*, [1923] 1 Ch. 41; Digest Supp.; 92 L.J. Ch. 153; 128 L.T. 332.

(18) *London & Montrose Shipbuilding & Repairing Co., Ltd.* v. *Barclays Bank* (1926), 31 Com. Cas. 182; Digest Supp.

(19) *Midland Bank, Ltd.* v. *Reckitt*, [1933] A.C. 1; Digest Supp.; 102 L.J.K.B. 297; 148 L.T. 374.

APPEAL from a decision of BRANSON, J., dated Dec. 15, 1936, and reported in [1937] 1 All E.R. 183.

F. P. M. Schiller, K.C., and *James Wylie* for the appellants.

A. T. Miller, K.C., and *Valentine Holmes* for the respondent bank.

Schiller, K.C.: The words " in good faith and in the ordinary course A of business " occur in the Bills of Exchange Act, 1882, s. 60, but not in the Stamp Act, 1853, s. 19. These two sections are inconsistent, and the former one is impliedly repealed. [Counsel referred to *Capital & Counties Bank, Ltd.* v. *Gordon* (5), and *Ex p. Caruthers* (8).] Where a cheque, not intended to go through a private account, is paid into such B an account, that is not in the ordinary course of business: *Ross* v. *London County, Westminster & Parr's Bank* (9). The meaning of " in the ordinary course of business " was considered in *Morison* v. *London County & Westminster Bank, Ltd.* (2). Where the servant of a company pays into his own account cheques drawn by the company, that is not C the ordinary course of business: *Underwood (A. L.), Ltd.* v. *Bank of Liverpool* (3); *Slingsby* v. *District Bank, Ltd.* (10). If a bank is negligent, that cannot be in the ordinary course of business: *Slingsby* v. *Westminster Bank, Ltd. (No. 2)* (11). *Bissell & Co.* v. *Fox Brothers & Co.* (6) is the only case since 1882 in which reliance has been placed D on the Stamp Act, 1853, s. 19.

Miller, K.C.: It is submitted that judgments in cases decided under the Bills of Exchange Act, 1882, s. 82, do not assist the court to find the meaning of the words " in the ordinary course of business " in sect. 60 of that Act. The different phrasing in sect. 60 is intended to cover a E different set of circumstances. The course of business ends when the money is paid. [Counsel referred to *Charles* v. *Blackwell* (12) and *Brighton Empire & Eden Syndicate* v. *London & County Bank, Ltd.* (13).] The words are not inconsistent with some degree of negligence on the part of the bank. If the two findings of BRANSON, J., are inconsistent, F the one that is wrong is the finding that the bank was negligent. Any negligence that there was took place after the payment. [Counsel referred to *Morison* v. *London County & Westminster Bank, Ltd.* (2) and *Lloyds Bank* v. *Chartered Bank of India, Australia and China* (14).] Although most of the 1853 Act was repealed, sect. 19 was left to give G unconditional protection. *Bissell & Co.* v. *Fox Brothers & Co.* (6) has been acted on for many years. If the bank was negligent, it acted *bona fide* and in the ordinary course of business. The negligence of the customer was greater than that of the bank, and lasted for 15 years. [Counsel referred to *Lewes Sanitary Steam Laundry Co., Ltd.* v. *Barclay* H *& Co., Ltd.* (15).]

Schiller, K.C., in reply: The two branches of a bank must be treated as one bank: *Lacave & Co.* v. *Crédit Lyonnais* (16). It makes no difference if a cheque is paid in to the same branch as it is drawn upon. The court must see in what capacity the bank acted. Here the bank was collecting cheques for and on behalf of Blackborow; otherwise sect. 82

has no application to this case. Handling these cheques at all without inquiry was negligence. [Counsel referred to *Re Farrow's Bank* (17), *London & Montrose Shipbuilding & Repairing Co., Ltd.* v. *Barclays Bank* (18), *Midland Bank, Ltd.* v. *Reckitt* (19), and *Lloyds Bank, Ltd.* v. *Savory* (*E. B.*) *& Co.* (1).] In *Bissell & Co.* v. *Fox Brothers & Co.* (6), the cheque was not crossed, and the court treated it as having been paid over the counter.

Greer, L.J.: This is an appeal by the plaintiffs, whom I shall call for short "the Carpenters Company," from a decision of Branson, J., in favour of the defendant bank, the British Mutual Banking Co., Ltd. The Carpenters Company had in their employ a clerk named Blackborow, who from time to time was the acting clerk of the Carpenters Company. He was also the secretary of an institution which I will call for short the Rustington Home, the expenses of running the home being expenses which the Carpenters Company had taken upon themselves to pay. From time to time moneys became due from the Carpenters Company to tradesmen who supplied goods required for the purposes of the Rustington Home, and it was part of the duty of Blackborow to obtain cheques from the Carpenters Company to pay these tradesmen. The Carpenters Company kept an account with the defendant bank for the purposes of the Rustington Home. The cheques of the Carpenters Company required the signatures of the master and warden, and the counter-signature of the clerk. Unfortunately, the Carpenters Company trusted Blackborow, in the belief that he was an honest man upon whom they could rely, but, in the year 1920, he began to steal the cheques, forge the indorsement of the tradesmen who were the payees of the cheques, take them to the defendant bank, and hand them over to that bank with the request that they should be credited to his private account. In the early cases, he stated, in explanation of his using the cheques purporting to be endorsed by the payees, that he had already paid the money out of his own pocket, and that he was, therefore, entitled to ask that the cheques should be credited to his account.

The practice of paying in cheques with forged indorsements continued from 1920 down to Aug., 1935. The writ in the action was issued on Apr. 15, 1936. All the claims based on cheques prior to Apr., 1930, were barred by the Statute of Limitations, and the action was concerned only with the cheques fraudulently used with forged indorsements on and after the cheque of Apr. 17, 1930. All the cheques were crossed cheques. The case made for the Carpenters Company was that all the cheques in the 6 years before action, the face value of which was £1,955 5*s.* 3*d.*, had been received by the defendant bank as a collecting bank, and that, in passing them to the credit of the private account of Blackborow, the bank had converted the cheques to its own use, and, unless it could make out that it was protected by the Bills of Exchange Act, 1882, s. 82, it was liable for the face value of the cheques as damages for conversion. The case put forward in argument for the defendant bank was that it was merely a paying bank, and was protected by the Bills of Exchange Act, 1882, s. 60.

The Bills of Exchange Act, 1882, s. 82, is in the following words :

> Where a banker in good faith and without negligence receives payment for a A customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

The circumstances in which the question as to the protection afforded to a bank by the Bills of Exchange Act, 1882, s. 82, usually arises are where the bank asking for the protection of the section is one receiving B payment for a customer of a crossed cheque from another bank. It will be convenient to describe the bank which receives the crossed cheque drawn on another bank as "the collecting bank," and the bank that pays the collecting bank as "the paying bank." As I have said, in most cases that have arisen, the collecting bank and the paying bank C are different corporations, and the collecting bank is protected only if it deals with the cheques without negligence, whereas, by the Bills of Exchange Act, 1882, s. 60, the paying bank is protected if it pays the cheque to the collecting bank in the ordinary course of business, in which case it is deemed to have paid the cheque in due course, although the D indorsement has been forged or made without authority. In the present case, as in *Lloyds Bank, Ltd.* v. *Savory (E. B.) & Co.* (1), a case arose for decision in which the collecting bank and the customer's bank which passed the cheques to the credit of the fraudulent presenter were both branches of the same legal entity. It is unquestionable now, as E SCRUTTON, L.J., said in his judgment in *Savory's* case (1), at p. 129 :

> Before the Crossed Cheques Act, 1876, and the Bills of Exchange Act, 1882, the defendants would have had no answer to the plaintiffs' claim. They dealt with the cheques in a manner inconsistent with the rights of the plaintiffs, the true owners, i.e., they "converted" them, and would be liable for their face value lost by the plaintiffs : *Morison's* case (2) ; and it would be no defence that they had no reason to believe that they were converting them.

F

After referring to the question as to their protection under sect. 82 of the Act of 1882, SCRUTTON, L.J., said :

> Before the Acts, the bank, of course, owed a duty to every owner of property not to convert it, but that duty was absolute and independent of reasonable care.

G These observations were made in a case which was concerned with the action of two branches of the same bank. The law on this subject was stated, in a way that has never been questioned, by LORD READING, C.J., in *Morison* v. *London County & Westminster Bank, Ltd.* (2). All the cheques in the present case were crossed cheques, that is to say, they H were cheques which were to be paid to a collecting bank only. The difficulty in this case is that the collecting bank and the bank that credited the cheques to the fraudulent presenter were not merely the same bank, but the same and only branch of that bank. In *Savory's* case (1), the Court of Appeal held the bank liable, because, by receiving the cheques and sending them to its branch at Wallington, it was dealing with the cheques without the authority of the true owner, the drawer of the cheques, and the Court of Appeal apparently considered that the only way in which the bank could escape liability for converting the cheques by so dealing with them was by bringing itself within the protection of sect. 82. The decision seems to involve that, if the bank acts both in the capacity of collecting bank and in that of customer's bank, it must be held guilty of conversion, and liable for the face value of the cheques, unless it can bring itself within the protection of sect. 82. In the present case, what happened was that, when the cheques were presented to the defendant bank, they had never ceased to be the property of the drawers, the Carpenters Company, as they had never in fact been endorsed by the payees. The defendant bank was then asked by Blackborow to receive the cheques, and to place the amounts to the credit of his private account with it. This the bank did, and, so doing, it in my judgment converted the cheques to its own use, and became liable to the Carpenters Company, the drawers of the cheques, for the face value of the cheques.

In my judgment, the Bills of Exchange Act, 1882, s. 60, protects a bank only when that bank is merely a paying bank, and is not a bank which receives the cheque for collection. In my judgment, Branson, J., was wrong in treating the defendant bank as if the bank had been merely a paying bank, and in failing to apply the law of conversion to the facts proved before him. The sole question which he had to decide was whether the bank was protected by the Bills of Exchange Act, 1882, s. 82, from its liability for conversion of the cheques. He treated sect. 82 as applicable to the defendant bank, but decided that it had not proved that it received payment without negligence, but, on the contrary, he decided that it was negligent.

It was suggested in the course of the argument that the finding of negligence was wrong, because, after so many forged cheques had been presented and debited to the Carpenters Company, the bank was entitled to suppose that the system which started in 1920, and had gone on ever since then, had been passed by the Carpenters Company, and that the bank was entitled to think that the cheques during the last 6 years were cheques received without negligence, because the bank was entitled to suppose that the Carpenters Company had no objection to the long-standing practice of Blackborow's paying cheques, made out in favour of customers, to the credit of his own account. It seems to me that this argument ought not to succeed. Each transaction, when a cheque was presented with a request that it should be passed to Blackborow's account, must fall to be determined on the facts relating to such transaction. It might well be that the earlier transactions were not fraudulent, but that the cheques concerned in those transactions were paid in to Blackborow's credit with the knowledge and consent of the Carpenters Company, but it would not follow from that that the cheque presented on Apr. 17, 1930, was also a cheque which the bank was entitled to cash, upon the assumption that the Carpenters Company assented to its being used by Blackborow as a cheque to be paid to his credit. There are some parts of the decision in *Morison's* case (2) which appear to indicate that, after a number of transactions had appeared in the books of the defrauded company, and had been passed by the auditors of the defrauded company, the bank would be entitled to think, when the next cheque came in, that it was freed from the necessity of any inquiry, and its failure to inquire would not be negligence. This view is inconsistent with *Underwood (A. L.), Ltd.* v. *Bank of Liverpool* (3).

Up to this point, I have considered only the law of conversion as applied to cheques and the provisions of the Bills of Exchange Act, 1882, s. 82. I have still to consider the meaning and effect, on the facts of this case, of sect. 60 of that Act. In doing so, I think that I should follow the views expressed by Lord Halsbury, L.C., in *Bank of England* v. *Vagliano Brothers* (4), and consider both sect. 82 and sect. 60 without reference to any of the earlier decisions on the law of bills of exchange except in so far as they may be necessary to resolve any ambiguity in sects. 82 and 60. In my judgment, the defendant bank in this case was, as the receiving bank, liable for conversion of the cheques. It received the crossed cheques from Blackborow at a time when the Carpenters Company as drawers were the true owners of the cheques. It dealt with the cheques at the request of the Carpenters Company's fraudulent servant, received the cheques from him, and immediately passed them to the credit of his account. It did not, in this case, cash the cheques over the counter, and it is unnecessary to consider what would have been the result if, instead of passing them to Blackborow's credit, the bank had paid him the cash over the counter. In my opinion, though it is unnecessary to decide this in the present case, it would still, as receiving bank, be liable for conversion. Be this as it may, on the facts proved in the present case, I think that, when the bank received the cheques and passed them to the credit of Blackborow's private account, it converted the cheques by dealing with them as if they were Blackborow's property, and immediately crediting him with the amount thereof. Inasmuch as Branson, J., has rightly found that the bank was guilty of negligence in so doing, the bank has failed to make out any answer to the Carpenters Company's claim for damages for conversion. This seems to me a result which is strictly in accordance with the decision in *Lloyds Bank, Ltd.* v. *Savory (E. B.) & Co.* (1).

It remains to say something with reference to the questions discussed in the judgment as to the effect of the Stamp Act, 1853, s. 19. I agree with the view to which Slesser, L.J., called attention in the course of the argument, that the Bills of Exchange Act, 1882, s. 60, must be treated as inconsistent, so far as cheques are concerned, with the provisions of the Stamp Act, 1853, s. 19, and the sole duty of the court, after the passing of the Bills of Exchange Act, is to apply sect. 60 of that Act. The observations of Stirling, L.J., in *London City & Midland Bank, Ltd.* v.

Gordon (5), were made *per incuriam*, as they refer to sect. 19 of the Stamp Act as if it had been part of the Bills of Exchange Act. *Gordon's* case (5) calls for consideration from another point of view. The cheques in that case belonged to various classes, but they were all crossed cheques. Class 4 related to crossed cheques drawn on one branch of the defendant bank and handed to another branch for collection. A
As to these cheques it was held by Sir Richard Henn Collins, M.R., though with some difficulty, that, though the defendant bank was a collecting bank as well as a paying bank, it was protected from liability by reason of sect. 60 of the Bills of Exchange Act. I find it a little difficult to follow the logic of this reasoning, because the bank was no less B
a collecting bank because it was collecting from one of its branches for the customer, and paying the money so collected for the benefit of the fraudulent presenter of the cheque ; but, be this as it may, it seems to me that the actual decision does not bind me in the present case, inasmuch as there was an express finding of the jury, on which the Court C
of Appeal acted, that the bank acted without negligence. It seems to me impossible to say, in the present case, that the bank acted without negligence. Branson, J., has expressly found that it acted negligently, and it cannot, therefore, in my judgment, be heard to say, when acting negligently, that it was acting in the ordinary course of business within D
the meaning of the Bills of Exchange Act, 1882, s. 60. The finding, in this case, that the bank acted negligently, in my judgment distinguishes this case from *Gordon's* case (5). I note that, by para. 7 of the statement of claim, the action was based alternatively on negligence. I think on this ground the decision in *Gordon's* case (5) is not an authority on which E
we are bound to decide that the bank, having acted negligently, is excused by reason of the Bills of Exchange Act, 1882, s. 60, from the consequences of its negligence. I understand the judgment of the Court of Appeal to mean that, if there had been negligence, there would have been a case for conversion by the defendant bank as receiving bank, F
and no protection under sect. 82, and, secondly, if the defendant bank was forced to rely on sect. 60, regarded as the paying bank, it would be protected by that section, but, in any event, as there was no negligence on its part, it was freed from liability if treated as paying bank.

For the reasons above stated, I am of opinion, though with some G
hesitation, that Branson, J., was wrong in holding that the bank was entitled to the protection of sect. 60 of the Bills of Exchange Act, and the appeal will be allowed with costs, and judgment entered for the Carpenters Company for the face value of all the cheques received by the bank and passed to the credit of Blackborow during the 6 years H
preceding the issue of the writ. The amount of these will be £1,955 5*s*. 3*d*. The appeal will, in my judgment, be allowed with costs, and judgment entered for the plaintiff company for £1,955 5*s*. 3*d*., with costs.

Slesser, L.J. : In this case, the critical question arises as to whether or not the defendant bank has wrongfully received the proceeds of the plaintiffs' cheques and converted them. In so far as it received the plaintiffs' cheques, at Blackborow's request, and credited its customer Blackborow with the proceeds, which were at all times the property of the plaintiffs, it appears to me to have acted, albeit wrongly, as a receiving bank as well as in the capacity of a paying bank. As paying banker, A it may well be protected by the Bills of Exchange Act, 1882, s. 60, in so far as it acted in good faith, which is not disputed, and in the ordinary course of business. BRANSON, J., has come to the conclusion that, in all the facts of this case, which I do not repeat, it did so act in the ordinary course of business. It was argued by Mr. Schiller that, in so B far as the judge has held that it failed to show that it acted without negligence within the meaning of sect. 82 of the Bills of Exchange Act, therefore it cannot be held to have acted in the ordinary course of business. I do not agree; negligence does not necessarily preclude the protection of sect. 60, a view made clear in the case of the other require- C ment, of good faith, by sect. 90 of the same Act, which in terms provides that "a thing is deemed to be done in good faith within the meaning of the Act where it is in fact done honestly, whether it is done negligently or not." This provision is helpful, I think, in deciding whether an admittedly negligent act can be done in the ordinary course of business. D In *Vagliano's* case (4), LORD HALSBURY, L.C., speaking of the alleged negligence of bankers evidenced by the pursuit of an unusual course of business, says, at p. 117:

> I should doubt whether . . . it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur, necessarily giving rise to suspicion.

E

BRANSON, J., points out in his judgment in the present case that there was nothing in the steps taken by the bank in the present case which was not in the ordinary course of business, and I agree with him. *Bissell & Co.* v. *Fox Brothers & Co.* (6), which the judge cites, was a case F decided under the Stamp Act, 1853, s. 19, which section has no limitation of reference to payments in the ordinary course of business, and, therefore, is of no assistance on that question in the present case. See also the *dicta* of STIRLING, L.J., in *Gordon's* case (5), which also can refer only to the Stamp Act, 1853, s. 19. That section, I think, G is impliedly repealed by the Bills of Exchange Act, 1882, s. 60, in the case of bills of exchange and cheques: *per* LORD LINDLEY in *Capital & Counties Bank, Ltd.* v. *Gordon* (5), at p. 251. But, though I am of opinion that the Stamp Act, 1853, is not here applicable, I think that the judge was entitled to hold, on the facts, that the Bills of Exchange Act, H 1882, s. 60, applied to this case, and, therefore, it follows that the banker as payer is to be deemed to have paid the bill in due course, notwithstanding that the indorsement has been forged.

As receiving bank, however, unless protected by statute, it was guilty of conversion, and liable in trover, or for money had and received, for it dealt with the cheques, which, for the want of a payee, were still the property of the plaintiffs, in a manner inconsistent with the plaintiffs' rights as the true owners: *per* Lord Lindley in *Capital & Counties Bank, Ltd.* v. *Gordon* (5), at p. 247, Sir R. Henn Collins, M.R., *ibid.*, [1902] 1 K.B., at p. 262; *Morison* v. *London County & Westminster Bank, Ltd.* (2), *per* Lord Reading, at p. 365, *per* Phillimore, L.J., at p. 379; *Lloyds Bank, Ltd.* v. *Savory (E.B.) & Co.* (1), *per* Lord Wright, at p. 228.

As to the protection of the Bills of Exchange Act, 1882, I think that the judge was entitled, as a question of fact, to find that the bank had failed to show that it had acted without negligence. The fact that Blackborow, an employee of the plaintiffs, wished the proceeds of the cashed cheques to be credited to his account was fully known to the cashier. True, he suspected Blackborow, not of forgery, but of seeking to obtain secret commission for himself, and mentioned his suspicions to his superior on many occasions; but the circumstances, on any view, were such as should have put the bank on inquiry. Nor was the repetition of the practice any excuse: neglect of duty does not cease by repetition to be neglect of duty: *per* Lord Tomlin in *Bank of Montreal* v. *Dominion Gresham Guarantee & Casualty Co., Ltd.* (7), at p. 666. Any observations to the contrary in *Morison's* case (2) on the so-called principle of lulling to sleep must now be received with great reserve. I agree with Greer, L.J., that, in so far as Sir Richard Henn Collins, M.R., in *Gordon's* case (5), and the rest of the court, held that sect. 82 of the 1882 Act applied, and that there was no negligence, his observations at p. 274 and those of Stirling, L.J., at p. 281, as to the effect of sect. 60 or sect. 82, were *obiter*, and are not binding in this case on a finding that there was negligence, and the protection of sect. 82 cannot be invoked by the bank at all.

It follows, therefore, that, on the finding of the judge that the bank has failed to prove that it acted without negligence, it is liable to the true owner in conversion, and that this appeal succeeds.

MacKinnon, L.J. [read by Slesser, L.J.]: If I were free to decide this case on principle and apart from authority, I should be of opinion that, so far as the cheques were crossed cheques, this appeal should be allowed. But, having regard to a decision of this court, to which I must refer later, I think that the decision of Branson, J., was correct, and the appeal falls to be dismissed.

The relation of the parties is that of customer and banker. By drawing a cheque, the customer issues a mandate to the banker according to its terms. If the mandate is, "Pay X. or order," that is in truth, "Pay this if it is indorsed by X." If the indorsement of X. has been forged, but the cheque is paid, the mandate has been disobeyed, and the banker will be liable to make good the sum so paid, unless there is some statutory provision which relieves him from liability. If the cheque is not crossed, the statutory provision is to be found in either the Stamp Act, 1853, s. 19, or the Bills of Exchange Act, 1882, s. 60.

I will assume (though I do not think it is necessary to decide it) that the qualification of payment "in the ordinary course of business," added in the Act of 1882, must now qualify the immunity given by sect. 19 of the Act of 1853. If these were not crossed cheques, I think the only question would be whether the defendant bank paid them to Blackborow "in the ordinary course of business." I agree with BRANSON, J., in thinking that it did. It is said that, in paying them, it acted negligently, and, for that reason, it cannot be said to have paid in the ordinary course of business. I do not agree with that contention. A thing that is done not in the ordinary course of business may be done negligently, but I do not think that the converse is necessarily true. A thing may be done negligently and yet be done in the ordinary course of business: the drawing of the cheques by the plaintiffs' officials in this case seems to me a crucial example.

It is not without importance to observe that the banker does owe a duty of care to his customer; the banker and his customer are in a contractual relation. The collecting banker, apart from legislation, owes no duty of care at all to the drawer of a cheque upon another bank. The duty not to be negligent imposed by the Bills of Exchange Act, 1882, s. 82, upon the collecting banker is a duty created only by the section itself. That being so, it seems to me highly significant that, when sect. 60 was passed to limit the liability of the paying banker, the condition of his immunity expressed is only that he shall pay "in the ordinary course of business," and there is no stipulation, as in sect. 82, that he shall act without negligence. But, if that had been intended, seeing that the paying banker already owes a duty of carefulness to his customer, it would have been the more obvious to express it. If, therefore, any of these cheques were not crossed cheques, I think that the defendant bank would be relieved from liability by sect. 60 as having paid them "in the ordinary course of business," even if it was negligent in doing so.

As regards crossed cheques, I think other considerations arise. The mandate of the customer who draws a crossed cheque, "Pay X. or order," makes it subject to a twofold condition: "Pay this money if X. indorses the cheque and if it is presented for payment by a banker." If the paying banker disobeys this mandate in either respect, he will be liable, unless there is statutory provision for his immunity. On principle, and apart from authority, I should think that such a provision must be found in those sections of the Bills of Exchange Act which deal with crossed cheques. Primarily, the defendants were the paying bankers, on whom the cheques were drawn. What in fact the bank did was to debit them to the drawers, the plaintiffs, and credit them to its customer, Blackborow; but primarily they were the paying bankers. Now, sect. 79 (2) provides that if a banker "pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed," he is liable to the true owner of the cheque.

Obviously a cheque may be drawn on, say, the Midland Bank, payable to a customer of that bank, and crossed specially "Midland Bank." That paying bank cannot comply with sect. 79 (2) otherwise than by debiting the drawer and crediting the payee. It must be both the paying bank and the bank receiving payment. So, if a cheque drawn on the Midland Bank and crossed generally is paid in by a customer of that bank, it must be entitled to pay it by debiting the drawer and crediting the payee. Its customer cannot be required to open an account at another bank in order that the Midland Bank can literally comply with sect. 79 (2) by "paying to a banker."

In the strictest analysis, I think that the defendant bank paid these cheques to Blackborow, and he paid in equivalent amounts to the credit of his account. But, for the purpose of the Bills of Exchange Act, 1882, ss. 79, 80, 82, I think that the defendant bank did pay the crossed cheques to a banker, i.e., to itself. If, for the purposes of sects. 79 and 80, it paid to a banker, it would seem to me to follow that, for the purposes of sect. 82, it must be the banker who received or collected it. If so, when sued by the plaintiffs in conversion, I should, for my own part, think that the defendant bank must rely for its answer on sect. 82, and establish that it acted in good faith and without negligence. In that case, I should think that it could not set up that, its primary relation to the plaintiffs being that of paying banker to customer, it can rely on sect. 60, and claim immunity as having paid "in the ordinary course of business."

But, though this would be my own view, I think I am precluded, by a decision of this court, from giving effect to it. In *Capital & Counties Bank, Ltd.* v. *Gordon* (5), at p. 242, the facts as regards cheques in class 4 seem to me to have been indistinguishable from those in this case. The bank claimed immunity under sect. 60; the plaintiff claimed that it must rely on sect. 82. It was held by SIR RICHARD HENN COLLINS, M.R., at pp. 272, 275, that the bank could rely on sect. 60. STIRLING, L.J., said the same, at pp. 281, 282. MATHEW, L.J., did not specifically deal with class 4, but, at the end of his judgment, he expresses his agreement with the other members of the court on this and on other minor questions. This decision being, as I think, directly in point, I find myself constrained to follow it, and, therefore, to hold that the defendant bank in this case can rely on sect. 60 as to the crossed cheques credited by it to Blackborow's account. This, I think, was the view of this case taken by BRANSON, J. I think that he was right. I therefore think that this appeal should be dismissed, though, as I have indicated, if the absence of any authoritative decision allowed me to do so, I should have been in favour of allowing the appeal, as regards the cheques that were crossed. To do so would, of course, involve a finding that the defendant bank did not act without negligence. On that, too, I should agree with BRANSON, J.

Mr. Miller made the point for the defendant bank that some of these cheques were payable to a fictitious or non-existent payee, and therefore, under sect. 7 (3), could be treated as payable to bearer. I do not think that this makes any difference. In fact, directly the cheques to order were indorsed in blank, they became equivalent to bearer cheques under sect. 8 (3). But, apart from that, if he can rely on sect. 60, the A point is immaterial to him. But, even if they were all bearer cheques, but were crossed, the provisions of sects. 79 and 82 would apply equally to them.

I should have added, as to *Gordon's* case (5), that nothing was said in the House of Lords as to the cheques in class 4. There was no cross-B appeal about them by the plaintiffs.

Appeal allowed with costs. Judgment for the plaintiffs with costs. Leave to appeal to the House of Lords.

Solicitors: *Sir John J. Stavridi* (for the appellants); *White & Leonard & Nicholls & Co.* (for the respondent bank).

C [*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

Re LEGH'S RESETTLEMENT TRUSTS, PUBLIC TRUSTEE D *v.* LEGH.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **July 6, 7, 30, 1937.**]

Perpetuities—Power of appointment—Appointment upon trust to pay income during their joint lives to two grandchildren in equal shares as tenants in E *common—After death of either grandchild to pay whole income to survivor —Neither grandchild alive at date of deed conferring power of appointment —Contingent interest.*

In the exercise of a special power of appointment conferred upon him by a deed of 1891, a testator by his will appointed a sixth part of the settled funds upon the following trusts in favour of his two grand-F children: "upon trust during the joint lives [of the grandchildren] to pay the income thereof to them in equal shares as tenants in common and after the death of either of them to pay the whole of the income thereof to the survivor of them during the residue of his or her life." Then followed a disposition of the capital upon the death of the surviving grandchild. Neither of the two grandchildren was alive at the date of the deed conferring the power of appointment:—

G Held: the reversionary life interest in the whole income appointed to the surviving grandchild was a contingent interest, and the appointment, therefore, in the circumstances, was void by reason of the rule against perpetuities.

[EDITORIAL NOTE. It is a well settled proposition that a remainder is contingent H where the person to take is not yet ascertained or not in being. It is also settled that that proposition applies in the case of a limitation to two for life with remainder to the survivor in fee. It was sought to say that it was otherwise where the remainder is to the survivor for life, but this view was rejected by the court.

As to Contingent Remainders, see HALSBURY, 1st Edn., Vol. 24, Real Property, pp. 220-222, paras. 415, 416; and for Cases, see DIGEST, Vol. 37, pp. 96, 97, Nos. 323-334.]

Cases referred to:

(1) *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783; 37 Digest 68, *103*; 75 L.J.Ch. 359; 94 L.T. 432.

(2) *Gooch* v. *Gooch* (1853), 3 De G.M. & G. 366; 37 Digest 62, *60*; 22 L.J.Ch. 1089; 21 L.T.O.S. 249.

(3) *Re Samuda's Settlement Trusts, Horne* v. *Courtenay*, [1924] 1 Ch. 61; 37 Digest 96, *324*; 93 L.J.Ch. 141; 130 L.T. 286. A

(4) *Re Crichton's Settlement, Sweetman* v. *Batty* (1912), 106 L.T. 588; 37 Digest 97, *334*.

(5) *Pearks* v. *Moseley, Re Moseley's Trusts* (1880), 5 App. Cas. 714; 37 Digest 68, *98*; 50 L.J.Ch. 57; 43 L.T. 449.

(6) *Leadbeater* v. *Cross* (1876), 2 Q.B.D. 18; 44 Digest 1051, *9038*; 46 L.J.Q.B. 31; 35 L.T. 803. B

(7) *Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535; 37 Digest 98, *336*; 74 L.J.Ch. 361; 92 L.T. 534.

Appeal from a decision of Luxmoore, J., dated Oct. 14, 1936. The point here dealt with by the Court of Appeal did not arise for decision at the present time, but, as the event which gave rise to it must inevitably C happen, the court at the desire of the parties expressed its views upon it. The facts are set out in the judgment of Sir Wilfrid Greene, M.R.

Wilfrid M. Hunt for the plaintiff, the Public Trustee.

J. Neville Gray for the adult defendants.

J. G. Craufurd for W. V. Legh. D

Lindsay M. Jopling for the two infant defendants.

C. Montgomery White for H. S. Hopcraft and Kathleen Hopcraft.

R. R. A. Walker for Thomas Legh and C. D. Lacey.

Sir Wilfrid Greene, M.R.: The testator by his will exercised a E special power of appointment conferred upon him by a deed of Oct. 2, 1891. By cl. 20 of his will, he appointed a sixth part of the settled funds in favour of two grandchildren, the children of his deceased daughter Mrs. Cowie. The trusts declared by that appointment were as follows:

F

> Upon trust during the joint lives of my said grandson and granddaughter Ian David Cowie and Jennifer Jean Cowie to pay the income thereof to them in equal shares as tenants in common and after the death of either of them to pay the whole of the income thereof to the survivor of them during the residue of his or her life but so that my said granddaughter shall not during 21 years from my death have power to anticipate the half or the whole (as the case may be) of the income payable to her under this present trust.

G

Then follows a disposition of the capital upon the death of the surviving grandchild. Neither of the two grandchildren was alive at the date of the deed which conferred the power, and, by reason of that fact, the question arises whether the gift of the whole income to the survivor of them is void for perpetuity. The will must be construed without refer- H ence to the rule against perpetuities. If, upon the true construction of the language used, the legal character of the interest created is one which attracts the operation of the rule, it is immaterial that this result might have been avoided by the use of different language creating an interest different in legal character though the same in practical effect. Thus, in a gift upon trust to pay the income to A. during his life and after his death to transfer the capital to B. if he shall be then living, B.'s interest is contingent, and will fail if A.'s death is an event falling outside the limit permitted by the rule. On the other hand, if the gift to B. is in terms absolute with a gift over in the event of his predeceasing A., his interest will be a vested one, and the rule will not apply, notwithstanding that the practical result in the two cases will be the same. The rule is strict, and highly technical in its operation, and the temptation to construe words in such a way as to exclude its application is one which must be firmly resisted.

The question, therefore, which arises is whether, upon the true construction of the will, the interest in the whole income appointed to the surviving grandchild is contingent or vested. As a mere matter of words, this question can have only one answer, for the word "survivor" in itself imports the contingency of survivorship. But it is said that this does not necessarily conclude the matter, for the reason that an interest for life which is to take effect upon the happening of a given event, e.g., the death of a person to whom a prior life interest is given, in its very nature requires survivorship, if it is to take effect at all, and that the character of the interest remains the same, whether the necessity for survivorship, as a condition of taking, be expressed or not. Thus, it is said, and with truth, that, in a gift in trust for A. for life and after his death for B. for life if he shall survive A., the addition of the words "if he shall survive A." does not make the gift to B. contingent, since it merely expresses the inherent characteristic of B.'s interest, viz., that it can be enjoyed only if he survives A. The case would, of course, be quite different if the gift to B. were a gift of corpus.

It is said that, in the present case, the words can be construed as an appointment of one moiety of the income to each grandchild for his or her life, and after his or her death to the other grandchild for his or her life, and that the expectant interest of each grandchild in the other's moiety is vested, in spite of the fact that the condition of survivorship (which is in any event essential and inherent) is expressly attached. This argument is attractive, but, in my opinion, unsound. The original interest given to the two grandchildren is an interest to them as tenants in common, the duration of their interest as such being the joint lives of the two. Upon the death of the first to die, a new and different interest is given, namely, a life interest in the entirety. During the joint lives, it is uncertain which of the two will survive to take that interest which is, in consequence of necessity, contingent in the case of each grandchild. The nature of the interest in the entirety which is appointed upon the death of the survivor appears to me to be in its essence something different from a continuation of the previous interest of the survivor in one moiety with a life interest in the other moiety added to it. If the property appointed had been real estate, the distinction would have been more apparent.

But I cannot leave the matter there without reference to certain authorities, particularly as the subject is one which has given rise to controversy. In *Whitby* v. *Von Luedecke* (1), Buckley, J., had to deal with an appointment in terms substantially the same as those in the present case, and he held that the appointment of the whole income to the survivor was contingent, and, therefore, void for perpetuity. This decision, which has been twice followed in Ireland, has been criticised. One criticism was made by Mr. Sweet, the editor of Jarman on Wills, 7th Edn., Vol. 1, p. 324, note (*b*). But his criticism was based on the fact that the decision was contrary to the view expressed by Lord Cranworth in *Gooch* v. *Gooch* (2), at p. 383. The view of Lord Cranworth, however, was itself based upon an argument which cannot to-day be supported. In *Re Samuda's Settlement Trusts*, *Horne* v. *Courtenay* (3), a similar question came before Eve, J., who followed the decision of Buckley, J., although, apart from that decision, he would apparently have taken the other view. He said, at p. 67:

> I cannot help thinking that the nature of the interest ought to be ascertained by considering the case of each daughter separately and not by grouping them together, and if each daughter's interest is so examined the only contingency in the life interest in remainder would be that which is already imported into the gift by the use of the word "survivors," and which must necessarily be implied in any gift of a life estate in remainder.

I need scarcely say that, in view of this difference of judicial opinion, the question must be considered as being one of difficulty. But, for the reasons which I have given, I think that the language precludes the separate treatment of each interest which Eve, J., thought was permissible. The decision of Neville, J., in *Re Crichton's Settlement*, *Sweetman* v. *Batty* (4), is of no real assistance, as there was in that case the additional contingency of death without leaving issue.

There must accordingly be a declaration that the appointment of the life interest in the whole income to the survivor of the two grandchildren is void for perpetuity.

Romer, L.J.: The question to be decided is whether the reversionary life interest appointed to the survivor is a vested or a contingent interest. The question is of importance for this reason. Neither of the two appointees had been born at the date of the settlement's taking effect. If, therefore, the reversionary life interest be contingent, it will not necessarily vest within a life in being and 21 years thereafter, and will fail to take effect by reason of the rule against perpetuities. This circumstance, however, must be disregarded in answering the question: see *Re Moseley's Trusts*, *Pearks* v. *Moseley* (5), at p. 719. If the interest would be regarded as contingent had the appointees been lives in being at the date of the settlement, it would be quite improper to treat it as vested merely because they were not. The temptation to do so is great, but it is a temptation that must be resisted. No one can doubt that, had the testator realised that, by giving the survivor a contingent interest, such interest must fail to take effect, he would have worded his disposition differently. He could, for instance, have avoided all difficulty by appointing one-half of the share to the grandson for life with remainder to the granddaughter for life, and the other half to the granddaughter for life with remainder to the grandson for life. Where the words of a bequest or devise are legitimately capable of two constructions, the court will always be ready to adopt the one that will give effect to what may be thought to be the testator's real intentions. But if, in the present case, the words used by the testator are capable of being read only as conferring a contingent life interest upon the survivor of his two grandchildren, then that must necessarily be assumed to have been his intention. By so construing them, therefore, his words will be given the meaning that he intended them to have. His intention that the reversionary life interest should take effect will no doubt be defeated. But it will have been defeated by the rule against perpetuities, and not by the court of construction.

Now, in my opinion, the words that the testator has used can be regarded only as creating a contingent life interest in the survivor of the two grandchildren. To hold otherwise would be to depart from well-settled principles of law. Fearne, we know, divided contingent remainders into four classes, the fourth of which is, " where the person to whom the remainder is limited is not yet ascertained or not yet in being " : see FEARNE ON CONTINGENT REMAINDERS, 10th Edn., Vol. 1, p. 5. One of the examples of contingent remainders of this class given by him is that of the limitation of an estate to two for life with remainder to the survivor of them in fee : " The remainder is contingent for it is uncertain who will be the survivor " : *ibid.*, p. 5. The fact that one of them must be the survivor is, of course, immaterial. It is said, however, on behalf of the two grandchildren, that, though this is so in the case of a limitation to the survivor in fee, it is different where the limitation is to the survivor for life. Now, it is true that, in some cases, a limitation that seems at first sight to be contingent is in reality vested. Such a limitation is to A. for life with remainder to B. for life if B. shall survive A. The remainder, though in terms expressed to take effect only upon a contingency, is, nevertheless, a vested remainder. The reason for this is that the words of contingency are treated as applying, not to the vesting of the interest in remainder, but to the vesting of the interest in possession.

> Where an estate in remainder is limited in terms of contingency on the happening of certain events, and the events described are precisely those on which (the preceding estates having determined) it will fall into possession, it is construed to be not a contingent gift conditioned to take effect on these events, but a devise immediately vested, the possession of which is necessarily dependent on the events in question : POWELL ON DEVISES, 3rd Edn., Vol. 2, p. 217.

In the case of *Leadbeater* v. *Cross* (6), a testator had devised an estate to his granddaughters in tail with cross-remainders between them, and, in case the granddaughters should all die without issue, leaving their father and mother surviving, he devised the estate to the father and

mother and the survivor of them for life and after their death to certain persons in fee. Both father and mother died before the death of the surviving granddaughter. If, therefore, the words, "leaving the father and mother or either of them surviving" imported a contingency, such contingency would have applied equally to the ultimate gift in fee. It was held, however, consistently with the principle stated in POWELL A
ON DEVISES, that the words of contingency applied merely to the vesting in possession of the interests of the father and mother, and, accordingly, that the ultimate limitation in fee took effect. It is, perhaps, unnecessary to point out that the question whether or not the limitation to the survivor of the father and mother was contingent did not arise. But this principle B
cannot avail the grandchildren in the present case. The reversionary interest, being a life interest, obviously cannot vest in possession unless the one to take it is living when the preceding interest determines. But, until that event happens, it is impossible to say which of the two will take it. The contingency expressed in the word "survivor" is one, C
therefore, that applies to the person to take, and, consequently, to the vesting in interest, and not merely to the vesting in possession.

It remains only to consider some of the authorities that were cited to us. In *Whitby* v. *Von Luedecke* (1), a testatrix, in exercise of a special power of appointment, directed that the income of the property subject D
to the power should be equally divided between her two daughters A. and L. during their respective lives, and that, in the event of the death of either, the survivor should receive the whole income during her life. Neither of the daughters was a life in being at the date of the settlement, and BUCKLEY, J., held that the survivor took a contingent, and not a E
vested, estate, and that the appointment to her was void, as contravening the rule against perpetuities. It was contended before him that the will should be read as though it said that, when A. died, L. should take a life interest in the entirety, and that, when L. died, A. should take a life interest in the entirety, and that those two interests in remainder F
would be vested interests. As to this contention the judge said, at p. 788:

> Now it seems to me that this is impossible. Every vested interest must be one which may, not necessarily which must, vest in possession. If that be true, it is obvious that the two estates of which I have spoken are such as that one of them—you cannot say which—certainly cannot vest in possession, and none the less because G
> it is impossible to say which of the two will fail so to vest.

This at first sight might seem to indicate that the judge was of opinion that, if the words of the will were read in the way that was suggested, the two interests in remainder would not be vested, but I do not think that this was what he meant. I think that he was merely rejecting the H
suggested construction, for he continued as follows:

> There is a difference, as it seems to me, between these two things—a vested estate for life, which may fail to fall into possession by reason of the life tenant dying before the event happens which gives possession, and the gift of a contingent estate for life. What I have here is a gift under which, as I understand the language, only the survivor of the two ladies will be entitled to some estate under these words

> "in the event of the death of either the survivor shall receive the whole," and I could not at the mother's death have said which of the two it was. It seems to me that that was a contingency—a contingent estate. I cannot read the instrument as creating two vested estates, one of which must fail, and the other of which must take effect. I think it is a contingent estate.

In this conclusion I respectfully concur. This decision was followed, though reluctantly, by Eve, J., in *Re Samuda's Settlement Trusts, Horne* v. *Courtenay* (3). In that case, which was an appointment to three daughters and the survivors of them during their lives, Eve, J., said, at p. 67:

> I cannot help thinking that the nature of the interest ought to be ascertained by considering the case of each daughter separately and not by grouping them together, and if each daughter's interest is so examined the only contingency in the life interest in remainder would be that which is already imported into the gift by the use of the word "survivors," and which must necessarily be implied in any gift of a life interest in remainder.

With all respect to the judge, I cannot agree that the case of each daughter ought to have been considered separately. The testator had not considered them separately, and I can see no justification for the court doing what the testator had omitted to do.

The case of *Whitby* v. *Von Luedecke* (1) has, however, received some adverse criticism in Jarman on Wills, 7th Edn., Vol. 1, p. 324. It is there said that the decision in the case seems erroneous, being inconsistent with the doctrine laid down by Lord Cranworth in *Gooch* v. *Gooch* (2), at p. 383. In that case, Lord Cranworth said that a trust in a will for four persons for their respective lives, such persons being unborn at the date of the death of the testator, with benefit of survivorship among them would be a perfectly good trust. But he then added his reason for so thinking. He said, "because the four with the person who had the fee could convey the fee." With the greatest deference, I venture to think that this is no reason for regarding as valid the trust in favour of the survivors and survivor of the daughters. The fact that the persons entitled in remainder can, by joining with the persons entitled to the particular estate, convey the fee does not necessarily show that the remainders are vested. If land be devised to A. for life remainder to B. for life, and if B. die before A. remainder to C. for life, A. and B. and C. and the heir-at-law can together convey the fee. Yet C.'s life estate in remainder is indubitably contingent only. The remainder is, indeed, one of the two examples of his second class given by Fearne in Fearne on Contingent Remainders, see p. 7. It may be, as suggested by Farwell, J., in *Re Ashforth, Sibley* v. *Ashforth* (7), at p. 541, that Lord Cranworth was really thinking of a joint tenancy. I cannot at any rate regard his *dictum* as an authority that an express limitation to the survivors of several unborn tenants for life is valid.

A declaration must accordingly be made in the terms indicated by Sir Wilfrid Greene, M.R.

MacKinnon, L.J.: I agree. The question is whether the direction in cl. 20 in this will is or is not void as infringing the rule against perpetuities. That question depends on whether the future interest of one or either of the two grandchildren in the whole of the sixth part of the settlement was, on the death of the testator, a contingent or a vested interest. As I understand the rules of law upon such a problem, a future estate or interest is vested when there is a person who has an immediate right to that interest upon the cessation of the present or previous interest. But a future interest is contingent if the person to whom it is limited remains uncertain until the cessation of the previous interest. Secondly, as I understand the matter, whether a future interest is vested or contingent depends on the actual language used in the instrument under consideration. By the use of apt, but different, language, that which is in terms contingent might be so expressed as to create exactly the same result, but with a vested instead of a contingent interest. For instance, the two provisions (i) gift to A. for life, with remainder to his children who survive him, and (ii) gift to A. for life, and remainder to his children, but if any child dies in A.'s lifetime his share shall go to the survivors, achieve exactly the same result, but under (i) the interest in the remainder is contingent, while under (ii) the interest of each child is vested, though liable to be divested by his death. For, if, by the language used, the conditional element is involved in the ascertainment of the remainderman, the remainder is contingent. If, however, by the language used, a vested interest is given, but subject to its being divested on a future event, then the remainder is vested. But, though it is possible, by the use of apt, but different, language, to express that which in terms creates a contingent gift, so that it could, in those other terms, create a vested interest, it is not, as I understand, legitimate to alter the language in this way. The question must be decided upon the actual language used.

I need not read again the words of cl. 20 in this will. *Prima facie*, they seem to me to be a gift of the whole income to either A. or B. upon a contingency, viz., whether A. or B. dies first. No doubt by the use of slightly different language exactly the same result could have been achieved, for example, if the direction were to divide the income into halves, pay half to A. and half to B., and, on the death of either, thenceforward to pay his half to the other. In that case, no doubt each might be said to have a vested interest in the half of the other upon the other's death. The change of language is slight, but it is a change. The language used is a direction to pay the whole of the income to the survivor, and I cannot escape the conclusion that this is a contingent, and not a vested, interest in the survivor, that is contingent upon the chance of his surviving.

The case of *Whitby* v. *Von Luedecke* (1) is indistinguishable from this one. In that case, at p. 788, Buckley, J., summed up his judgment in the sentence :

> I cannot read the instrument as creating two vested estates, one of which must fail, and the other of which must take effect. I think it is a contingent estate.

I come to the same conclusion, and I find myself unable to share the doubt as to the correctness of that decision expressed by Eve, J., in *Re Samuda's Settlement Trusts, Horne* v. *Courtenay* (3).

Solicitors: *Holloway, Blount & Duke* (for the plaintiff, the adult defendants and W. V. Legh); *Waller, Mager & Cobbett* (for the two A infant defendants, H. S. Hopcraft and Kathleen Hopcraft); *Robins, Hay & Waters*, agents for *Lacey & Son*, Bournemouth (for Thomas Legh and C. D. Lacey).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

B

BRIGGS *v.* PARSLOE AND OTHERS.

[Chancery Division (Farwell, J.), **July 1, 2, 12, 1937.**]

C *Specific Performance—Promise to make settlement—Promisor to be appointed trustee of will—Retention of wasting securities—Tenant for life appointed trustee—Breach of trust.*

A testator by his will and codicil appointed W., B. and H. trustees and directed the income of his residuary estate to be paid to his son H. S. for life and after the death of H. S. his wife was to receive an annuity out of residue during widowhood and thereafter a similar annuity D was to be paid to the daughter of H. S. Upon the death of the daughter the residue was to go to her children as she should appoint, and in default of children there was a gift over to a named charity. The trustees had power to retain investments existing at the date of the testator's death; and the number of the trustees was not to fall below three. At the death of the testator there were living H. S., the wife E of H. S., and their daughter who was married and had two children living. The testator's residuary estate consisted of shares in two brickmaking companies, both of which were well managed and paid an extremely high rate of dividend, but which held their brickfields upon leases expiring in 1950, and the shares were therefore wasting securities. After H. S. had enjoyed the income of the two companies for 10 years, it occurred to the trustees that something should be done to protect F the interests of the remaindermen; and they accordingly proposed to H. S. that they should either sell the shares in the companies and invest the proceeds in trustee securities, or that they should create a sinking fund out of the income of H. S. In reply to this, H. S. offered to settle £40,000 (his wife consenting) on his daughter and her children, the interests of the daughter and the grandchildren not to take effect until his death. This offer was accepted by the trustees. The settlement, how- G ever, was not made. H. (one of the trustees) then died, and H. S. wanted to be appointed in his place. Shortly afterwards W., another trustee, died. H. S. wrote to the sole remaining trustee, B., saying that the draft deed to settle the £40,000 had been prepared and was only awaiting the appointment of two new trustees. Relying on this letter B. appointed H. S. and the latter's friend Q. as trustees. H. S. then H died, and it appeared that no settlement had been made or even prepared. H. S. had a private fortune of £120,000, which he left by his will wholly to his mistress and their two illegitimate children. The trustee B. then brought this action against the executors of H. S., claiming specific performance of the promise to make a settlement. It was contended that (*a*) this action could not be brought by B., but only by the trustees of the will as a body; (*b*) there was no consideration moving from the daughter and her children to H. S.; (*c*) the contract could not be enforced, as the appointment of H. S. as a trustee of the will was a breach of trust :—

Held : (i) B. and W. had been contracting for a benefit to the daughter and her children, not in the capacity as beneficiaries under the will, but for a benefit for them entirely outside the will.

(ii) the consideration was the withdrawal of a valid objection to H. S. as trustee.

(iii) the appointment of a tenant for life as trustee was not a breach of trust. If it were, specific performance should be decreed, because a contract involving an innocent breach of trust is enforceable.

(iv) H. S. by his conduct had made himself trustee of £40,000 for the benefit of his daughter and her children and there should be a declaration that his executors held £40,000 with interest at 4 per cent. from the date of the death of H. S. for the benefit of his daughter and her children.

[EDITORIAL NOTE. The case here reported is of the type associated with the now exploded theory of " making good " a representation. In order to obtain relief in a case of the particular kind here reported, it is necessary to prove a contract binding upon the defendant and enforceable by the plaintiff, and unless a contract can be proved the action must fail. A mere representation, even though acted upon by the plaintiff or those whom the plaintiff represents, is not sufficient.

As to Making Good a Representation, see HALSBURY, Hailsham Edn., Vol. 23, pp. 79, 80, para. 111 ; and for Cases, see DIGEST, Vol. 35, pp. 55, 56, Nos. 494-510.]

Cases referred to :

(1) *Berg* v. *Sadler & Moore*, [1937] 2 K.B. 158 ; [1937] 1 All E.R. 637 ; Digest Supp.

(2) *Alexander* v. *Rayson*, [1936] 1 K.B. 169 ; Digest Supp. ; 105 L.J.K.B. 148 ; 154 L.T. 205.

Action for specific performance of a promise to execute a settlement.

By his will, dated June 20, 1919, S. H. Sands, the father of Harold Sands, gave his residuary estate to his trustees upon trust for sale and investment with power to vary the investments and upon trust to pay the income to his son Harold during his life, then to Harold's wife during her widowhood and then to Harold's daughter, i.e., the testator's granddaughter, Muriel Sands, during her life. The granddaughter's interest was a protected life interest, but this was immaterial, as the testator by a codicil revoked the life interests of Harold's wife and the granddaughter, and gave them annuities of £400 and £320 per annum respectively. The granddaughter was then given a power of appointment among her children, and in default of such children the whole residue was to go to a named charity. There was a power to the trustees to retain any investment upon which any part of the estate was invested at the time of the testator's death and a direction that when the number of trustees was reduced to two another should be appointed. The testator died on Aug. 5, 1920. The estate was sworn rather less than £50,000, and consisted to a large extent of certain shares in two private companies. Those two companies were extremely successful, and for the last ten years up to 1936 the dividends which were paid on those shares were extremely high.

Harold Sands, in addition to the benefits under the will, had been given by his father one half of the original holding which his father had in these two companies, and that holding provided a substantial income. In 1918, the testator had bought Beacon Hall, Benenden, Kent, which he had purchased in the name of his son Harold, and of which Harold was in possession. Harold's wife lived at Beacon Hall, and, in later years, nominally, Harold Sands lived there too, but Harold Sands was there only very occasionally, and it was really the home of Mrs. Harold Sands. There were certain properties, farms which went with that estate, and two of those farms had been conveyed to trustees by Harold for the benefit of his daughter, her husband and her children, the income during the life of the daughter having to be accumulated, unless Harold Sands directed it to be paid to her. He did in his lifetime give such direction, but it was not irrevocable. The position, therefore, was this: Mrs. Sands was at her home at Beacon Hall, and the expenses of that property were entirely paid by her husband, Harold Sands. The only immediate benefit which she took under the testator's will was the annuity of £400 a year given her by the codicil. So far as the granddaughter, Muriel, was concerned, she had the £320 a year given to her under the codicil, and she had in addition any income that there was so long as Harold Sands so directed under the settlement, and Harold Sands also paid her husband, Mr. Jeaffreson, an annual sum for keeping up and looking after the property, but that, of course, was entirely in Mr. Harold Sand's control, and he could have stopped that payment at any time. Harold Sands had from the shares which he had been given by his father and from the income of his father's estate a very substantial income indeed; during the last year or so of his life it was in the neighbourhood of £20,000 a year. He was one of the directors of these two companies, and eventually became chairman.

Of the three trustees and executors, Mr. Hind was a solicitor, Mr. Briggs was a brother-in-law of Harold Sands, and the last, Mr. Weston, was at the material date a man of considerable age, 80 or thereabouts. Mr. Hind, the solicitor, was the person who had had to a large extent the management of the trusts. In 1930, some ten years after the testator had died, it occurred to Mr. Hind that possibly the trustees were unjustified in continuing to hold the shares in these two companies, which were wasting securities, because they were concerned with bricks, and the leases under which the companies held the property expired in 1950. In those circumstances, Mr. Hind, no doubt feeling it was his duty so to do, started, in Aug., 1930, a suggestion either that the trustees ought to realise the shares, and invest the proceeds in some form of trustee security, or that there should be provision made by way of a sinking fund, so that a portion of these large dividends should be accumulated and built up to form a fund for the benefit of the remaindermen under the will of the testator. The other two trustees shared the view of Mr. Hind, but they both realised that it would be resented by Mr. Sands and might cause difficulties. Finally, on May 28, 1931, Mr. Hind wrote to Mr. Harold Sands suggesting either that there should be a sale of these shares or that there should be deducted from the dividends a sum of 10 per cent. in each year, which would be invested by the trustees and retained as part of the trust funds under the will. These suggestions very much disturbed Mr. Sands, and finally, by a letter of July 28, 1931, written to his wife, he suggested he might make a settlement of some £40,000 in favour of his daughter and her children, subject to his own rights, as the £40,000 would be out of the money he had saved, and, if that were done, there could be no reason for pressing the suggestion of a sale, or making any provision for a sinking fund. Mrs. Sands, who was the first tenant for life after her husband under the father's will, was quite content to agree to any such course as that. That suggestion was communicated to the trustees, and they obviously, from the correspondence, were greatly relieved at such a suggestion. They realised that, if such a settlement was made on the daughter and her children, to take effect after the death of Harold Sands, the daughter would be provided for, and there could then be no real reason for pressing for either the sale or the sinking fund. On July 7, 1931, Mr. Hind died. Mr. Sands was minded to get himself appointed the new trustee. Mr. Sands realised that, if he were one of the three trustees, no sale of the shares and no provision of a sinking fund could be made without his knowledge and consent. Mr. Briggs consulted one of the partners of the late Mr. Hind and was told that the appointment of a tenant for life as a trustee was not, as a rule, such an appointment as the court would make, and that they, the trustees, ought to consider seriously whether, in all the circumstances, it would be proper to make such an appointment. It was arranged in July, 1931, that, if Mr. Briggs and Mr. Weston would appoint Harold Sands one of the trustees, then Harold, in return, would make a settlement of £40,000, from part of the money he had saved from the dividends in the past, in favour of his daughter and her children, to take effect upon his death or in which he would take an interest as first life tenant. Mr. Weston then died, leaving Mr. Briggs the sole surviving trustee. Mr. Sands then asked to have appointed, in addition to himself, a Mr. Charles Quarrell, the son of the gentleman who had acted as solicitor for Mr. Harold Sands, and had himself acted as his solicitor in some matters. Finally, that was agreed to, but there was a considerable delay in the matter, and Mr. Harold Sands became impatient about it. Finally, on Mar. 1, 1932, he wrote to Mr. Briggs a letter in these terms:

> I have already told you that the completion of any new trust I may see fit to create will be entirely independent of, and in no way whatever connected with, the S. H. Sands Trust, of which you are now the sole surviving trustee. All I can tell you is (though it does not concern you in any way) that the draft deed to create my new trust has been prepared, and now only awaits, what has already been far too long delayed, namely, the appointment of two new trustees for the S. H. Sands Trust, and until that matter is completed it can proceed no further.

There was in fact no deed in existence at that date, nor had there ever been a deed in existence, to give effect to the settlement which Mr. Sands had promised to make. When Mr. Briggs got that letter, he proceeded on Apr. 14, 1932, to appoint Mr. Sands and Mr. Quarrell to be trustees. Harold Sands died on June 16, 1935, and, during the remainder of his life, he had occupied the position of a trustee under his father's will. A The shares remained unsold, all question of any sinking fund was given up, and Mr. Harold Sands remained, during the remainder of his life, in undisputed possession of the very large dividends which these two companies were paying.

In July, 1933, Mrs. Sands had come to the conclusion that she could B no longer live with her husband, and she instructed solicitors to act for her in the preparation of a separation deed. During the negotiations for that deed, Mrs. Sands, writing to Mr. Harold Sands' solicitors, mentioned the trust which was to be made in favour of the daughter and her children, and the solicitors on Mr. Harold Sands' behalf repudiated C the suggestion that he was under any liability to make any settlement at all. Except in that one case, there appears to have been no reference made to the bargain which had been struck in July, 1931, or to the fulfilment by Mr. Harold Sands of his promise at that interview. Mr. Briggs said in his evidence that he always found Harold Sands a man D of his word, and he thought he would carry out the bargain he had made, but Harold Sands had proved in the past, in the case of the earlier settlement, that he would do things only in his own time, and sometimes at a very late date; he would put off things as long as he could. When Mr. Sands died, he left a will, by which he appointed the defendants E in this action to be his executors and trustees. He left an estate in the neighbourhood of £120,000, but left nothing to his wife or his daughter or his grandchildren. The whole of his money, and practically the whole of his estate, was given to the lady with whom he had been living, and the two children that he had had by her.

F In those circumstances, Mr. Briggs commenced this action on Mar. 19, 1936, claiming in effect specific performance against Harold Sands' trustees and executors, of the contract which he said was made on July 30, 1931. Mr. Briggs died during the course of the action and the action was continued by his personal representative. Mr. Briggs' G evidence was taken upon commission before he died.

C. E. Harman, K.C., and *J. L. Stone* for the plaintiff.

W. P. Spens, K.C., and *W. S. M. Knight* for the defendants.

FARWELL, J.: The first ground on which it was contended that H this action could not succeed was that the plaintiff, Mr. Briggs himself, could not maintain this action. Of course, if Mr. Briggs could not maintain the action, neither could his legal personal representative. As I understand the argument, it was this: Mr. Herbert Briggs was contracting, if he did contract at all, on behalf of himself and Mr. Weston, who were the sole trustees of the father's will, and they were contracting for something which was to be done by Mr. Harold Sands, and, if there was a right to enforce such a contract, that right was vested in Mr. Weston and Mr. Briggs, as trustees of the father's will; and, when the new trustees were appointed, it was a chose in action which vested in those new trustees, and the body of trustees would be the persons, if there were such persons, who could enforce this contract, not Mr. Briggs himself, or not Mr. Weston and Mr. Briggs if Mr. Weston had been alive. I do not think that that contention is well founded. No doubt Mr. Weston and Mr. Briggs were contracting or agreeing to do something which they could do only as trustees of the father's will. The appointment of Mr. Sands as a trustee was something which they alone could do in that capacity as trustees, but they were bargaining for a benefit, not for any of the beneficiaries under the father's will. Although the granddaughter and her children were among the beneficiaries under that will, they were not bargaining for a benefit for them *qua* beneficiaries under the will, but quite distinctly for a benefit which was to go to them quite independent of the will altogether. Mr. Sands, in his letters, stressed that over and over again. Mr. Sands was not going to have a settlement under which any part of his money might get ultimately into the hands of the charity. Mr. Sands was quite determined that any settlement he made was to be nothing to do with his father's will, but would be a separate settlement for his daughter and her children. The contract which was made, if it be an enforceable contract, was a contract by Mr. Briggs and Mr. Weston, on the one side, that they would do something *qua* trustees; but, on the other side, the benefit which was to be given to the daughter and her children was a benefit, not in their position as beneficiaries under the will at all, but entirely outside it, and as though they were not beneficiaries at all under that will. That being so, it appears to me that Mr. Briggs and Mr. Weston were bargaining on behalf of the daughter and her children for a benefit which was to pass to them, and they, Mr. Briggs and Mr. Weston, or the survivor of them—in this case Mr. Briggs—on behalf of the daughter and her children, are, in my judgment, entitled to enforce the contract, if it be enforceable. It could be tested in this way. If Mr. Briggs had refused to bring any action at all, in my judgment it is clear that Mrs. Jeaffreson, on behalf of herself and children, could have brought the action. No doubt she would have had to obtain the permission of Mr. Briggs to bring the proceedings in his name, or she would have had to join him as a defendant in the action; but she, on behalf of herself and her children, in my judgment, could have brought this action to enforce this contract. If that is so, it follows that Mr. Briggs himself is entitled to bring the action, and to enforce, if he can, the contract, which was a contract made, not for a benefit to accrue to himself, but for a benefit to accrue to the persons on whose behalf he was acting, and, in my judgment, it cannot be said that Mr. Briggs was not entitled to maintain this action. If he was entitled to bring this action, it is open to his legal personal representative to carry on the action. At the time the action was brought, Mr. Briggs was the sole surviving trustee, and, as trustee for Mr. Sands' daughter and her children, he was entitled to maintain the action.

Then it is said that, if that be the true view, there was no consideration moving from the daughter and her children to Mr. Sands. I do not accept that view. Mrs. Jeaffreson could, on behalf of herself and her children, had she been so minded, have raised an objection to her father as one of the trustees, and, had she pressed such an objection, it is quite plain that the trustees would have been in a considerable difficulty, and, if she had pressed it to the point of taking proceedings in this court, it is extremely doubtful whether the court would have allowed such an appointment. It might be that the court, if it were satisfied that the £40,000 settlement was made, would have permitted the appointment, because, at any rate so far as Mrs. Jeaffreson and her children were concerned, much of the objection to the appointment of Mr. Sands would have been got rid of in that way; but, in the absence of any such settlement, it might well be that this court would have refused to sanction the appointment of Mr. Harold Sands as a trustee. On behalf of Mrs. Jeaffreson and her children, Mr. Briggs and Mr. Weston gave up any opposition which might be advanced by the lady on her own or her children's behalf, and without any difficulty they made the appointment, and in that way got rid of one of the obstacles which might have stood in their way. It is said that it would seem that the consideration for the abstention from objection was very considerable. That no doubt is true, but two things must be remembered in regard to that. In the first place, the settlement of £40,000 was not a result of anything between Mr. Briggs, Mr. Weston and Mr. Sands; it was not the result of a hard-fought bargain, or anything of that kind. It was Mr. Sands' own suggestion; he was the first to put forward the suggestion that he should make a settlement of £40,000. He thought it worth while to make the suggestion, at any rate, in the hope of getting what he wanted. In the first place, he wanted to prevent the sale of the shares or the provision of a sinking fund, and, after Mr. Hind's death, he was content to agree to settle £40,000 if he could be made a trustee. I think he was confident that, once he was in the position of a trustee, he could stop what he thought was all nonsense, namely, the idea of selling these shares or providing the sinking fund. Further, we cannot forget this: Mr. Sands was a wealthy man, and Mrs. Jeaffreson was his only daughter, and her children were his only grandchildren. Therefore it would seem not an unnatural thing to do, in order to get what he wanted, to make a substantial settlement on the lines which I think he did. In my judgment, to say that there was no such consideration to support this contract is a contention which is not well founded, and, in my judgment, there is no ground for saying that this contract is one which the court would not have enforced on that ground.

The final ground, and the one which may be somewhat difficult, is this. It is said that this court will never enforce a contract which involves a breach of trust. That statement, in my judgment, is too wide. In the first place, I desire to point out that, technically, this contract did not involve a breach of trust at all. It was no breach of trust to appoint Mr. Sands a trustee. No doubt such an appointment is one which the court does not very readily make, but the court does not refuse, in certain circumstances, to make such an appointment. It has been made over and over again by these courts in a proper case, and there is no breach of trust in appointing a tenant for life as a trustee, although it is an appointment which the court might well hesitate to make. Once Mr. Sands was made a trustee, no court could remove him from the trust merely on the ground that he was a tenant for life, and, in my judgment, there was not any breach of trust in appointing Mr. Sands as a trustee in fact, although now it may be realised that the effect of appointing him a trustee would be, in all probability, to prevent the sale of the shares or the provision of this sinking fund ; but, none the less, technically, at any rate, there was no breach of trust. Assuming that it was, what, then, was the position ? I think it is true to say that this court would not compel a person to commit a breach of trust. If there is a contract which is obligatory, and which involves one side in a breach of trust, I have little doubt but that this court would refuse to enforce such a contract, because the court would say that it would not compel either party to commit a breach of trust. Further, of course, this court would never enforce a breach of trust which involved any illegal act. That is not on the ground that it is a breach of trust, but on the ground that the court will never enforce a contract the object of which is illegal.

There are two recent striking illustrations of that principle to be found in the reports, *Berg* v. *Sadler & Moore* (1) and *Alexander* v. *Rayson* (2). Those cases illustrate the principle that this court would not consider the possibility of assisting an illegal act, and, if there is an illegal act involved, the court will not recognise the contract at all. Therefore, if you have a case of a breach of trust which involves some criminal act —for instance, a trustee putting a portion of the trust money in his own pocket, or some such case as that—of course the court would not enforce it, in any circumstances, because it would involve an illegal purpose ; but, where there is an innocent breach of trust, and that breach of trust has been committed as a result of the contract, it is not, in my judgment, true to say that the court will not enforce it by making the other side or the other party carry out his part of the bargain. Take a not uncommon case, where a beneficiary requests a trustee to do a certain thing, and the trustee says : I am very doubtful whether I can ; I am not at all sure if it would not be a breach of trust if I did that. The beneficiary then says : If you will do what I press you to do, I will undertake to indemnify you against any loss. The trustee does the action, and it turns out it was a breach of trust, and the trustee is

personally liable. Would this court hesitate for a moment to enforce the indemnity ? The indemnity would be enforced none the less if the consideration for it was something which turned out to be a breach of trust, and, if it were necessary for me to decide it in this case, and if I were to come to the conclusion that the act of appointing Mr. Sands a
A trustee was a breach of trust at all, I should have no hesitation in saying that it was an innocent breach of trust, and, the act having been committed by Mr. Griggs and Mr. Weston, Mr. Sands is bound to make good his part of the bargain, and to make a settlement accordingly.

It appears to me that the result is that, although, in my view, this is
B a contract which could be enforced, the result could have been obtained in a somewhat different way. There was a bargain made between Mr. Briggs and Mr. Sands that Mr. Sands should make a settlement, if he were appointed a trustee. When there was some delay about the matter, Mr. Sands wrote and represented that he had had a settlement prepared,
C and that it was only awaiting the appointment of himself as trustee for him to sign it. That was an untrue representation. There was no such document, and I am not at all sure that Mr. Sands ever really contemplated in his own mind that there would be. There certainly was not, at that date, but the representation was made to get Mr. Briggs to do what
D he did, namely, execute the appointment. In the face of that, is it possible for Mr. Sands to deny that he was a trustee of £40,000 (part of the money he had saved from the dividends) for his daughter and her children, subject to his own life interest, and, that being so, in my judgment Mrs. Jeaffreson and her children could have brought this action
E in their own names, asking for a declaration that Mr. Sands was a trustee of the £40,000 on their behalf, and such action, in my judgment, would have succeeded. There would have been a necessity to plead estoppel, and Mrs. Jeaffreson and her children would have had to be parties ; but an action so framed, in my judgment, would have succeeded. How-
F ever, I myself am satisfied that it is not necessary for that course to be adopted, because the same result is obtained by acceding to what the plaintiff asks me to do in this action, and there must be specific performance of the contract made on July 30, 1931.

What I propose to do is this : I propose to declare that the contract
G ought to be specifically performed, and I propose to make a second declaration that the defendants, as executors of Harold Sands, are trustees in the sum of £40,000 with interest at 4 per cent., on the death of Mr. Sands, for the benefit of Mrs. Sands' daughter and her children. Having made those declarations, it appears to me that I cannot, in these
H proceedings, go on to declare the trust or to execute the trust. It would be necessary, to do that, for Mrs. Jeaffreson and her children to be before the court, and it would be necessary for Mrs. Jeaffreson and her children to be separately represented, because obviously their interests might conflict. In my judgment, the proper course is for an originating summons to be taken out, either by Mrs. Jeaffreson or by someone on behalf

of the infants, making either Mrs. Jeaffreson or the infants defendants, and making the present defendants in this action plaintiffs, but not making the present plaintiff in this action a party, asking for the execution of the trust fund, and, when that summons comes before the court, this court can deal with it and do that which Mr. Sands omitted to do, namely, declare that the proper trust should be executed in accordance therewith.

Solicitors: *Thompson, Quarrell & Co.* (for the plaintiff); *Collyer-Bristow & Co.* (for the defendants).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

CROSS (INSPECTOR OF TAXES) *v.* LONDON & PROVINCIAL TRUST, LTD.

[King's Bench Division (Finlay, J.), **June 15, July 30, 1937**.]

Income Tax—Income arising from securities—Foreign bonds—Payment of interest suspended—Issue of funding bonds in place of interest—Sale of funding bonds—Liability to tax on proceeds of sale.

The Brazilian government suspended payment of interest on certain bonds and issued funding bonds to the holders thereof in place of interest over a period not exceeding 3 years. The respondent company, which held some of these bonds, sold the funding bonds which it received. The company was assessed to income tax under Sched. D, Case IV, upon the proceeds of sale:—

Held: the issue of the funding bonds was the issue of a capital asset and not a payment of interest nor a payment of an equivalent of interest. There was accordingly no receipt of income by the respondent company, and the proceeds of sale of the funding bonds were not liable to tax.

[EDITORIAL NOTE. The issue of funding bonds in place of interest is here held to be a capitalisation of interest. It is to be noted that the bonds were only in place of interest over a period not exceeding 3 years and that there would apparently have to be more or less regular issues of these bonds; but this is not thought to prevent the resulting capitalisation. It should also be noted that the funding bonds were bonds of the debtor who ought to pay the interest. Giving such a bond is not payment of the interest, but rather a promise to pay it in the future. The decision is possibly not of general application and may be restricted to income from foreign securities assessed under Sched. D, Case IV.

As to Capitalisation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 252-254, paras. 511-517; and for Cases, see DIGEST, Supp., Income Tax, Nos. 662*a*-666*a*.]

Cases referred to:

(1) *Scottish & Canadian General Investment Co.* v. *Easson*, [1922] S.C. 242; 28 Digest 20, case *h*; 8 Tax Cas. 265.

(2) *Income Tax Comr.* v. *Darbhanga* (*Maharaja-dhiraja*) (1933), L.R. 60 Ind. App. 146.

(3) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (1905), 5 Tax Cas. 159; 28 Digest 23, case *b*.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts discharging assessments made upon the respondent company under Sched. D, in the sums of

£275 10*s.* for 1933/34 and £309 for 1934/35 in respect of profits described as Case IV.

The Attorney-General (*Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the respondent company.

A

FINLAY, J.: London & Provincial Trust, Ltd., had among its investments certain bonds, which in 1926 had been issued by the United States of Brazil. The bonds were described as 6½ per cent. External Sinking Fund Gold Bonds of 1926. Attached to them, there were coupons B providing for the payment of interest on Apr. 1 and Oct. 1 in every year. Early in 1932, the Brazilian government gave notice by circular that it was suspending payment of interest on these and on some other bonds. The circular was in these terms:

> The government of the United States of Brazil has found itself compelled to C suspend the payment of interest and sinking fund on the loans mentioned below. It has therefore decided to fund the interest payable on these loans during a period not exceeding 3 years, and also to fund the arrears mentioned below representing unpaid interest on and drawn bonds of certain French gold franc loans.

Then various details are set out, the substance of it being that the Minister of Finance was to issue two series of funding bonds, that the funding D bonds were to be issued at 5 per cent. per annum, that interest was to be payable, and that coupons were to be attached to the bonds. Now, the substance of what was done was perfectly plain. The Brazilian government, finding itself unable to pay the interest, funded the interest, and paid not interest but issued a new bond called a funding E bond, so that the person entitled, but for the repudiation, to the interest got not interest, but got instead a funding bond. Now, the company became entitled to these funding bonds. It surrendered its coupons for the 1926 bonds as they fell due, and, in due course, in respect of the coupons it surrendered it received funding bonds. The company, having F received these funding bonds, from time to time sold them, and it is admitted, and indeed there can be no doubt, that they were all of marketable value when they were received, and, of course, also of marketable value when they were sold. Now, the contention of the company before the commissioners was very simple, and it was this: that no payment G had been made by the Brazilian government, and that no income had arisen to the company within the meaning of Sched. D, Case IV. The inspector of taxes contended that the funding bonds represented money or money's worth, that they were received in satisfaction of interest due from the government, and were income arising from securities, and H *Scottish & Canadian General Investment Co.* v. *Easson* (1) was referred to. The decision of the commissioners was to this effect:

> We do not think that the case of *Scottish & Canadian General Investment Co.* v. *Easson* (1) affords us guidance. Apart from the fact that the assessment in that case was under Sched. D, Case I, the "payment" of interest was made in securities of another company. The present assessments are defended under Sched. D. Case IV. To satisfy that case there must be income arising abroad. There clearly

has been no payment of *interest* by the Brazilian government out of its public revenue to use the words appropriate to Sched. C (under which the assessment would then fall to be made) and we are unable after considering all the facts to see that there has been any payment of *income* from abroad at all within the scope of Case IV. All that has been done is that the appellant being the owner of coupons which are unpaid has received a bond, bearing interest, for the amount unpaid, and we cannot regard this transaction as income arising from securities abroad within Case IV. We express no opinion upon this appeal as to the possibility of assessments under other cases of Sched. D. We accordingly discharge the assessments. A

Two cases were referred to before me. First, the case which was referred to before the commissioners, *Scottish & Canadian General Investment. Co.* v. *Easson* (1), which was a Scottish case in the Inner House, and there: B

> The appellant company held certain 5 per cent. mortgage bonds of the Western Canada Power Co., Ltd. That company was unable to meet the coupons which fell due for payment on Jan. 1, 1916, in respect of the interest on the bonds for the half year from July 1, 1915. A reorganisation of the finance of the company, involving the formation of a new company, then took place and the appellant company surrendered its holding of bonds of the old company, with the unpaid coupons attached, and received in exchange 5 per cent. bonds of the new company C of equivalent face value, bearing interest from July 1, 1917, together with an issue of ten year 7 per cent. debentures of the new company, equal in face value to 10 per cent. of the face value of the surrendered bonds. The 7 per cent. debentures issued to the appellant company under this arrangement were thus exactly equivalent in face value to the amount of the coupons for the two years' interest from July 1, 1915, to July 1, 1917, which had been surrendered with the bonds of the old company, but in the scheme of reorganisation it was not expressly stated that these debentures were in satisfaction of the arrears of interest. In computing for the purposes of D assessment to income tax, Sched. D, the profits of the appellant company for the year during which it had received the 7 per cent. debentures, a sum equal to 75 per cent. of the face value of those debentures, as representing their actual value at the time of receipt by the company, had been included as interest received:—Held: that the commissioners had evidence before them sufficient to enable them to arrive at their determination that the 7 per cent. debentures represented the two years' interest coupons which had been surrendered with the old bonds, that the value of E the debentures had therefore been properly included in the computation of the company's profits, and that, as objection had not been raised upon the appeal to the basis adopted in valuing the debentures, the court had no material upon which to question the commissioners' finding that 75 per cent. of the face value of the debentures fairly represented the profit of the appellant company.

Lord Clyde, Lord President, says this at p. 271: F

> The question is just one of ascertaining the profits and gains of the company, and if instead of receiving cash the company get a saleable security, that saleable security is just part and parcel of the company's profits and gains.

For myself, I do not question for a moment that general principle. I think that, if, instead of receiving money, you receive money's worth, no doubt that money's worth falls to be regarded as money, and falls to G be brought in for purposes of assessment, and that really is what was decided in that case. The other case referred to before me was *Income Tax Comr.* v. *Darbhanga (Maharaja-dhiraja)* (2). There a decision of the Privy Council was delivered by Lord Macmillan, and one point which he considered has some bearing at all events upon the question which I H have to consider, because there a question did arise as to whether certain promissory notes were or were not to be regarded as income. What Lord Macmillan said was this, at p. 161:

> The commissioner's opinion was that the transaction when rightly viewed amounted to the acceptance by the assessee from his debtor, in lieu and satisfaction

of the capital and interest due to him, of assets and securities *prima facie* worth the valuation put upon them and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly. There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth : *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) A (3) ; *Scottish & Canadian General Investment Co.* v. *Easson* (1). . . . Now here the first six items amounting to Rs. 20,74,973, may perhaps reasonably enough be regarded as the equivalent of cash, but the seventh item of Rs. 17,34,596, consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor ; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of Rs. 17,34,596 B is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all. In so holding their Lordships find themselves in agreement with the learned judges of the High Court who differed on this point from the commissioner.

Now, in the present case, there is no doubt at all, of course, that these bonds were things of value, as is shown by the fact that they were things C which could be sold, and in fact were sold, in the market. The question does not seem, on the case before me, to be whether the bonds were things of value, but whether there was anything here which was either interest itself or analogous to interest. A person receiving those bonds, in these circumstances, is not, I think, receiving interest, or indeed D receiving income. Looking at it from the point of view of the recipient, what happened here was this, that Brazil was not able to give him interest, and, instead of interest, she gave him a capital asset, and that capital asset, if the obligations under it were duly fulfilled, would, of course, itself produce income, and would result in income, which, of E course, if and when it is received, would be liable to tax. I do not think that it can be said (and in this I agree with the commissioners) that here there is a receipt of interest, or a receipt of any income under Sched. D, Case IV. The whole point is that there was not income, and that the capital asset was, so to speak, substituted for the income. I cannot F regard this as being a payment of an equivalent of interest, so to speak, a payment of interest in kind, so as to fall within the case of *Scottish & Canadian General Investment Co.* v. *Easson* (1). On this ground, I arrive at the conclusion that here the view which was taken by the commissioners was correct, and, accordingly, this appeal is dismissed with costs.

G *Appeal dismissed with costs.*

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Linklaters & Paines* (for the respondent company).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

GROOM *v.* CROCKER AND OTHERS.

[King's Bench Division (Hawke, J.), **July 26, 27, 1937.]**

Insurance—Motor insurance—Absolute conduct and control of proceedings—Duty of insurance company and its legal advisers.

Libel—Litigation—Letter passing between solicitors for plaintiff and defendant—Admitting negligence in motor accident—Malice—Damage.

Solicitors—Negligence—Action on motor insurance policy—Solicitor giving effect to pooling arrangement among insurance companies.

The plaintiff took out with an insurance company a motor insurance policy containing a clause that the plaintiff would not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement, or admission of liability for which the company might be liable under the policy without the written authority of the company, and that the company should have absolute conduct and control of all or any proceedings against the plaintiff. The plaintiff's car was run into by a motor lorry, the collision being caused solely by the negligence of the lorry driver. A passenger in the plaintiff's car was seriously injured, and issued a writ against the owners of the lorry and also, at their request, against the plaintiff. The latter informed the insurance company, and left the matter in its hands, as he was bound to do under the policy. The company sent the papers to its solicitors, who entered an appearance to the writ and acted in the conduct of the defence. Neither the company nor the solicitors ever at any time communicated with the plaintiff in any way and eventually the solicitors delivered a defence on behalf of the plaintiff admitting that the accident was caused solely by his negligence and wrote a letter to this effect to the solicitors opposing them. Having accidentally found out what was happening, the plaintiff protested to the local agent of the insurance company, to which agent the latter wrote "If we had repudiated liability we ran a very serious risk of the court holding a different view." At the trial of the action, judgment was entered against the plaintiff for £1,124 12*s.* 10*d.*, damages and costs. The latter now claimed damages against the solicitors and the insurance company for breach of duty, negligence and libel:—

Held: (i) the question whether there was a breach of duty on the part of the insurance company fell within the doctrine of *Scott* v. *Avery* (1) and was a matter for arbitration, the policy containing the usual clause making arbitration a condition precedent.

(ii) the letter written by the insurance company was not defamatory.

(iii) the letter written by the solicitors was defamatory, the occasion on which it was written was privileged, but there was evidence of indirect motive.

(iv) the solicitors were negligent.

(v) the damages for negligence were not nominal, as the plaintiff might have to pay an additional premium on future insurances. They must be taken at the figure assessed by the jury, £1,000.

(vi) the plaintiff was also entitled to recover the £1,124 awarded against him as damages in the previous action, but would hold the same as trustee for the insurance company.

(vii) the defendant was entitled to a declaration that by reason of the negligence of the solicitors he was not liable to pay any part of their costs while acting for him in the action.

[EDITORIAL NOTE. Insurance companies have found it necessary for the efficient working of their business to insert clauses in policies which give them full control over litigation arising thereunder. The present case establishes a definite limit to that control and they cannot in terms admit that the insured has been negligent contrary to the fact without their solicitors incurring a liability for breach of duty and possibly also the insurance company. The latter company, however, is not liable to an action for breach of duty, as that is one of the matters that must be referred to arbitration under the usual clause inserted in all policies. The difficulties in the present case arise from the pooling arrangements made between insurance companies intended to relieve them of the heavy cost of fighting cases, where it is tolerably clear that the damages must be paid by one party or the other.

As to Duty of Solicitors, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 755, 756, para. 1253; and for Cases, see DIGEST, Vol. 42, pp. 91-100, Nos. 826-939.

As to Malice, see HALSBURY, Hailsham Edn., Vol. 20, pp. 499-503, paras. 613, 614; and for Cases, see DIGEST, Vol. 32, pp. 156-161, Nos. 1878-1940.]

Cases referred to:

(1) *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; 16 Digest 115, *149*; 25 L.J. Ex. 308; 28 L.T.O.S. 207.

(2) *Walsh* v. *Julius White & Bywaters* (1927), *Times Newsp.*, July 13.

(3) *Re Crocker*, [1936] Ch. 696; [1936] 2 All E.R. 899; Digest Supp.; 105 L.J. Ch. 276; 155 L.T. 344.

(4) *Addis* v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 17 Digest 78, *1*; 78 L.J.K.B. 1122; 101 L.T. 466.

Action for breach of duty and libel against a firm of solicitors and an insurance company.

The defendant insurance company issued to the plaintiff a policy dated July 21, 1934, whereby the company undertook to indemnify the plaintiff against all sums, including the claimant's costs and expenses which the plaintiff might become legally liable to pay in the event of injury caused by or through or in connection with the plaintiff's motor car. The policy included the following clause:

> The plaintiff will not incur any expense whether in respect of litigation or otherwise or make any payment settlement arrangement or admission of liability for which the insurance company may be liable thereunder without the written authority of the company and the company shall if and so long as it so desires have absolute conduct and control of all or any proceedings against the plaintiff.

On Aug. 11, 1934, the insured car was involved in a collision with a lorry owned by Tear Bros. The collision was solely due to the negligence of the driver of the lorry, who was subsequently convicted of dangerous driving. The plaintiff's brother, who was a passenger in the car at the time of the accident, was seriously injured and issued a writ against Tear Bros., to which action the present plaintiff was joined as a defendant. In accordance with the terms of his policy, the plaintiff passed the writ on to the insurance company and left the whole conduct of the action to it. The insurance company placed the matter in the hands of the defendants Messrs. Crocker, who acted as its solicitor, and was advised by them that, as the driver of the lorry had been convicted, it seemed that the action could be successfully defended. Messrs. Crocker entered an appearance to the writ and proceeded without any instructions from the present plaintiff or any communication with him whatever to instruct counsel to settle a defence admitting negligence and to suggest what sum should be paid in settlement of the claim. Beyond that direction no instructions were given to counsel and a defence was drawn and delivered admitting the negligence alleged in the statement of claim. With the defence a covering letter written by Messrs. Crocker was sent to the solicitors for the plaintiff in that action stating that the defendant for whom they were acting, the present plaintiff, "admits that he was negligent in the case referred to." That letter was complained of in the A present action as a libel upon the plaintiff. Some six weeks later the plaintiff became aware that that defence had been delivered and he pointed out to the insurance company that it had been delivered without his authority or consent. In this connection the insurance company wrote to its agent at Norwich the following letter: B

> You state that Mr. Groom is very cross that, without his consent, negligence should be admitted, when, in fact, no one seriously suggests that he was negligent. That may be the view of our insured, but nevertheless if we had repudiated liability we ran a very serious risk of the court holding a different view and giving a decision against us.

C

The plaintiff also alleged that this letter was a libel upon him. On Nov. 1, 1935, the action came on for trial before GODDARD, J., and judgment was given against the present plaintiff for £924 damages and £208 12*s.* 10*d.* costs, solely by reason of the admissions in the defence.

The plaintiff claimed against Messrs. Crocker damages under the D following heads: (i) the £1,132 12*s.* 10*d.* damages and costs awarded against him in the action; (ii) he had lost his no claim bonus; (iii) the necessity of disclosing the judgment against him on future insurances; (iv) liability to pay Messrs. Crocker's costs, if recovery was not barred by their negligence; (v) damage to his reputation by the publicity given E to the action in the local press. The defendants, Messrs. Crocker, said that they were not instructed until the writ and statement of claim had been served, and that by that time a pooling arrangement had been made between the insurers concerned, in pursuance of which the admission of liability was made. They had mentioned the matter to counsel and F understood that he approved of the arrangement. Against the insurance company the plaintiff claimed in respect of breach of duty and libel. The jury answered all questions left to them in favour of the plaintiff, and their answers so far as material appear in the judgment.

D. N. Pritt, K.C., and *Gerald Gardiner* for the plaintiff.

G

Sir William Jowitt, K.C., *H. D. Samuels, K.C.*, and *Valentine Holmes* for the defendants, William Charles Crocker.

Sir Patrick Hastings, K.C., and *Maurice Lyell* for the defendant, National Farmers' Mutual Insurance Society, Ltd.

H

HAWKE, J.: I deal with the insurance company first. Two questions arise with regard to it. The first is as to the duty, and the second is as to the libel which is complained of in para. 11 of the statement of claim. I will deal with the question of duty first. I propose to say something about that later, but at present it seems quite enough for me to say that the first question of duty would appropriately have arisen in the course of the arbitration which the parties had agreed should be a condition precedent to the plaintiff having any claim against the insurance company, and, as I have already expressed my view, rightly or wrongly, that this case comes within the principles of the well-known case of *Scott* v. *Avery* (1), I need say no more. I have to give judgment in favour of the insurance company with regard to the plaintiff's claim against it for breach of its duty to him. I made a note of Sir Patrick Hastings' point, that the position of an insurance company is altered by reason of the provisions of the two Road Traffic Acts of 1930 and of 1934. I do not propose to decide anything about what effect those statutes have, because I do not think that the question of their effect arises in this case. One other reason is that, as Mr. Pritt pointed out to me, those are statutes which deal with the effect of what people who are covered by insurance may do after an accident has taken place, and the effect on the rights of third parties against insurance companies in the sense of going directly to the insurance company to recover the money. I will deal with these points, if ever it should fall to my lot to do so, when they arise. I do not see how they arise in this case at all, and I do not propose to say anything about them.

Then, as to the libel: the jury found that the letter in question was defamatory, but, of course, I had the preliminary responsibility of deciding whether that particular letter was capable of being defamatory. I do not think it was. I expressed a tentative opinion during the trial that this letter was not capable of a defamatory meaning, and the subsequent discussions with regard to that have not altered my view. That matter went to the jury merely in order to get an answer, subject to discussions which might take place after the answer was given. I think that that matter ought not to have gone to the jury, and I suppose that, if I had been merely summing up to the jury, and had not been asking questions, I should have told them so. On this question with regard to the libel against the insurance company, it appears to me that that part of the letter which is complained of is nothing more than a sort of pious belief in the profession—particularly judicial persons may think impious, if that is the right word—that cases may go wrong. Well, I suppose it is a fact that some of them do. I suppose there is always a certain amount of risk in litigation, and, if a letter merely expressed doubt as to what the result might have been, I do not think it can properly be treated as an imputation of a charge against the person about whom the letter is written. That is one of my reasons for the conclusion at which I have arrived. I have arrived at the conclusion that the letter was not capable of being defamatory, and therefore the insurance company will take judgment in respect of that as well as on the *Scott* v. *Avery* (1) principle.

Now I turn to the case against Messrs. Crocker, and perhaps I had better deal (because it is the gravest part of the case, in my opinion) first with the question of the libel. I am asked to say that that letter was not capable of a defamatory meaning. The jury have found that in fact it was defamatory, that it cast an imputation upon the plaintiff that he had been negligent in driving a motor car on a public highway. If that is what it means, I think that it is defamatory to say that a man has been guilty of negligence in driving dangerously a vehicle or a vehicle which may be dangerous on a public highway. I think that it does hold him up in some degree to odium or contempt, certainly to contempt, and, if that is what the letter meant, or what the letter said, I think it is defamatory. I think it is capable of meaning that, and the jury have done the rest—they have said that it did in fact mean that—and I think, therefore, that, *prima facie*, the question being for the jury, they have decided it, and, so far as I have gone at the moment, their verdict must stand. But then I have ruled that the occasion was privileged, and no one seems to doubt that I was right about that. I certainly have not any doubt about it, and, therefore, however defamatory the letter might have been in its terms, the plaintiff will not be entitled to succeed upon the issue of libel unless he has proved—the onus being upon him—that the persons who wrote it were actuated by malice or an indirect motive. An indirect motive, of course, is only a manifestation of the thing which, amongst lawyers, stands as malice. Mr. Samuels submitted to me that there was no evidence of any indirect motive. The jury found it. I think that the letter was written in the course of carrying out a scheme in which these defendants, very likely misconceiving the position, sought to put upon one of their clients a liability which it is not suggested lay upon him, which they did not think lay upon him—in fact, they thought definitely that it lay upon someone else—but for purposes of their own, disregarding the interests of their own client, they embarked upon this scheme. I am going to use one expression of my own about it. I think it was a stupid scheme. It was thought, I suppose, by those who conceived it and by those who carried it out, to be a remarkably clever bit of tactics. I think it was absolutely stupid and worthless. But they had embarked on this scheme, and their motive in writing the letter was to keep it going. In other words, they were saying something which they knew to be false or did not believe to be true, and their motive was certainly indirectly—I do not wish to use any offensive expression—to disregard the interests of one client because it suited them better to regard the interests of another client. I think that there is plenty of ground for assuming indirect motive in this case, and the jury have found it, and that relieves me of any anxiety as to whether it existed or not.

Then that leaves me with two other questions. Were they guilty of a breach of duty? It was in the mind of those who were representing primarily the insurance company—I mean Messrs. Crocker—that, under this policy, the insurance company could do exactly what it liked; it could throw away the assured; it could let any sort of injurious imputa-

tion be put upon him. I do not know where the limit is to what the company might do. I do not think that that is the meaning of this policy. It is clearly established by the case of *Walsh* v. *Julius White & Bywaters* (2), and was established in the course of this litigation by a decision of CLAUSON, J., in *Re Crocker* (3), that Messrs. Crocker were
A certainly acting as the solicitors of Mr. Groom. I do not think that the policy means that the company can do what it likes, and can disregard the interests of the assured. I think that it may take any steps that it thinks proper in the course of conducting the defence, and, if the assured does not like its methods, or the view that it takes as to the proper
B method of conducting the defence, it can tell him to go away. I do not think that that means that it can put up a false defence for its assured. It seems to me that the sort of view underlying this case is that the insurance company is in the position that it is doing everything for the assured, that it may treat him how it likes, and that the assured has
C nothing to say. I think it has been forgotten by some people that insurance companies would not exist unless they got premiums from persons who insured themselves, and I think that the person insured is as much entitled to be treated with some consideration as is the insurance company. However, Messrs. Crocker, quite frankly, I thought,
D when Mr. Crocker was in the witness-box, admitted that they did not think it was part of their duty to regard the interests of Mr. Groom. It is only fair to Mr. Crocker personally to say that, so far from there being the slightest evidence, I think that everyone believed what he said about it—that he did not know actually what was going on in this
E case—but that does not suggest that he, as a partner in the firm, may not be liable for what happened. I certainly understood him to say that, if this sort of thing happened again, he would take a very different view about it, and I think he is right. I think that his firm disregarded the interests of Mr. Groom, a person to whom the firm owed a definite
F duty, and that, by doing so, they have produced the results which have been injurious to him, and I think that the firm must pay. I have no doubt about the duty that it owes, and, indeed, as I have suggested, I thought that it had given this up at the trial, and that the only question that I should have to deal with was the question—a somewhat difficult
G one—of the damages which might ensue, and the kind of damages that the jury might be asked to award. But Mr. Samuels raised a point as to this duty; he submitted the proposition that, by calling upon the insurance company to implement its contract to cover him in any proceedings brought against him, he had authorised the company to take
H any course it liked, irrespective of his interests. Well, if that is to be held, it will not be so held by me. I do not think he did anything of the kind; I think that the company was bound to consult his interests or tell him that he must conduct the proceedings for himself, and I think that the solicitors were in the same position, though I think that perhaps the burden may fall a little more heavily upon the solicitors, because

they ought perfectly well to have known that, when they have a client, they must keep his interests in their minds, and they did not.

I come now to the question of the damages that ensue. First, were the damages confined to 40*s.*, or were there other damages which the plaintiff could rightfully recover from Messrs. Crocker by reason of their negligence ? I admit that I have been very seriously concerned in my mind in this case as to whether the plaintiff could recover more than 40*s.* I have finally come to the conclusion that he may. I have listened with the greatest interest and attention to the argument which Mr. Pritt addressed to me, and, although I am not forgetting the case of *Addis* (4), I am captivated by Mr. Pritt's argument, and I think that the matter is not here confined to 40*s.* I do not propose to deal with this on any general principle, although, of course, general principles are involved. In this particular case, I think I should be completely wrong if I confined the matter to 40*s.* damages. It is quite obvious to me—I may be wrong about it—that this gentleman was damaged to the extent of whatever value may be given to the fact that his friends may speak to him in the market-place and say : " Well, why did you try to damage your brother ? " or " Why did you not take proper care ? " Quite apart from that, I think that, as an ordinary commercial mercantile thing, he is damaged goods now for insurance purposes, and, if he were to go to another insurance company to insure his car, as he proposes to do, the company could say : " Well, we want to know something about this ; you have had an accident, and a serious accident, and you have been let in for £924 and for we do not know how much in costs, and we are not going to take you on the ordinary premium." I suppose —I do not know what happens behind the doors of insurance companies —that the company's actuaries would set about devising a premium which would meet the case of covering a man who was not of 100 per cent. insurable value, but who was of some less value, who was, in other words, using the expression which I used just now, damaged goods. That would not be included in the 40*s.* I think that he would clearly be entitled to recover that. Mr. Pritt has also satisfied me that damages are not confined to nominal damages. Starting upon that basis, I do not propose to canvass what the damages here were. I suppose I know —at least, I ought to know, but I may be wrong about it—that none of this £1,000 was punitive, because I told the jury not to give punitive damages. There, again, I do not know what they did about it. All I can say is that I think the damages were not confined to nominal damages in this case, and that, that being so, I must accept the amount that the jury awarded, namely, £1,000.

Then there is another point ; there is the £1,132, the amount which Mr. Groom was adjudged to pay at the suit of his brother Aubrey, being £924 damages, and a further sum for costs which made it up to £1,132. Now, is Mr. Groom entitled to recover that from Messrs. Crocker ? No question was asked of the jury about this, because it was agreed that I could deal with that sum, apart from any finding of the jury. I can only say that I accept Mr. Pritt's argument about it. I think that he is entitled to recover the £1,132 as part of the damages in this case, and, of course, it is damage quite independent of what the jury found with regard to the £1,000.

I think that that covers the facts with which I have to deal. Perhaps I may add that of course Mr. Groom will not keep that £1,132 himself It will go back to the insurance company when he gets it. The curious result of all this will then be that the insurance company has paid £924 and some costs which it ought not to have paid if Messrs. Crocker had advised it properly and had remembered the interests of Mr. Groom when acting as his solicitors. I am entitled to assume, on all that passed here, that Mr. Groom was not responsible for the accident, because the question whether or not Mr. Groom was the person responsible for the accident on the highway was tried before me, and we had the evidence of both sides, and no question was asked of the jury on that issue. The curious result then is this: If this case had been properly conducted for Mr. Groom, and conducted with regard to his interests, instead of having judgment against him, or judgment against him with some other person included, Messrs. Tear Brothers, he would have got a clean acquittal before GODDARD, J., who tried the action, and the insurance company would not have had to pay anything. The result of my order, if it is carried out, is that the insurance company will get back the amount that it was wrongly forced to pay, and justice will be done in that respect.

I think that Mr. Pritt's client is entitled to recover this money. I am told by Mr. Samuels that the insurance company does not want it. Well, when it has its money it may do what it likes with it, and, if it likes to make a present to Messrs. Crocker, it may think that it ought to—I do not know, and I am not going to express an opinion. The company fell in with the scheme; it did not conceive it; it did not suggest it or carry it out, but it fell in with it, and it may think that it has to return that money. That is a question with which we have nothing whatever to do, and I do not propose to express any opinion about it, but I think that the plaintiff is entitled to recover that money, of which he will, admittedly, at once stand trustee for the insurance company.

This is one of the points upon which I feel a little difficulty; it seems so unnecessary to grant a declaration to the plaintiff that he is not liable to pay Messrs. Crocker's costs of defending. They do not want them, and, of course, they never really looked to him. It has been established in the course of these proceedings what Messrs. Crocker did not believe —namely, that they were his solicitors—and I suppose they are entitled to be paid for their work, because, of course, if he gets his damages, Mr. Groom is then put in the position of having been properly defended, and he must pay the solicitors who defended him for their work in doing it, even although it was done, perhaps, in a rather unusual way. I think that I must grant the declaration; it will have no effect on costs or anything, but I shall grant the declaration.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the plaintiff); *Linklaters & Paines* (for the defendants Crocker); *Nash, Field & Co.* (for the defendant insurance company).

[*Reported by* Malcolm Logan, Esq., *Barrister-at-Law.*]

BENN *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Finlay, J.), **June 25, July 30, 1937.**]

Income Tax—Sur-tax—Profits or gains assessed by reason of the rules at nil—Repayment by company of tax deducted upon assessment being overruled—Profits or gains not assessable at all—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 20*—Finance Act,* 1927 (c. 10), *s.* 39 (1)*—Finance Act,* 1931 (c. 28), *s.* 7.

The appellant, a shareholder in a company, received in 1923 two dividends less income tax deducted by the company, such dividends being the distribution of profits received by the company from foreign possessions in the first year of its existence. The appellant was assessed to and paid super-tax upon these dividends and upon the income tax deducted from them. It was later decided by the House of Lords that, upon the proper construction of the rules, these profits were not assessable to income tax in the first year of the company's existence, though they would be assessable in later years. Under this decision the sum paid by the company to the Inland Revenue in respect of the first year was returned to the company, and ultimately the company paid to its shareholders a sum equal to the tax deducted in 1923. The appellant was assessed to sur-tax on the amount so paid to him:—

Held: (i) these payments were properly chargeable to sur-tax and that did not amount to double taxation, because the distribution in 1923 was of profits assessed by reason of the rules at nil, and not of profits not assessable at all.

(ii) in any event the Finance Act, 1931, s. 7, was applicable to the distribution.

Gimson v. *Inland Revenue Comrs.* (2) *distinguished.*

[**EDITORIAL NOTE.** There is a distinction between profits which by the rules have to be assessed at nil and profits which are not assessable at all. The former are income within the meaning of the income tax and the latter are not; and the former therefore must be brought into account for the purpose of sur-tax.

As to Dividends out of Profits not assessed to Tax, see HALSBURY, Hailsham Edn., Vol. 17, p. 230, para. 465; and for Cases, see DIGEST Supp., Income Tax, Nos. 674*w*, 674*x*.]

Cases referred to:

(1) *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143; Digest Supp.; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400.

(2) *Gimson* v. *Inland Revenue Comrs.*, [1930] 2 K.B. 246; Digest Supp.; 99 L.J.K.B. 532; 143 L.T. 704; 15 Tax Cas. 595.

(3) *Neumann* v. *Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

(4) *Brown* v. *National Provident Institution, Ogston* v. *Provident Mutual Life Assocn.*, [1921] 2 A.C. 222; 28 Digest 62, *316*; 90 L.J.K.B. 1009; 125 L.T. 417; 8 Tax Cas. 57.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing an appeal against an additional assessment to sur-tax in the sum of £19,425 for the year ending Apr. 5, 1929, made upon the appellant in respect of certain payments received by her from Ormond Investment Co., Ltd.

A *J. Millard Tucker, K.C.*, and *Cyril King, K.C.*, for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

FINLAY, J.: The appellant was in 1928/29 the owner of certain shares B in Ormond Investment Trust, Ltd., and, on Mar. 9, 1923, the directors of the company passed this resolution:

> That the annual accounts of the company be made up to Dec. 31 in each year and that the first of such accounts be made up to Dec. 31, 1922. Also that an interim dividend of £23 per share (less income tax) be declared for the period up to and including Dec. 31, 1922, and that the same be payable on Monday, Mar. 19, C 1923.

Then a cheque for the amount of her holding was sent to the appellant with the following covering letter, dated Mar. 19, 1923:

> The directors having declared an interim dividend for the period ending Dec. 31, 1922, and resolved that such dividend be payable on the 19th instant, I am instructed D to send you the following statement together with a cheque covering the amount of dividend payable. . . . I hereby certify that the amount deducted for income tax will be paid by me to the proper officer for the receipt of taxes.

On Apr. 9, 1923, the following resolution was passed by the company: "That the final dividend of £19 per share (less tax) be paid for the period E ended Dec. 31, 1922" and a cheque and a letter in precisely, or practically, the same terms as those of the last letter which I have read, were sent to the appellant. Now, the aggregate of the two gross dividends paid by the company was £289,674, and the aggregate income tax deducted therefrom was £72,418 10*s*. The company was assessed to F income tax under Sched. D, Case V, r. 1, for the year 1922/23, in respect of a dividend of £601,717 received on Dec. 7, 1922, and, apart from a sum of £546 interest, that comprised the whole income of the company for that year. That assessment was upheld on appeal to the special commissioners, and the duty, amounting in all to £150,429 5*s*., was paid; G but the decision thus arrived at by the special commissioners was, after going through all the courts, finally reversed by the House of Lords on Feb. 24, 1928: see *Ormond Investment Co., Ltd.* v. *Betts* (1). It is quite unnecessary, because it has nothing to do with the matter before me, to consider the grounds of that decision. It is sufficient to say that H it was decided by the House of Lords that tax was not exigible, and thereupon the sum of £150,429 was repaid to the company on Mar. 14, 1928, together with interest thereon. The sum of £601,717 was subsequently brought into the average in computing the company's liability for 1923/24, 1924/25 and 1925/26. The directors, of course, had to consider what was to be done with that amount so repaid, and, on Apr. 25, 1928, about two months after the decision in the House of Lords, the following resolution was passed by them:

> That in view of the opinion of counsel, the sum of £72,418 10*s.* in respect of tax deducted from the dividend of £289,674 be placed to reserve, and that such reserve be used from time to time as may be determined for dividend purposes.

The balance of the repayment was utilised by the company in paying outstanding income tax for later years, which had been allowed to remain in abeyance. On July 30, 1928, the following resolution was passed by the directors:

> That the sum of £34,485 being part of the amount standing to the credit of the reserve fund be distributed in full to the respective shareholders in accordance with their respective interests.

On July 31, 1928, a cheque for the amount of her share of the distribution on her own holding of shares was sent to the appellant, with the following covering letter:

> I forward you herewith cheque for £165 being your proportion of part of the amount standing to the credit of the reserve fund, which, by a resolution of the directors, is distributable to the respective shareholders in accordance with their respective interests. This payment is not subject to tax or super-tax. The House of Lords decided that the profits arising to the company in the material period were not subject to any liability to tax.

Then, on Jan. 10, 1929, a further resolution was passed:

> That the sum of £37,933 10*s.*, being part of the amount standing to the credit of the reserve fund, be distributed in full to the respective shareholders in accordance with their respective interests.

On Jan. 11, 1929, a cheque for the amount of her share of the distribution was sent to the appellant with a similar letter. In making her return for super-tax for the years 1923/24 and 1924/25, the appellant had added back the tax deducted from the dividends paid on Mar. 19, 1923, and Apr. 11, 1923, and had, accordingly, been assessed to super-tax on the gross amounts of those dividends. Now, on these facts, it was contended on behalf of the appellant:

> (i) that, as the appellant has been assessed to and paid super-tax for 1923/24 and 1924/25 on the gross amount of the dividends, there would be double taxation if she were required to pay sur-tax for 1928/29 on the repayment of the income tax deducted from the earlier dividends; (ii) that neither the £601,717 nor the £150,429 5*s.* nor the £72,418 10*s.* out of which the payments in the year 1928/29 were made, was chargeable, nor had it at any relevant time been charged to income tax, and accordingly under the decision in the case of *Gimson* v. *Inland Revenue Comrs.* (2) the sums paid to the appellant were not chargeable to sur-tax.

The contention of the Crown was:

> (i) that the sum of £19,425 was income of the appellant for the year 1928/29 in respect of which she was chargeable to sur-tax; (ii) that there was no double taxation of the appellant in consequence of the additional assessment to sur-tax for 1928/29.

They also contended that *Gimson's* case (2) was distinguishable, and that, in any event, the Finance Act, 1931, s. 7, was applicable to the distribution in question. Now, the commissioners gave this decision:

> The Ormond Investment Co., Ltd., paid in 1923 two dividends less income tax in each case, and in estimating the appellant's income for super-tax purposes these

dividends were grossed up by the addition of the tax deducted. In 1928/29 the company paid two dividends, which together were equivalent in amount to the tax deducted from the 1923 dividends. The resolutions declaring the 1928/29 dividends did not state that they represented a refund of the tax deducted from the earlier dividends, but even had they done so the 1928/29 dividends would still have been in law separate dividends chargeable themselves separately to sur-tax. Even if the legal effect of the declaration of the 1928/29 dividends had merely been to make the 1923 dividends free of tax, then under the Finance Act, 1931, s. 7, those free of tax dividends should themselves have been grossed up. On either view there does not appear to us to be any double taxation. It is also contended that these dividends are not assessable because they fall within the principle of *Gimson* v. *Inland Revenue Comrs.* (2). These dividends were, however, in the words used by LORD TOMLIN in the case of *Neumann* v. *Inland Revenue Comrs.* (3), paid out of " profits or gains assessed by reason of the rules at nil," and not out of " profits or gains not assessable at all." Moreover, the profits out of which they were paid came into the computation of the company's profits for assessment to income tax in the following year. The case is, therefore, distinguishable from *Gimson's* case (2), independently of the retrospective application of the Finance Act, 1931, s. 7. We hold, therefore, that this, and the connected appeals, fail.

All Schedules Rules, r. 20, is in these terms:

> The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.

The Finance Act, 1927, s. 39 (1), provides:

> Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due, or that there may be deducted from any dividend the tax appropriate thereto, or that a proportionate deduction of the tax charged shall be allowed by any person out of any produce or value payable to him, shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due.

Finally, there is a provision which, in my view, is very important in this case, the Finance Act, 1931, s. 7, which is in these terms:

> (1) The provisions of r. 20 of the General Rules, which authorise the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period. (2) Subject as hereinafter provided, a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in subsect. (1) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said r. 20, be equal to the net amount received.

Now, two cases were specially brought to my attention: *Gimson* v. *Inland Revenue Comrs.* (2), and *Neumann* v. *Inland Revenue Comrs.* (3). *Gimson's* case (2) was a decision of ROWLATT, J. It was disapproved by the Court of Appeal in *Neumann's* case (3), but in the House of Lords, LORD TOMLIN and LORD WRIGHT expressed the view that *Gimson's* case (2) was rightly decided. I think that it was rightly decided, and, in saying that, I am following the opinion which was expressed both by LORD TOMLIN and by LORD WRIGHT. The facts in *Gimson's* case (2) are set out on p. 597, and they are in these terms:

> The Treasury Bill Discounts and Interest on Munition Levy were each received

> in one year only many years before the year when the dividend in question was declared. These particular amounts had not been brought into computation for assessment in the respective years of receipt, because under the rules of Case III of Sched. D which were in force at that time the basis of assessment was the amount of the preceding year's income which was nil. Neither had these particular amounts been brought into computation for assessment in the following years because the company had no income from these sources in those years, and under the decision in the case of *Brown* v. *National Provident Institution* (4), no assessment could be made for those years. The War Loan interest of £6,702 was the amount received A without deduction of tax in the year 1921/22. As no income from this source had been received in the following year 1922/23 this amount of £6,702 of War Loan interest had not been included in any computation for assessment to income tax for 1922/23 or any other year but there had been an assessment under Case III for 1921/22 in respect of the War Loan interest based on the amount received in the previous year.

B

The matter was discussed by ROWLATT, J., in the judgment, which, as I say, I conceive to be quite correct in law as it stood, and what he decided was this: that there was, in these circumstances, no liability to super-tax at all, and the substance of the view which the judge took was this, that, inasmuch as there was, in the circumstances, no income C tax liability, so, also, there could be no liability to super-tax. At. p. 601 he says this:

> Now I am bound to say I have always regarded it as fundamental that, just as in the case of an individual whose income comes to him straight and who gets back the tax which he has suffered, and no other, and pays super-tax in respect of a fund which has suffered tax, and no other, so if this gentleman had received this money D not from the company but direct, by holding the source of income himself and had been liable to income tax in nil because of the regulations affecting measurement, his income would not be subject-matter on which he could get back tax which was small or pay super-tax in case it was big.

Now we come to the other case, also very important, *Neumann's* case (3). E It is not necessary to go through the rather difficult facts in that case—a case in which the decision of the Court of Appeal, which reversed a decision of mine, was affirmed by the House of Lords, but affirmed on different grounds—but there are two passages which it is necessary to look at, one in the opinion of LORD TOMLIN and the other in the opinion F of LORD WRIGHT. What LORD TOMLIN said was this, at p. 363:

> It is not disputed that, if a dividend is paid out of the profits produced by a sale of a capital asset, it is not made out of profits or gains charged on the company and, therefore, no deduction from the dividend is authorised, and the dividend itself is not liable to be taken into account in fixing the liability to sur-tax of the shareholder. Again, where the dividend was paid out of profits or gains not chargeable on the company by reason of the application of the rules relating to the G measurement of taxable income, it was held in *Gimson* v. *Inland Revenue Comrs.* (2) (decided before the passing of the Finance Act, 1931) that no deduction was permissible, and that the dividend ought not, therefore, to be taken into account for the purposes of sur-tax. The Court of Appeal in the present case have held that the decision was wrong. I do not think it was wrong. The profits or gains in that case were not profits or gains assessed by reason of the rules at nil, but profits or gains not assessable at all. They were, therefore, not profits or gains to be charged H on the company and no deduction was permissible from a dividend paid out of them. It is unnecessary to express any opinion as to the effect, if any, of the Finance Act, 1931, s. 7 (1), upon such facts as those dealt with in that case.

Then the passage in the opinion of LORD WRIGHT, at p. 370, is this:

> But there still remains to be considered the question whether the company was authorised to deduct tax from the dividend, either under r. 20 or, now, under

sect. 7 of the Act of 1931. The answer to that question depends on determining whether the dividend paid to the appellant was paid out of profits and gains charged to tax. Thus, where a dividend was paid out of profits which were not chargeable to income tax, it was held by ROWLATT, J., in *Gimson* v. *Inland Revenue Comrs.* (2), that super-tax was not payable. Part of the dividend was in respect of profits of a capital nature, part out of profits which were not assessable by reason of the rules of admeasurement. I think the decision was correct as the law then stood, though, as regards the latter class of profits, the case may now need to be
A considered afresh in the light of the Finance Act, 1931, s. 7, that is, on the question whether such profits were or were not chargeable.

Now, it was argued here that *Gimson's* case (2) does not apply. I have already indicated that I follow LORD TOMLIN and LORD WRIGHT in thinking that *Gimson's* case (2) was well decided, but it follows, I
B think, that, if the view of LORD TOMLIN in *Neumann's* case (3) is followed, *Gimson's* case (2) does not cover the present case. Here, there was income liable to assessment, though in the particular year a nil assessment fell to be made, and the second dividend, it may be noticed, was in the second year, when clearly the company had income assessable,
C and, indeed, assessed; but I further think that, even if it be assumed, contrary to the view which I have formed on the consideration of *Gimson's* case (2), and particularly on consideration of the passage in the opinion of LORD TOMLIN in *Neumann's* case (3), that *Gimson's* case (2) is applicable here, then I think that sect. 7 is applicable. I think that that
D section is clearly retrospective. It was suggested by Mr. Tucker in his able argument that it might be thought to apply only to dividends paid after Apr. 5 in that year, or, in the alternative, to dividends paid within the 6 years. I find it impossible to accept either of those suggestions. It accordingly follows, if I am right in that, that the section
E applies, and the fact that the section applies seems to me to relieve the Crown of any difficulty which might otherwise arise. In the result, therefore, I have arrived at the conclusion here that the decision of the special commissioners was correct, and it accordingly follows that this appeal must be dismissed with costs.

F *Appeal dismissed with costs.*

Solicitors: *Blundell, Baker & Co.*, agents for *Jonathan Knowles & Cox*, Bradford (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* LONDON CASINO, LTD.

[King's Bench Division (Finlay, J.), **July 26, 27, 1937.]**

Revenue—Entertainments duty—Restaurant in converted theatre—Elaborate revue during meals—Minimum charge—Finance (New Duties) Act, 1916 (*c.* 11), *s.* 1.

A The defendant company was in occupation of premises which had previously been used as a theatre. These premises were adapted for use as a restaurant, but the general aspect of a theatre was retained; the stage was enlarged, the seats in the stalls and dress circle were replaced by tables and chairs, and staircases were built from the dress circle to the stage. Food and drink were supplied, as in an ordinary restaurant, and patrons were able to dance on the stage. There was in B addition an elaborate revue performed on the stage, which was fitted and adapted for the production of such a revue. Patrons were allotted tables as in an ordinary restaurant; there was a fixed menu each night, but dishes could be ordered *à la carte.* A minimum charge of 15*s.* 6*d.* was made, payments being made before leaving. The question arose as to whether the company was liable to pay entertainment duty:—

C Held: upon the evidence, the 15*s.* 6*d.* was paid by patrons for admission to an entertainment within the Finance (New Duties) Act, 1916, but, as part of the payment was in respect of other privileges and rights, only that part of the payment which represented the right of admission to the entertainment was dutiable.

Lyons & Co. v. *Fox* (2) *distinguished.*

D **[EDITORIAL NOTE.** It had been held in *Lyons & Co.* v. *Fox* (2), that restaurant music was merely incidental to the meal and that payment was really made for the meal. That decision was only arrived at after a difference of opinion among the judges, and in the present case Finlay, J., had come to the conclusion that the facts, which are materially different from those in the earlier case, do not warrant a conclusion that the entertainment is incidental.

E As to Entertainments Duty, see HALSBURY, Hailsham Edn., Supp., Revenue, para. 1216; and for Cases, see DIGEST, Vol. 39, pp. 300, 301, Nos. 784-791.]

Cases referred to:

(1) *A.-G.* v. *McLeod,* [1918] 1 K.B. 13; 39 Digest 300, *784*; 87 L.J.K.B. 89; 117 L.T. 631.

F (2) *Lyons & Co.* v. *Fox,* [1919] 1 K.B. 11; 39 Digest 300, *787*; 88 L.J.K.B. 241; 119 L.T. 763.

(3) *A.-G.* v. *Swan,* [1922] 1 K.B. 682; 39 Digest 300, *785*; 91 L.J.K.B. 367; 127 L.T. 61.

(4) *Cordiner* v. *Stockham,* [1920] 1 K.B. 104; 39 Digest 301, *788*; 89 L.J.K.B. 21; 121 L.T. 664.

(5) *A.-G.* v. *Valentia* (1924), 41 T.L.R. 78; 39 Digest 300, *786.*

G (6) *A.-G.* v. *Arts Theatre of London, Ltd.,* [1933] 1 K.B. 439; Digest Supp.; 102 L.J.K.B. 105; 148 L.T. 266.

H Information by the Attorney-General on behalf of His Majesty praying, *inter alia,* that it might be declared: (i) that certain revues, particulars of which are set out in the judgment, were entertainments and that the minimum charges made by and/or paid to the defendant company were payments made *inter alia* for admission to such entertainments; and (ii) that the defendant company was indebted to His Majesty in respect of duty at the rates specified in the Finance (New Duties) Act, 1916, s. 1, as amended by the Finance (No. 2) Act, 1931,

s. 5, Sched. II, and the Finance Act, 1935, s. 1, on the minimum charges or alternatively on the dutiable amounts of the minimum charges. The facts are set out in the judgment.

The Attorney-General (*Sir Donald Somervell, K.C.*), *Valentine Holmes* and *H. P. J. Milmo* in support of the information.

A *Norman Birkett, K.C.*, and *Michael Rowe* for London Casino, Ltd.

FINLAY, J.: The substantial question which arises is whether duty is exigible from the London Casino, Ltd., under the Finance (New Duties) Act, 1916. The facts, quite shortly, are these. There was in
B London a theatre called the Prince Edward Theatre, which, as a theatre, had not been a success. Mr. Stone, a director of the defendant company, and others associated with him in the defendant company, conceived an idea that they might acquire this theatre, and alter it very substantially and extensively, none the less retaining the general aspect of a
C theatre. That is to say, there would still be a stage, and the familiar space on the ground-floor where the stalls normally are, but, instead of stalls, they would have tables, and seats at those tables. There would still be the dress circle, but, again, instead of having the seats which are normally in the dress circle, they would have tables and seats at
D them. There would be the upper circle, but that would be used exclusively for such purposes as lighting and dressing-rooms and things of that sort, and there would be staircases down from the dress circle, and along to the stage. The idea was that the place should be opened as a restaurant, but not as a restaurant of a type which, before this, had
E been known, at all events in England. The idea of the thing was that there should be a restaurant in the ordinary sense of the term, where one could get food and drink, and also that there should be another adjunct, which, I suppose, in the larger London restaurants is almost common form—that is to say, a dance floor and a band, so that people
F might, after dinner, or during dinner, dance if they were so minded. But use was made of the stage, and I am satisfied, as I say, that the use of the stage in this way, in a place where food could be obtained, was, in England, at all events, a new idea. The scheme really was this, that there should be provided food and drink of a high quality, that
G dancing, with, as I say, a band for dancing, should be provided, but—and this is an important point—that there should be, as an attraction, a revue. The revue, I am satisfied, was an ambitious revue of a very high class. It is quite unnecessary to go through the various advertisements, in which, often in rather glowing language, the revue is described.
H But the important thing is this, that this was a revue of an elaborate character, and the stage was perfectly fitted and adapted for the production of elaborate revues. The only thing that can be said is that, by reason of the fact that kitchens were installed below the stage, some of the effects depending upon trap-doors, or upon things rising from below, and so on, could not be given, but, with that one qualification,

the stage, I am satisfied, was fitted and was used for the production of revues of a very elaborate character. The full time of the revue was one hour and a half, and the normal thing was that the revue was given in two parts. On the ordinary nights, Monday to Friday, Part 1 began at 8.15 p.m. and finished at 9 p.m., and Part 2 began at 9.15 p.m. and ended at 10 p.m., and there was a shortened revue much later in the evening, during supper.

Now, my attention was called to an agreement between the defendant company and a company called Paris In New York, Inc., which is a corporation existing under the laws of the state of New York. That agreement shows that Paris In New York, Inc., had shows and cabarets of the sort which the defendant company desired to produce, and elaborate arrangements were made for the production by Paris In New York, Inc., of these revues at the theatre, as it is called, or at the restaurant, of the defendant company. It does not matter in the least whether you call it a theatre or a restaurant ; I am perfectly willing to call it "the restaurant." There was, and nobody is in the least concerned to deny it, a perfectly obvious interest of the Paris In New York, Inc., in this concern, its interest, of course, being that it produced the shows, and it was quite obviously very vitally interested in the success of the restaurant. The interest was reflected in the position both with regard to the directors and with regard to the shares, because one out of four of the directors was nominated by Paris In New York, Inc., who owned 5,000 shares out of 30,000 shares, and 5,000 out of 20,000 of what were called loan notes (no doubt something in the nature of debentures) in respect of money which had been lent to the company.

That, then, was the position. The defendant company was formed to run this restaurant, and to run it on very special lines. I am satisfied that the special character of the thing was this, that one was to obtain an excellent dinner (as Mr. Norman Birkett said) in very pleasant and refined surroundings, and one was, during or after dinner, to witness what was really an elaborate show lasting an hour and a half. I entirely accept the evidence given by Mr. Stone, which was to the effect that he wished the programmes relating to the show to be of an elaborate character, and wished them to be the sort of programmes which people would be likely to take home, so that thereby there might be a valuable advertisement of the place, and people might be induced to come there. I also had before me rather elaborate accounts, and they show, fortunately for everybody concerned, that this venture has been a rather conspicuous success. They show, as one would expect, that very large sums were expended on the kitchen account, for wine, and on the production and the expenses (salaries, and so forth) of the revues which were produced.

Now, it is necessary to explain exactly how the place worked. People who were minded, as large numbers of the public were minded, to go to this place, went there, and, very much as one does at any other restaurant, they went to a table in the foyer and there they were allotted a table, depending, of course, upon the number of the party, and so forth. Having been allotted a table, they then went into the theatre or restaurant, and there were shown to, or found, their table. It matters not the least whether in fact the table was allotted by a clerk at the A desk in the foyer or whether the head waiter inside allotted it; nothing turns on that. Having got to their table, they were naturally asked if they desired to order food, as in practically every case they did. Only one exceptional case, that of an excise officer who did not eat anything, was mentioned to me, but that case is so rare as to be negligible. The B position with regard to the food was this. There was a menu each night, and dishes could be ordered *à la carte*, but there was a minimum charge of 15*s*. 6*d*. One could for 15*s*. 6*d*. have, of course, a *table d'hôte* dinner, or, I suppose, have dishes *à la carte*, provided they did not exceed the value of 15*s*. 6*d*. Anything beyond that would, of course, have to C be paid for as an extra. Wine could be ordered, and, of course, as in the normal case, cigars and cigarettes could be ordered. I will take the normal case of people eating a *table d'hôte* dinner. In the normal case, they would eat their dinner, they would drink such wine as they thought fit to order, and they would probably, in the intervals, dance. Also, D they would see a show, in two parts, and lasting as a whole one and a half hours, and they could, of course, remain as long as they liked. I have no doubt that Mr. Stone was quite right when he said that, in one sense, the longer people stopped the better, because, the longer people stay in a place of that sort, dancing and watching the show, the more E likely they are to order drinks, and the more profitable it becomes for the restaurant. In the ordinary course, people would get into this place simply by going and saying that they wanted a table, going in there, and, at the end, just before leaving, paying their bill, precisely as, in any other London restaurant, one pays one's bill at the end of F one's meal, and just before one is leaving. There was, however, one exception which was given in evidence, and to which perhaps I ought to refer. Apparently, one can engage tables at the London Casino through any of the ordinary theatre agents. I was told that one can similarly engage tables at other restaurants, and, for all I know, that is G perfectly right, but, anyhow, one can so engage tables at the London Casino, and there was evidence before me of two people who had done that. In their case, the system was varied because they paid their minimum charge, two sums of 15*s*. 6*d*., as there were two of them, plus a booking fee, to the agents, and the arrangement, as was explained to H me by Mr. Stone, with the agents was that the agents got a commission upon any patrons of the London Casino whom they might introduce. Subject to that, the arrangement of paying at the end for all that had been consumed was as I have described it.

Now, on those facts, I cannot entertain any doubt that the people who pay 15*s*. 6*d*.—they often pay more, but I will take 15*s*. 6*d*. for convenience—do pay it, partly, at all events, as Mr. Birkett has said, because they can have a good dinner in pleasant surroundings. But that is not all. They pay it, and to a substantial extent pay it, because they will, in addition to their dinner, be able to see an extremely good and interesting and lively entertainment. People who go out constantly dine at a restaurant and then go on to a show, and the happiness of Mr. Stone's conception resided in this, that he had really run the two things into one. Whatever the result may be, I cannot bring myself to doubt that the normal person paying 15*s.* 6*d.* pays not only for the dinner, not only for the right to dance to a band, but to a substantial extent also pays it because he desires to see what is a good and elaborate and expensively produced show.

In these circumstances, the question which arises is as to whether entertainments tax is or is not exigible. That depends upon the construction of the Finance (New Duties) Act, 1916. Sect. 1, which is the charging section, is to the effect that "there shall be charged levied and paid on all payments for admission to any entertainment" an excise duty at a certain rate. Sect. 1 (2) has reference to certain provisions for stamped tickets, and contains a penalty clause, whereby, if a person:

> is admitted for payment to any place of entertainment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted shall be liable in respect of each offence to an excise penalty . . . .

Sect. 1 (3) does not appear to be material, but sect. 1 (4) is important:

> Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments duty shall be paid on the amount of the lump sum, but where the commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment, or covers admission to an entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable.

Then the definition is in sect. 1 (6):

> The expression "entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression "admission to an entertainment" includes admission to any place in which the entertainment is held.

I do not entertain the slightest doubt—indeed, I did not understand it to be contested—that here this was an exhibition or performance, and that, if payment was made for admission to a place in which the entertainment was held, then duty would be exigible. What I mean by that is this, that, if this very entertainment, this revue, were to be given in the theatre, without any food or anything of that sort, the persons paying for admission, then, quite plainly, the duty would be exigible. So far, I have no doubt at all. Then the definition goes on:

> The expression "admission" means admission as a spectator or one of an audience, and the expression "payment on admission" includes any payment made

by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required.

Now, on that Act there have been various authorities. *A.-G.* v. *McLeod* (1) was a case with reference to a Freemasons' festival, at which there was a dinner, the dinner being followed by a concert, which persons A dining might, if they desired, attend, the concert being held in another room. ROCHE, J., formed the view that, while duty was, of course, not exigible in respect of the dinner, where an inclusive sum of £1 1*s*. was paid for the dinner, the sum was properly apportioned by the commissioners, and the sum of 2*s*. was properly regarded as referable to the B concert, which was, ROCHE, J., held, an entertainment. That case was followed a year later by the case which has given me the most anxiety in this matter, *Lyons & Co.* v. *Fox* (2). The facts there were very different from the facts here; that had reference to the Trocadero Restaurant during wartime. There was a somewhat acute division of C opinion, DARLING, J., A. T. LAWRENCE, J., and BAILHACHE, J., constituting the majority, SHEARMAN, J., and SALTER, J., dissenting. There are observations in the judgments of the majority which have given me considerable difficulty, and to which I shall revert. That case was followed by *A.-G.* v. *Swan* (3), which related to a county cricket club. D There it was held that, where members paid a subscription to their county cricket club, part of that was referable to the right which it gave to the members to see all matches played on the ground, and, therefore, entertainments duty was payable in respect of it. There again the decision was given by ROCHE, J. *Cordiner* v. *Stockham* (4) related to E a concert on the Palace Pier at Brighton, and in substance it was there held that, where a man went into a hall with glass sides, on the pier at Brighton, sat down and listened to a concert, and paid 2*d*. for the chair on which he sat, that was exigible to entertainments tax, on the ground that the band concert was an entertainment, and that the man paying F his 2*d*. for his chair must be considered to fall within the Act, and that it must be regarded as a payment for admission to an entertainment. Then *A.-G.* v. *Valentia* (5) was a case relating to the Hurlingham Club, which somewhat resembled the county cricket club, and there it was held that persons paying subscriptions to Hurlingham Club must be G deemed to be paying, as to part of those subscriptions, for the right of entrance to polo matches or to tennis matches, and to things of that sort. That is, of course, a case which illustrates, as the Attorney-General, I think, rightly said, that rather a liberal construction has been given to the words "payment for admission," because certainly it is H true, I think, to say that nobody using ordinary language would say that a member of Hurlingham Club paying his subscription was, as to part of it, at all events, paying for admission to an entertainment, but that is what the Court of Appeal in that case held that he was doing. Then the last case to which I need refer, *A.-G.* v. *Arts Theatre of London, Ltd.* (6), was a case in which persons who were members of the society paid a subscription and had a right in respect of that subscription to secure, upon a further payment, admission to theatrical performances given by the company. It was held there by the Court of Appeal that the duty was exigible, that the subscription, so to speak, must be broken up, much the same as the subscription in the Hurlingham case had been broken up, and that duty was exigible in respect of that part of it which must be considered to represent the right of entry to an entertainment, namely, the theatrical shows given by the company.

On those authorities, apart from the case to which I shall revert, I should not have the slightest doubt. I think it is quite clear that here there was an entertainment. I should have thought that it was quite clear that, when the 15*s*. 6*d*. was paid, it was paid for admission to an entertainment, and not in the least the less paid for admission to an entertainment because it was also paid in respect of a dinner, no doubt a very excellent dinner, which had been consumed. I think that the matter is plainly one for a splitting up, which, as indicated in subsect. (4), is for the commissioners, but a difficulty undoubtedly is caused by observations of the majority of judges in *Lyons & Co.* v. *Fox* (2). I have no difficulty at all in distinguishing the facts there; they were very widely different. In that case, during tea or dinner at the Trocadero, a concert was provided. It is impossible, of course, that the judges could have had in contemplation anything like the case which arises here. The cases are as different as they can possibly be on their facts, and, of course, the observations made by the judges must be taken with reference to the facts which were before them, but, nevertheless, allowing for that fully, I think that, in the judgments, particularly in the judgments of BAILHACHE, J., and A. T. LAWRENCE, J., there are passages which do cause a difficulty. BAILHACHE, J., says, at p. 21:

> Is there anything in this Act which compels the court to give to the words " payment for admission " a meaning of a special character, and not the meaning which any person of ordinary intelligence would give to the words? I think not.

Now, if the judge there meant that the words " payment for admission " had reference to what we may conveniently call the " turnstile " theory, I think that later authorities clearly show that he was wrong. He goes on:

> On the contrary, every line of the Act convinces me that the language used in the Act is used in the ordinary sense in which an ordinary person would use it, and it is therefore quite unnecessary to pray in aid the rule of construction that where the meaning of a taxing Act is doubtful the language must be given that construction which is most favourable to the tax-payer. To my mind there is nothing doubtful about the meaning of the words " payment for admission " to an entertainment. It is true in a sense that payment of the bill for a dinner at the Trocadero includes payment for the musical entertainment which is given during and after dinner, but it is impossible in my opinion to hold that the sum paid for the dinner is a payment for admission to an entertainment within the meaning of this Act.

A. T. LAWRENCE, J., says very much the same, at p. 22:

> The question is, what does the Act mean? If the Act was intended to hit cases of this kind, and if the language used clearly carries out that intention, then, of

> course, the Act must be applied, although there may be difficulties in doing so; but I do not think that the Act was intended to apply to this class of case. I think it was aimed at cases where people pay for admission to an entertainment in the ordinary way.

It is not necessary to say with what respect one treats any observations made by A. T. LAWRENCE, J., but I make the same remark with regard A to him as that which I made with regard to BAILHACHE, J., that, if he, in that passage, was thinking that, so to speak, the turnstile theory could be applied, then later authorities show that he was wrong. Thinking, as I do, that, on the facts of the case there, the decision can be supported, and ought to be supported, on the ground that the facts B are utterly different from those in the present case, and that the dinner was the thing, and that music and songs were merely incidental, I have arrived at the conclusion that these passages, though they have caused me difficulty, are not sufficiently strong to induce me to hold that here the Attorney-General must fail, on the ground that the case is covered C by the case of *Lyons & Co.* v. *Fox* (2). In one sense, it clearly is not; the facts are utterly different; and, while these *dicta* do cause me difficulty, I think that they ought to be read with reference to the facts which were then before the court, and, if they are read in any wider sense, then they are inconsistent with subsequent decisions, including D at least one decision in the Court of Appeal. I am rather confirmed in that view by the fact that, in *Swan's* case (3), ROCHE, J., says this, which I think is useful, about the *Lyons* case (2). He says, at p. 688:

> The difference of opinion in the latter case [the *Lyons* case (2)] arose, as I read it, from a difference between the members of the court in the interpretation of the E findings of fact by the magistrate.

A little earlier he said this, at p. 687:

> In other words, there is nothing to prevent the question in this case from being a pure question of fact, and it is just because, in these cases, the question is one of fact that one meets with such difficulties.

F I think that that does tend to confirm me in the view which I have formed as to the way the *dicta* to which I have made reference, and, indeed, which I have read, in the *Lyons* case (2), ought to be treated. That, then, represents the view which I have formed on this case. I think that the payment here is payment for admission to an entertainment, G but I think that it would be entirely wrong to say that the whole of the payment is payment for admission to an entertainment. Quite manifestly, it is not. The words in the latter part of subsect. (4), words which, as LORD HANWORTH pointed out, are general, I think ought to be applied here, as indeed they have been applied here. The result must H be that the Crown is entitled to succeed.

Judgment for the plaintiffs.

Solicitors: *Solicitor of Customs and Excise* (for the informant); *Kenneth Brown, Baker, Baker* (for the defendant company).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

WOODMAN *v.* RICHARDSON AND CONCRETE, LTD.

[Court of Appeal (Greer, Slesser and MacKinnon, L.JJ.), **June 25, 28, 29, July 29, 1937.**]

Negligence—Invitee—Defective ladder removed from building operation—Ladder put back by unknown person—Onus on invitee to prove invitor's responsibility for or knowledge of replacement of ladder.

R. had contracted to erect a building, and to do so he had to erect a scaffolding for the use of his own workmen and of the sub-contractors' workmen. The plaintiff, a workman employed by the sub-contractors, was working on the scaffolding when he saw a ladder, by which he had ascended, being removed by two men employed by R. These two men informed the plaintiff that there was another ladder at the other end of the scaffolding. The plaintiff found this other ladder and was descending by it, when, as two rungs were missing, he slipped and sustained injuries. The evidence showed that the defective ladder had been put on a dump with discarded plant, a place from which no employee of R. had any right to remove it and again put it in use. There was no evidence as to how, or by whom, the defective ladder had been placed against the scaffolding. In an action for negligence against R.:—

Held: [MacKinnon, L.J., dissenting] the plaintiff could not succeed in his action as he had failed to prove negligence on the part of R. *Per* Greer, L.J.: Inasmuch as the plaintiff had failed to give evidence to show that the scaffolders put the defective ladder into position, or to show that some of the foremen on the job had seen, or ought to have seen, the defective ladder, and had failed to get it removed, his case necessarily failed for want of evidence. *Per* Slesser, L.J.: The risk that the defective ladder would be taken back into service in its defective state was not a risk the knowledge of the danger of which could be imputed to R., the fact that the ladder belonged to R. did not seem to alter the position, and, in the absence of any evidence or finding that it was replaced by his servants or with his knowledge, he could not be held liable.

[EDITORIAL NOTE. There is a duty to warn an invitee of the dangerous condition of a chattel, but where the dangerous chattel has been removed by the invitor or his employees from the sphere in which it is ordinarily used, then it is necessary for the invitee to show that the invitor or his responsible employees knew, or ought to have known, that the dangerous chattel had been brought back to a place where it might be used by the invitee. The invitor's duty is to take all reasonable precautions for the safety of the invitee, and not to insure his absolute safety.

As to Nature of Invitor's Duty, see HALSBURY, Hailsham Edn., Vol. 23, pp. 604, 605, para. 853; and for Cases, see DIGEST, Vol. 36, pp. 41-45, Nos. 247-281.]

Cases referred to:

(1) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(2) *Hall* v. *Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; Digest Supp.; 101 L.J.K.B. 679; 147 L.T. 404.

(3) *Fardon* v. *Harcourt-Rivington* (1932), 146 L.T. 391; Digest Supp.

Appeal by the defendant Richardson from a decision of Branson, J., dated Feb. 2, 1937. The facts are set out in the judgments.

Constantine Gallop for the appellant.

F. A. Sellers, K.C., and *James MacMillan* for the respondent.

Greer, L.J.: The defendant had contracted with the building owner to erect a cinema in the London Road, West Croydon, and to do so it was necessary for him to erect a scaffolding for the use both of his own workmen and of the workmen of Concrete, Ltd., the sub-contractor for the concrete-work. The action originally was an action against two defendants, the appellant Richardson and Concrete, Ltd., but the judge decided that no case was made out against Concrete, Ltd., and there is no appeal from that decision. This court is concerned only with the action against the defendant Richardson. The action was originally based, not only on negligence, but also on the breach of a statutory regulation, but, before the case came on for trial, the plaintiff's solicitors, by a letter dated June 22, 1936, to the defendant's solicitors, expressly abandoned the claim for breach of statutory duty, and limited the plaintiff's claim to the claim for negligence only. The facts of the case are somewhat peculiar, and the decision depends on whether the plaintiff has made out a case of negligence as defined in *Indermaur* v. *Dames* (1), where the law relating to liability to invitees is stated in these words, at p. 288:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

I agree with the judge that the relationship between the plaintiff and the defendant Richardson was a relationship of invitor and invitee. As the judge said in the course of his judgment:

> The duty to put up the scaffolding lay upon Richardson. He had to provide all the scaffolding that was required for the execution of this contract. By his sub-contract with Concrete, Ltd., Concrete, Ltd.'s, men were entitled to use the scaffolding which the defendant Richardson had erected.

On Sept. 25, 1935, the plaintiff, who was a workman in the employ of Concrete, Ltd., had occasion to go on to the scaffolding to do some necessary work there on behalf of his employers. Shortly after going up on the scaffolding, not having all the materials that he required, he wanted to come down again. He had obtained access to the scaffolding, on the first floor, by means of a ladder, which was perfectly safe, and no doubt had been put there by one or other of the scaffolders to whom was entrusted the work of putting proper and safe ladders into position for the use of the hod-carriers and others who required to get on to the scaffolding to do their work. Just as the plaintiff was preparing to descend, he saw two of Richardson's bricklayer's labourers taking away the ladder which he had used for the purpose of getting on to the scaffolding, and he called out to them: "Where are you going with that ladder? How am I going to get down?" One of them replied: "Don't get excited, there is one at the other end of the scaffolding." He then walked to the other end of the scaffolding, and started to descend the ladder there. After he had got about half way down, he lost his footing with his right foot, his left leg slipped, at a place where two rungs were missing, and he received the injuries in respect of which he claimed damages against Richardson. The missing rungs left a gap of 3 ft. in the ladder. He managed to extricate himself and get down the ladder, and he said, in his evidence, that there was another rung of the ladder missing at the end of the ladder, but this is of no importance, as it had nothing to do with his injuries. There was a man named Miller, a carpenter in A the employ of Concrete, Ltd., standing at the bottom of the ladder, with his back to the plaintiff. After reaching the ground, the plaintiff complained to Miller that he had injured his knee, but that complaint was not communicated to anybody else, and no person in Richardson's employ heard anything about it until a month afterwards. The defen- B dant's acting foreman was a man named White, who, by the orders of his employers, specially inspected the scaffolding once a week, and, of course, as he was a foreman, he would have to move about the different parts of the work, and so might have an opportunity of seeing whether the scaffolding and the ladders fixed for the men to ascend and descend C were in good order. Whether White or the foreman labourer, Townsend, had ever had an opportunity of seeing the damaged ladder in position is unknown. It certainly was not proved.

The following facts, which I think were essential to the plaintiff's case, were not proved: that the ladder in question was put in position by any D person within the scope of whose employment it was to erect ladders and place them in position for men to ascend to the scaffolding and to descend from it. The only evidence as to who had to do this was that it was part of the scaffolders' duty, and it clearly was not any part of the duty of the bricklayer's labourers, who were liable to instant dismissal E if they removed or erected without orders ladders providing access to the scaffolding. This duty was entrusted only to the scaffolders. There was no evidence on which it could be found that either of the defendant's foremen—White, the general foreman, or Townsend, the labourers' foreman—did see this particular ladder in position, or had any oppor- F tunity of seeing it on their rounds. There was no evidence as to when it was put up, or as to who in fact put it up. The judge at one period of the case seemed to think it probable that the workmen who took down the other ladder put up the defective ladder, and he said to Mr. Gallop, who was arguing the case for the defendant, "You are not saying that G it was not there to the knowledge of your clients. All the evidence is that your workmen had put up the ladder." I think the judge was then referring to the bricklayer's labourers who had taken down the other ladder, but of course the defendant would not be responsible for what they did, because it was not within the scope of their employment to put up H ladders. The difficulty about the case is that it is quite impossible, upon the evidence, to say how long the ladder had been in position. It may have been there for only a few minutes, or even seconds, before the plaintiff used it, in order to descend from the scaffolding. I do not think that the ladder in question was the one referred to by White, the acting foreman, as that ladder had not two rungs missing, but had two iron rungs in place of the original wooden ones, and a rung missing above those. The ladder which the plaintiff used must have been some other ladder. The evidence shows that this ladder had been put on a dump where plant that was not fit for use was put, a place from which no employee of the defendant had any right or duty to remove it and again put it into use. In the course of his cross-examination, the plaintiff admitted that it was the duty of anyone who wanted a ladder to bring the matter to the notice of the foreman or the scaffolder, and that it was a very dangerous thing for this important matter to be dealt with by bricklayer's labourers or anybody of that kind. The plaintiff did say that he thought that the scaffolder had put the defective ladder where it was, but there was no evidence whatever of this, and it seems to me highly improbable that a scaffolder who would have to use it would have put up this defective ladder. It seems to me probable that the bricklayer's labourers, who took away the proper ladder, were the people who put the defective ladder in position.

In my judgment, the plaintiff, in order to succeed on the ground of negligence, had to prove his case, and, inasmuch as he failed to give any evidence to show that the scaffolders put the defective ladder into position, or to show that some of the foremen on the job had seen, or ought to have seen, the defective ladder, and had failed to get it removed, his case necessarily fails for want of evidence. No doubt the acting foreman and the labourers' foreman would be from time to time passing the place where this ladder was at the time of the plaintiff's accident, but, inasmuch as we do not know how long it had been there, it does not seem possible to say that the foremen were negligent in not having discovered it, as they could not be expected to be at any particular place at any particular time.

I have come, with some regret, to the conclusion that, as the plaintiff failed to prove his case, the judge was wrong in giving judgment in his favour, and that, therefore, this appeal should be allowed with costs, and judgment entered for the defendant Richardson with costs.

SLESSER, L.J.: In this case, the facts of which have been fully stated by GREER, L.J., I have come to the conclusion, though not without hesitation, that there was no sufficient evidence against Mr. L. F. Richardson to entitle the judge to find him liable for negligence. That the plaintiff, the injured workman, who was in the employment of Mr. Richardson's sub-contractors, Concrete, Ltd., at the time of the accident, was there on the invitation of the defendant is not now disputed and, in those circumstances, the plaintiff was entitled to expect that the defendant would use reasonable care to prevent damage from unusual danger, which he knew, or ought to have known, existed. That the defendant did not know of the defects in the ladder down which the plaintiff fell is admitted. The critical question remains: ought he or his servants to have known of the unusual danger caused by the fact that two rungs of the ladder were missing ? If not, he has not failed in any duty to the plaintiff, and the plaintiff is not entitled to damages.

In this connection, it is important to remember that, if the misadventure was of so unusual and of so unexpected a kind that it could not reasonably have been expected, it cannot be said that the invitor ought to have known of it. *Indermaur* v. *Dames* (1) is authority to say that he must guard against unusual danger, but only such, albeit unusual, dangers as he may reasonably be called upon to anticipate. In the language of GREER, L.J., in *Hall* v. *Brooklands Auto-Racing Club* (2), at p. 231 :

> I do not think the defendants are under any obligation to provide safety under all circumstances, but only to provide against damage . . . which any reasonable occupier in their position would have anticipated as likely to happen.

Now, in the present case, there is no evidence whatever to explain how the defective ladder was placed near the plaintiff's work, so that he was induced to use it. According to the story of Lovell, a ganger's labourer in the employ of the defendants, the workmen of Concrete, Ltd., often moved ladders, but there was in the case no evidence that this particular ladder was moved by them. The judge has not, in terms, held the defendant guilty of negligence in allowing the ladder to be taken from the dump or boundary-wall to the scene of the plaintiff's work, but has come to the conclusion that there ought to have been a much more complete watch kept upon the plant which men were invited to use. Elsewhere he says, " This accident was caused through the negligence of the employees of Richardson in omitting to see that the scaffolding and ladders were reasonably safe." The specific negligence found was that the ladders were inspected only on successive Mondays, once a week. Mr. James White, assistant general foreman, says that he was probably on the site of the accident the same morning, and that he did not see the ladder. He added that he was sure that he would not have missed it if it had been there.

On these facts, I find it impossible to think that the defendant ought reasonably to have anticipated that someone unknown would take it upon himself to bring a defective ladder, with two rungs missing, from the boundary or dump, and set it up against the scaffolding, nor do I think that a more frequent inspection of the scaffolding or ladders, even a daily one, would necessarily have prevented someone from putting this particular ladder against the scaffolding, an act which would take only a few minutes. The case seems to me to fall within the language of LORD DUNEDIN in *Fardon* v. *Harcourt-Rivington* (3), at p. 392, to the effect that :

> if the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence ; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

In my opinion, the risk that this discarded ladder would be taken back into service in its defective state is not a risk the knowledge of the danger of which can be imputed to the defendant, the fact that the ladder belonged to the defendant does not seem to alter the position, and, in the absence of any evidence or finding that it was replaced by his servants, or with his knowledge, he cannot be held liable.

A I agree with GREER, L.J., that this appeal succeeds.

MACKINNON, L.J.: The plaintiff in this case met with an accident. The judge assessed his damages at £160. In one aspect, then, it is a case of small importance. But upon appeal there has been argued a question B as to the onus of proof which seems to me very important.

It was held by the judge—and in this court it has been admitted that he rightly so held—that, when the plaintiff was on the defendant's scaffolding, and upon any ladder provided by the defendant for use with that scaffolding, he was in the position of an invitee of the defendant. C It was further admitted, and could hardly be disputed, that, if the defendant provided the ladder, on which the plaintiff was injured, for his use as an invitee, it was apparatus which had in it a dangerous trap, against which the defendant ought to warn the invitee, or from which he ought to guard him. It was proved or admitted that this defective D ladder was in fact the property of the defendant, and was part of the plant that had been brought by him to the building-site. There was some suggestion of contributory negligence on the part of the plaintiff, in that he failed to look down at his feet and the rungs as he descended. The judge was satisfied that there was no negligence on the part of the E plaintiff, and the suggestion was not renewed in this court.

If, therefore, the defendant supplied this ladder as part of the premises to which he had invited the plaintiff, it seems clear that the defendant would be liable to compensate the plaintiff for the injury he sustained. But it is argued that there is no evidence that the defendant did supply F this ladder to be used by the plaintiff in descent from his scaffold. It is said that the plaintiff, having proved that he was on the defendant's scaffold, that this ladder was pointed out by the defendant's men as his means of descent, that it was the only means of descent available, and that it was the property of the defendant, must still fail to recover, G because he could not, and, therefore, did not, further adduce evidence that the ladder was put up against the scaffolding by someone acting with the authority of the defendant. It is said, as is the fact, that there was no evidence called, either for the plaintiff or for the defendant, to show who put up the ladder, and it is said that it is equally possible for it to have H been put up by some interloper, or trespasser, or unauthorised person, as by some person acting with the authority, and on behalf, of the defendant. Therefore, it is argued, the plaintiff must fail if he has not solved that alternative by adducing some positive evidence that the ladder was put up by some servant or agent authorised by the defendant.

I cannot accept this position. If an invitee has been injured by a pitfall upon premises owned or controlled by him who has invited him there, I think that he can recover against him, unless that person proves that the pit was not dug by himself nor by anyone for whom he was responsible. But I do not think that the defendant will escape liability merely upon a suggestion that the pit *may* have been dug by some unauthorised person, and that the plaintiff has not given any evidence A to disprove that possibility. In short, when the plaintiff proved (i) that he was an invitee on the defendant's scaffold, (ii) that it was the defendant's duty to provide him a ladder by which to descend, (iii) that this ladder was pointed out by two of the defendant's servants as his means of descent, (iv) that it was the only available means of descent, B and (v) that it was the defendant's ladder, if nothing more is proved, I think that the plaintiff is entitled to recover against the defendant for his injury. And nothing more was proved. There was a suggestion that some unauthorised person might have put up the ladder, but no evidence that it was so in fact. In the absence of any such evidence for C the defendant, I think that the plaintiff was entitled to recover, and that this appeal should be dismissed.

Appeal allowed. Judgment for the defendant Richardson, with costs. Leave to appeal refused.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellant); *L. Bingham* D *& Co.* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

HOLDSWORTH, LTD. *v.* ASSOCIATED NEWSPAPERS, LTD. E

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **July 2, 5, 29, 1937.**]

Libel—Defamatory words—Allegation that plaintiff company had refused to accept interim wages award of a joint conciliation board—Innuendo.

Practice—New trial—When granted—Plea of justification bound to succeed. F

The plaintiff company, a firm of haulage contractors, and its managing director, brought actions for libel against six newspapers. In five of the cases the words complained of alleged that the plaintiff company had refused to accept an interim wages award of a joint conciliation board for the road transport industry, and that, in consequence of that, members of a trades union had refused to handle the firm's goods at Hull and Liverpool Docks. In the sixth action, the words complained G of were similar, but it was also stated that the managing director was chairman of the Yorkshire Area Joint Conciliation Board, and had taken an active part in the formulation of the Yorkshire employers' scheme. In the innuendo, it was pleaded in each action that the words meant, *inter alia*, that the plaintiff company had refused to honour the award, but had been compelled so to do by the refusal of the unions to handle H its goods, that it was carrying on business in an illegal and unworthy manner, and that the managing director was the cause thereof, and was unfitted to retain such position:—

Held: (i) [Greer, L.J., dissenting in the case of the first five actions] the words complained of in their natural and ordinary meaning were defamatory, being such as might convey to a fair-minded man a reflection upon the plaintiff.

(ii) [Scott, L.J., dissenting] there should be no new trial: *per* Greer, L.J., because the words were not defamatory; *per* Slesser, L.J., because the plea of justification was bound to succeed.

(iii) in the sixth action the words were defamatory and there should be a new trial.

Sim v. *Stretch* (1) *applied.*

[**EDITORIAL NOTE.** This case is the first in which the definition of defamation as settled by the House of Lords in *Sim* v. *Stretch* (1) has been applied. It also considers how far the average member of the public may be taken to be cognisant of the working of conciliation machinery, and it is held that such a person must have known in 1936 that the honourable observance of collective bargains is essential to the successful working of such agreements.

As to Defamation, see HALSBURY, Hailsham Edn., Vol. 20, p. 396, para. 485; and for Cases, see DIGEST, Vol. 32, ppl 17-22, Nos. 78-129.]

Cases referred to:

(1) *Sim* v. *Stretch*, [1936] 2 All E.R. 1237; Digest Supp.

(2) *Rowell* v. *Pratt*, [1937] 3 All E.R. 660; Digest Supp.

(3) *Watkin* v. *Hall* (1868), L.R. 3 Q.B. 396; 32 Digest 96, *1272*; 37 L.J.Q.B. 125; 18 L.T. 561.

Appeal by the plaintiffs from a decision of du Parcq, J., and a special jury at the Leeds Assizes, dated Nov. 20, 1936.

In each of six separate actions for alleged libel, the plaintiffs were the same, I. W. Holdsworth, Ltd., and Charles Holdsworth, its managing director. All the publications complained of appeared in the public press. In five the wording was identical. These were the *Daily Mail*, the *Daily Despatch*, the *Yorkshire Observer*, the *Manchester Guardian*, and the *Sheffield Telegraph*, the defendants in each action being different. It was worded and printed as follows:

> Union Ban Lifted.
> Settlement of Haulage Wages Dispute
>
> Mr. Ernest Bevin, General Secretary of the Transport and General Workers' Union, announced at Sheffield last night that a dispute between the union and I. W. Holdsworth, Ltd., the haulage contractors operating in the North Midlands, had been settled. It was stated that the firm had refused to accept the interim wages award of the joint conciliation board for the road transport industry, and in consequence members of the union had declined to handle the firm's goods at Hull and Liverpool Docks since last Friday. Mr. Bevin said the firm had now agreed to accept the award and that the embargo on the handling of their goods had been lifted.

In the sixth action, against Iliffe & Sons, Ltd., in respect of an alleged libel in a weekly paper published by that company called *Motor Transport*, the language was materially, though not widely, different:

> Union Embargo on Big Haulage Firm.
> Holdsworths agree to Conciliation Wages.
>
> A drastic trade union move against the Yorkshire employers' wages scheme was revealed by Mr. Ernest Bevin, general secretary of the Transport and General Workers' Union, speaking at Sheffield on Wednesday. Mr. Bevin said that owing to refusal of I. W. Holdsworth, Ltd., Halifax, to continue to recognise Yorkshire interim agreement on wages and conditions of "A" and "B" licence holders, employees who were Union members had refused to load or unload Holdsworths' vehicles at Hull and Liverpool Docks since Friday last. Holdsworths, he continued, had now agreed to observe the interim agreement and the union's embargo had been lifted. Mr. Charles Holdsworth, director of the firm concerned, is chairman of the Yorkshire Area Joint Conciliation Board, and has taken active part in formulation of Yorkshire employers' scheme.

The six actions pursued separate paths until after the close of pleadings, when a consolidation order was made. In spite of the difference in the language of the alleged libel in *Motor Transport*, the same innuendo was alleged in that action as was alleged in the other five. In none of the statements of claim were any particular facts pleaded as a ground for giving to the words used a non-natural interpretation. The innuendo was in the following words:

> The said words meant that a wages award had been made by the Yorkshire Area Joint Conciliation Board which the plaintiff company had refused to honour or observe and had been compelled to do so by the refusal of the members of the Transport and General Workers' Union to handle the goods of the plaintiff company on the Hull and Liverpool Docks, that the plaintiff company had failed to observe and was failing to observe a fair wage clause as required by the conditions of their licences under the regulations of the Road and Rail Traffic Act, 1933, and had thereby carried on and were thereby carrying on their business under conditions which were illegal and unworthy of honourable employers, and that the plaintiff Charles Holdsworth was the cause thereof and responsible therefor and by reason thereof was unfit to be or to remain such chairman or managing director as aforesaid.

Norman Birkett, K.C., *Roland Oliver, K.C.*, and *Robert Fortune* for the appellants.

C. Paley Scott, K.C., and *H. C. Marks* for the respondents.

Greer, L.J.: It seems clear that, if the allegation of the plaintiff company and the plaintiff was that the words in their ordinary and natural meaning were defamatory, the plaintiff could not hope to succeed in the action, because, in their ordinary and natural sense, it was alleged by the defendants that they were true in substance and in fact, and the plaintiff company knew, if it relied on the ordinary and natural meaning of the words, that its action would fail, because it would have been quite simple for the defendants to prove that, in their ordinary and natural meaning, they were true. Early in his judgment, the judge said that Mr. Paley Scott, on behalf of the defendants, submitted that the words complained of were not capable of the defamatory meaning ascribed to them. Mr. Roland Oliver, who appeared at the trial for the plaintiffs, read us his note of what his submissions were. He made no submission that the words in their ordinary and natural meaning were defamatory, but confined himself to submitting that they had the meaning, or some part of the meaning, alleged in the innuendo. One can quite understand why Mr. Roland Oliver took this line, because, as a matter of strategy, it would have been unwise to rely on the ordinary and natural meaning of the words, inasmuch as it could so easily be proved that the words in their ordinary and natural meaning were true in substance and in fact. The judge would strictly have been entitled to confine his judgment to the question whether the words were capable of the meanings, or any of them, attributed to them in the innuendo. The judge, however, did direct his attention, not merely to the question whether the words were defamatory in the sense imputed to them by the innuendo, but also to the question whether, in their ordinary and natural meaning, they were defamatory. I therefore think it right to deal with this question. In my judgment, the judge was right in holding that, in their ordinary and natural meaning, the words were not capable of a defamatory meaning, and was also right in holding that they were incapable of bearing the meaning alleged in the innuendo. As regards the first question, if it really arose for decision, in my judgment, the A judge was right in holding that the words were not capable of a defamatory meaning if read without an innuendo. The question is whether any reasonable reader would understand them in a defamatory sense.

The first paragraph of the alleged libel was merely a statement that B a dispute had been settled, and is incapable of being defamatory of anybody. The second paragraph would not be interpreted by any reasonable man as defamatory. It seems to me that nobody could reasonably say that the refusal to accept the decision of a conciliation board of the whole country would be injurious to the character of a C firm who had refused to accept it. The nature of the award of a conciliation board is necessarily confined to an effort to conciliate two parties who were not agreed, and, before attaching any defamatory meaning to the words used, any reasonable reader would want to know whether or not the awards of joint conciliation boards are binding upon D employers of labour who are not prepared to accept them. I think that, in their ordinary and natural meaning, the words were incapable of any defamatory meaning. I also think that they were incapable of meaning what is alleged in the innuendo, which is based on the mistaken idea that a wages award had been made by the Yorkshire Area Joint E Conciliation Board, of which the plaintiff was chairman. I think that it is only by an imaginative interpretation of the words that they can be twisted into a statement that the plaintiffs had failed to observe a fair wages clause, or that they had done anything illegal or unworthy of honourable employers. I think that with regard to all the F newspaper cases the judge was right, and that this decision ought to be affirmed. With reference to the statement in *Motor Transport*, I think that the words are clearly capable of a defamatory meaning, because they allege that the plaintiff, who was chairman of the Yorkshire board, and a party to an interim agreement, had broken that agreement, G and that, in consequence of his doing so, Union members had refused to load or unload his vehicles at Hull and Liverpool Docks, and that he had been compelled by the action of the Union to observe the interim agreement to which the plaintiff company, through its managing director, and by Mr. Holdsworth himself, had been a party.

H There ought, therefore, to be judgment for the defendants in all the newspaper cases, but an order that the appellants are entitled to a new trial in the case against Messrs. Iliffe & Sons, Ltd., the proprietors of *Motor Transport*. The appellants must pay the costs in the newspaper cases, but, in the case against Iliffe & Sons, Ltd., the appeal succeeds, and the defendant company, Iliffe & Sons, Ltd., must pay the costs of that appeal, costs of the first trial to abide the event of the new trial. There will be liberty to apply in the event of the parties not thinking it worth while to have a new trial and failing to come to an agreement as to the costs of the first trial.

Slesser, L.J.: In my opinion, the judge was mistaken, in this case, in coming to the conclusion that the words complained of in any of the publications were incapable, in their natural sense, of bearing a defamatory meaning. In coming to this conclusion, I think that his judgment must be taken to have applied to the words in their natural meaning, as well as to the innuendoes which, so far as they are intelligible (and in the case of the newspapers they are not), do but repeat the natural meaning in more emphatic language. No innuendo of a secondary meaning is pleaded.

In the case of the publication known as *Motor Transport*, the words "owing to refusal of I. W. Holdsworth, Ltd., Halifax, to continue to recognise Yorkshire interim agreement," in my opinion, are capable of being understood to mean that the Holdsworth Company was at least regardless of its agreements, or even that it had broken an agreement with its employees, which meaning a jury might reasonably hold to be defamatory. The plaintiff Charles Holdsworth, said to be "chairman of the Yorkshire Area Joint Conciliation Board," and to have "taken active part in the formulation of the Yorkshire Employers' Scheme," is, by implication, involved in the action of the company, and so is also entitled to have a jury decide whether he has been defamed. The fact that the reference is to a non-existent interim wages award of the Yorkshire Joint Conciliation Board, and not to the actual National Interim Agreement, does not necessarily make the words less defamatory.

The position with regard to the five other newspapers is different. There the only statement which, in my judgment, can be taken to be capable of defamatory quality is that which speaks of the Holdsworth Company's refusal "to accept the interim wages award," the awarding board being rightly described as the Joint Conciliation Board for the road transport industry, but no reference whatever is made to Mr. Charles Holdsworth. In my opinion, to say of an employing company, more particularly of one associated with conciliation machinery, that it has refused to accept a wages award of the Joint Conciliation Board in its industry may, in the opinion of a jury, injure its reputation in an actionable manner. I disagree with the judge when he says, "nobody can think it derogatory to a man to say that he is not accepting the award of the Joint Conciliation Board." As Lord Atkin points out in *Sim* v. *Siretch* (1), the consideration of extant social conditions may be relevant. It is further to be noted that these particular boards have received statutory recognition, for, under the Road and Rail Traffic Act, 1933, s. 32 (1), when a matter is referred to an industrial court under the Road Traffic Act, 1930, s. 93, the court must have regard to any determination which may be brought to its notice relating to the wages or conditions of service of persons employed in a capacity similar to that of persons to whom the reference relates, such as those contained in a decision of a Joint Conciliation Board. These wages are, by the latter Act, in the cases of persons employed in the public service, to be not less favourable than those to be paid under a contract with government departments generally known as a fair-wages clause, and the assertion that an employer is not following such award may well raise the suggestion that he is not paying such fair wages. Moreover, I think that the general public may properly, in the opinion of a jury, be taken to have heard of conciliation boards in the greater industries, designed to produce peace in industry, and a jury may well think that to say of an employer that he has refused to accept the awards of such boards may suggest that he is unwilling to do his part as a good citizen to assist in the establishment of peaceful relations in his industry, and that he may not treat his employees properly. They may even assume, without seeking unreasonably for sinister meanings, that the award is one legally or morally binding upon him, and that he has improperly refused to obey the commands of law or of conscience. It is sufficient to say that, in my view, the words might convey to a reasonable, fair-minded man—a man who has no morbid or suspicious bias—a defamatory reflection upon the plaintiff company. On the other hand, the remaining language of the publications, including the allegation that the trades union refused to handle the firm's goods, and that, in consequence, the firm had agreed to accept the award, is, in my judgment, not a matter fit to be left to the jury. To say that a man has been coerced, rightly or wrongly, by a trade dispute is not to defame him. I have already observed that in all the publications other than *Motor Transport* the plaintiff, Mr. Charles Holdsworth, is not mentioned, and that in any event shows no cause of action.

Dealing with the five newspapers apart from the case of *Motor Transport*, in these circumstances, it becomes important to observe that it was conceded by the plaintiffs in their evidence that so much of the alleged defamatory statement as I think might properly be left to a jury was true. In the defence, there is a plea of justification, and Mr. Holdsworth, in his evidence in examination-in-chief, said, "It was decided by the Yorkshire Employers [which included his firm] not to accept Redmayne's award," that is, the recommendations of Sir Richard Redmayne, which had been embodied in the award of the National Joint Conciliation Board on Feb. 13, 1936. In cross-examination, he added: Resolution of National Joint Conciliation Board—the Yorkshire Board did not accept it. "The plaintiff company did not accept it." The only possible defamatory matter, as I find, being thus acknowledged by the plaintiff company to be true, although I disagree with the judge that those words were not capable of a defamatory meaning, I think that the plea of justification on a new trial must succeed, and, consequently, I have come to the conclusion that his withdrawal of the case from the jury cannot have caused any substantial wrong or miscarriage of justice within the principle recognised in R.S.C., Ord. 39, r. 6, which, even where not in words applicable, affords a guide as to discretion in refusing a new trial: *per* Lord Maugham in *Rowell* v. *Pratt* (2). Therefore, for that reason, so much of this appeal as refers to the publication other than *Motor Transport* fails. A

In the case of *Motor Transport*, however, the statement that the plaintiff company, and, by implication, Mr. Charles Holdsworth, refused to continue to recognise the "Yorkshire Interim Agreement of Wages and Conditions of 'A' and 'B' Licence Holders" is not conceded to be true, and I cannot say that, in that case, there should not be a new trial. B
In the final result, therefore, though for different reasons, I come to the same conclusion as that of Greer, L.J., that this appeal should be allowed in the case of the publication known as *Motor Transport*, and dismissed in the other cases.

Scott, L.J.: I have had the privilege of perusing both the judg- C
ments which have been read. I find myself in agreement with both my brethren in regard to the action against Iliffe & Co. in respect of the paragraph in the weekly journal *Motor Transport*, that both the individual plaintiff, Charles Holdsworth, and his company are entitled to a new trial. As regards the paragraph in the other five actions, I am in D
agreement with Slesser, L.J., as to the defamatory meaning of which the words were reasonably capable, and regret, therefore, that I must disagree with Greer, L.J., on that issue. I agree with both that the plaintiff Charles Holdsworth must fail, and have his motion for a new trial dismissed, but I do not agree with Slesser, L.J., that, on the E
particular evidence at the trial, the plaintiff company has lost its right to a new trial.

At the close of the plaintiffs' case, it was submitted that in neither publication were the words capable of any defamatory meaning. The judge upheld this contention, expressing his full concurrence as to the para- F
graph in the five newspapers, with doubts as to that in *Motor Transport*. He accordingly entered judgment for the defendants in all six cases, without submitting any issue to the jury. In his judgment, he did not in terms says that the words without the innuendo were incapable of a defamatory meaning, but the language used by him in various passages G
in his judgment satisfies me that he had both questions in mind, not only the question whether the words were capable of bearing the meaning alleged in the innuendo, but also, disregarding the innuendo, the question whether they were capable by themselves of bearing a defamatory meaning, and that he intended definitely to decide both questions in H
favour of the defendants. This aspect of the case assumed importance before us, as Mr. Paley Scott, for the respondents, submitted that it was not open to the appellants to rely on any meaning of the words published other than that assigned in the innuendo. This contention was put on two grounds, first, that the legal function of the

innuendo is to tie the plaintiff to the particular meaning which it alleges, and, accordingly, to preclude him from relying on any other, and, secondly, that the case had been tried and disposed of in the court below on the footing that the innuendo was the only issue. I thought this latter contention mistaken in fact, and the language of the judgment satisfied me that the judge was giving his decision upon the actual words of the paragraphs as well as on the innuendo.

The contention that the legal effect of the innuendo is to tie the plaintiff company to that one meaning, and to prevent them from relying on the meaning of the words without any innuendo, is, in my view, erroneous. When first introduced into pleading, the function of the innuendo was to allege a defamatory meaning where the natural meaning of the words used was innocent or uncertain, but the special circumstances surrounding the occasion of their publication gave them a defamatory sense: see Bullen & Leake on Pleading, 3rd Edn., p. 305. Before the Common Law Procedure Act, 1852, it was the practice to aver the special facts in order to ground the innuendo, but sect. 61 of that Act provided that:

> In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense . . . and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

That statutory provision is still law; the result of it is stated by Blackburn, J., in *Watkin* v. *Hall* (3), at p. 402:

> Those latter words I can put no other meaning on, than that the legislature enacted, that a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning, shall be taken as if there were two counts, one with the innuendo and one without the innuendo.

I think that the law as it stands to-day is accurately stated in Gatley on Libel and Slander, 2nd Edn., at pp. 668, 669. Immediately after quoting the above passage, it states:

> It follows, then, that if the plaintiff can satisfy the jury that the words are actionable either with or without the meaning ascribed to them in the innuendo, he is entitled to recover. His failure to prove that the words bear the meaning ascribed to them in the innuendo will not necessarily preclude him from succeeding in the action; for he can, in such a case, treat his unproved innuendo as surplusage, and contend that the words are defamatory in their natural and ordinary meaning.

Fraser on Libel and Slander expresses the rule in similar language: see 7th Edn., p. 18, repeating the words of the 5th Edn., the last for which Fraser, J., was personally responsible. The judge at the trial must, therefore, in my opinion, be taken to have decided in regard to each paragraph that it was not capable of a defamatory meaning, either in the sense of the innuendo or in the natural sense of the printed words. We have to determine whether he was right or wrong. It will be convenient to take the paragraph in the five papers first, and consider it apart from the innuendo.

For the purpose of determining whether the words were capable of conveying a defamatory meaning, the judge divided readers of the alleged libel into 3 classes: (i) those who knew all the facts; (ii) those who knew none of the facts ; and (iii) a middle class, variously described by him, which may, I think, not unjustly be summarised as a class with inaccurate information, who would be prone to put an erroneous interpretation on the words used. This classification is, in my opinion, somewhat misleading. With newspaper paragraphs of the kind complained of, the relevant readers are, on the one hand, the general public, and, on the other, all those who have a greater or less special knowledge about the subject matter of the particular publication—in this case, the motor-transport industry ; and the typical reader for the court to have in mind is the reasonable man, of normal intelligence, possessed of such a degree of knowledge of the current circumstances of the industry as it may be proper to infer in the circumstances of the case. To the ordinary member of the public, the words may convey a meaning different from that understood by a person in the industry, and the one meaning may be more or less defamatory or innocuous than the other, according to the circumstances in evidence. In Apr., 1936, when this paragraph was published, the political and social conditions of industry in Great Britain were very different from what they had been in the Victorian days of industrialism and *laissez-faire*, and a corresponding change had taken place in public opinion. Since the War, in particular, there had been built up by the joint endeavours of trades unions and employers' associations, with increasing assistance from Parliament, acting under the stimulus of the newer public opinion, a great system of collective bargaining, aimed at establishing and maintaining harmonious relations between employers and employed, on fair terms to both. By Apr., 1936, every reasonably intelligent person in the country knew that the so-called conciliation machinery of a trade is vital to its well-being, that the successful working of that machinery is possible only if there is honourable observance, by both sides, of bargains made through their representatives on the various joint boards of the industry, and, finally, that, because of these things, loyalty to the conciliation machinery is an honourable duty of those in the industry, owed to the nation at large.

The above considerations, which, however imperfectly expressed by me, are in substance indisputable, lead necessarily to the broad conclusion that to say of a particular person, on one side or the other in a modern organised industry, that he has repudiated, or failed to observe, a collective bargain of the industry, or an award which is binding under its arbitral machinery, is libellous, just because it imputes disloyalty to the joint organisation on which the welfare of the industry and that of the nation so largely depend, and, therefore, conduct which, in that sense, is dishonourable. Such a statement, in my opinion, falls exactly within the test propounded by LORD ATKIN in *Sim* v. *Stretch* (1), a test which binds this court, and which, if I may respectfully say so, seems to me to be very complete. It is this :

> Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally ?

In the motor-transport industry, such considerations apply with additional force, because Parliament has recognised the dependence of the industry on its conciliation machinery, and has treated the effective working of that machinery as a matter of public policy: see sect. 93 of the Act of 1930, and sect. 32 of the Act of 1933. For these reasons, it A is, in my opinion, impossible to rule that the words of the paragraph in the five newspapers by themselves, and apart from the innuendo, were not capable of a defamatory meaning when read by the ordinarily intelligent member of the public to-day, even one possessed of no special knowledge. *A fortiori* does this follow in the case of a reader actually B engaged in the industry, or otherwise familiar with its recent history. The various documents proved in the course of the plaintiffs' case, all of which were public property in the industry, show the sort of repercussions on the reputation of individuals which are likely to follow upon disregard of the conciliation machinery of the industry. I C take as an illustration the statement printed on p. 2 of the report of the sub-committee selected by the National Joint Conciliation Board for the Road Motor Transport Industry (Goods) to consider the Question of Wages, Hours, and Conditions of Employment in all their aspects, submitted to and adopted by the National Joint Conciliation Board on D Aug. 1, 1934. This statement was drawn up for the press generally, and speaks for itself. It demonstrates so clearly the modern view of conciliation machinery that I think it is worth quoting almost *in extenso*. It says this:

> The following is the agreed press statement issued in conjunction with the report: E When the Road and Rail Traffic Act, 1933, was passing through Parliament, the Minister of Labour undertook to call a conference for the purpose of establishing a conciliation board to deal with the vexed question of wages, hours, and working conditions in the road-transport industry. Subsequent to the passing of the Bill, the Minister of Labour appointed an advisory committee to advise him on the constitution of such a board. That committee carefully examined the problem and made suggestions for the establishment of such a joint board. It further recom- F mended that the joint board should be established on such lines as would constitute it a conciliation board for the purpose of the Road and Rail Traffic Act, 1933, s. 32, and the Road Traffic Act, 1930, s. 19, so that its determinations could form a settled foundation on which the administration of the fair-wages provisions could be based, and variation of the limitation of driving-hours effected. The Minister of Labour then took steps to constitute the board, and at its inaugural meeting the board received welcome and good wishes from both the Minister of Labour and the Minister of Transport in person. Following the adoption of a constitution, the G board appointed a sub-committee to examine the problem of wages and working conditions in all its phrases, and report. The sub-committee examined the problem and reported to the full board on Aug. 1, 1934, when the report was adopted. The board has been influenced in all its proceedings by the understanding that it would be regarded as a proper body as referred to above, and this report, therefore, is intended to provide a basis of fair wages and conditions as contemplated in the Road and Rail Traffic Act, and it has been adopted with the belief that every H possible means will be taken by the appropriate authorities and others concerned to secure its observance by all "A" and "B" licence holders.

From what I have already said, it is apparent that I do not agree with the interpretation placed by the judge upon the paragraph in the five newspapers, nor with his consequent decision that it was in itself incapable of any defamatory meaning. I am anxious not to usurp the function of the jury, but I feel bound, in courtesy to him, to state in a positive form what I think the words are capable of meaning. The paragraph must be read as a whole, and, so read, it might, in my opinion, convey this meaning, or something like it: (i) that Holdsworth & Co., Ltd., being employers who were a party to, and bound in honour by, the conciliation machinery of the road-transport industry, had refused A to accept a conciliation award which it ought, as a consenting party, to have obeyed, and so was guilty of disloyalty to the conciliation machinery of the industry, and thus of unfair conduct towards the men; (ii) that, in consequence, the Transport and General Workers' Union, representing the whole of the men's side of the industry, had been obliged to apply B the normal sanction for such disloyalty by refusing to handle the company's goods; (iii) that the company had no valid excuse for its conduct. It is not for this court to say that the paragraph in fact had this meaning. That is for the jury. All I say is that, in my opinion, it is impossible to rule as a matter of law that it could not have such a meaning. The paragraph, C however, affects the plaintiff company alone. There are no words in it capable of pointing to the plaintiff Charles Holdsworth. As regards him, the judgment for the defendants was right, and his appeal in the five actions must be dismissed.

So far as concerns the claims by the plaintiff company, I now pass to D the innuendo. Here I find myself obliged to criticise the pleader. It was ridiculous to use the same innuendo for both alleged libels. They differ in such substantial points that the innuendo pleaded could not conceivably apply to both. But, putting that aspect on one side, a good deal of the innuendo in the five actions is very similar to what I have said appears to E me a possible meaning of the words in their natural sense. The specific implications alleged, which could have been conveyed by the paragraph in the five newspapers, in so far as they go beyond the statement of the meaning which I have just suggested, depend in part on the evidence adduced as to the surrounding circumstances. Such evidence is ad- F missible to construe a libel just as much as it is admissible to construe any other written document, although the limits of admissibility are no wider in a case of libel than they are in the interpretation of any other document, unless it be both alleged and proved that, by reason of certain special facts, known to persons to whom the libel was published, some G non-natural meaning of the English words was in fact conveyed. In none of the statements of claim was there any such allegation, and no such issue was before the judge. I do not propose to discuss the detailed allegations of the innuendo, as, in the event of a retrial, the less we say about the innuendo the better. It is sufficient, for the purpose of the H motion for a new trial, to say that, in the light of the evidence about the surrounding circumstances adduced at the trial, I consider it impossible to treat the paragraph in the five newspapers as necessarily incapable of conveying some of the defamatory reflections upon the conduct and character of the plaintiff company that were alleged in the innuendo.

The allegation, however, that the words referred to an award made by "the Yorkshire Area Joint Conciliation Board" must be rejected, in the absence of any allegation of special facts entitling a jury to give the words used that meaning. As they stand, they plainly refer to the National Conciliation Board of the whole industry, an allegation as A serious as, if not more serious than, that of the innuendo, but not the allegation of the innuendo. Similarly, there was no fact alleged or proved to bring in the personality of Charles Holdsworth himself, and there was, therefore, no foundation for the last three lines of the innuendo. I feel bound to add that the insertion of these two allegations in the innuendo B was improper. An innuendo should be framed with a high sense of responsibility and great care.

Apart from this criticism, I cannot see that the meaning alleged in the innuendo differs greatly from what I have suggested as a possible meaning of the words in their natural English sense, read in the light of C modern conditions and the surrounding circumstances proved in evidence, especially the various documents including the one from which I have extracted the press statement. In regard to the paragraph in *Motor Transport*, it is plain that the attack, if it was an attack—and that question is for the jury—was directed against Mr. Charles Holdsworth D personally as well as against his company, I. W. Holdsworth, Ltd. But what I have said as to the possible meaning of the paragraph in the five newspapers cannot be applied to the paragraph in *Motor Transport* without certain obvious modifications. In the other paragraph, the attack—if it was an attack—was directed solely against the plaintiff E company. In the *Motor Transport* paragraph, the criticism was primarily directed against the Yorkshire employers in general, in respect of what the paragraph calls their "wages scheme," and against Charles Holdsworth and the plaintiff company only in so far as it assigns the blame to them for "taking an active part in formulation of that scheme." The F sting of the paragraph seems to be that the Yorkshire employers, led by Charles Holdsworth, had repudiated the Yorkshire conciliation agreement to which they were parties. It is, in my opinion, not impossible that an imputation might be conveyed by the paragraph that he had thereby broken faith with the Joint Conciliation Board, of which he was G chairman, and, if the jury so found, it would obviously be defamatory. The judge ought to have left the issue on the paragraph without the innuendo to the jury.

It is unnecessary to say much about the innuendo. It alleges an award by the Yorkshire Board. That allegation I do not understand. The H paragraph quite definitely says that it was the "Yorkshire interim agreement" which the plaintiff company refused to continue to recognise. I presume that the allegation about the "award" was retained by counsel because he wanted to have the same innuendo as that in the other actions, but that reason does not justify the allegation. The rest of the innuendo, however, was, in my opinion, sufficient, in the light of the evidence, to make it right for the judge to leave it to the jury. In the result, I hold that, on each paragraph, that is, in all six actions, there was a case for the jury (*a*) on the words themselves, (*b*) on the innuendo, but not at the instance of the individual plaintiff, Charles Holdsworth, except in the case of *Motor Transport*.

There remains for consideration the difficulty which SLESSER, L.J., A feels about ordering a new trial in the case of the five newspapers. R.S.C., Ord. 39, r. 6, does not in terms touch a case like the present, where the judge has entered judgment for the defendant at the close of the plaintiff's case. But I agree with him that the Court of Appeal has an inherent discretion to refuse a new trial, if it is really satisfied that, for some other B reason in the action, a new trial will be futile because judgment in the end will be the same as that which it would have been if the motion for the new trial had been dismissed. I agree with him, also, that that principle was affirmed in the judgment of LORD MAUGHAM in *Rowell* v. *Pratt* (2). His view is that certain answers by the plaintiff, Charles C Holdsworth, must lead to a verdict against him on the issue of justification. I am not satisfied that we know enough about the facts on that issue to warrant his conclusion. The result would appear to depend primarily on how far, under the conciliation machinery, the employers in the Yorkshire area were, at the date of the dispute in question, bound by the D resolution of Feb. 13, 1936, of the National Board, so as to preclude their standing out upon the three points on which they had been objecting for some months. My doubt on this aspect seems to be borne out by the conduct of Mr. Paley Scott at the trial. If the defendants' case on justification had really been proved out of the evidence given by the E plaintiff himself and by his witnesses, I cannot understand why he did not ask for judgment on that ground as well as on the meaning of the paragraphs. As he did not, I do not think it right for us to refuse a new trial. The onus of proof of justification is on the defendants, and I cannot feel sure that they will succeed on it at a new trial. F

My conclusion upon the appeal would, therefore, be that the plaintiff company is entitled to a new trial on both paragraphs, and in each case, both on the words used themselves and on the innuendo, and that, in the *Motor Transport* case, the plaintiff, Charles Holdsworth, is entitled to a new trial on both aspects of the claim ; but in the five actions his appeal G must be dismissed. As, however, SLESSER, L.J., whilst agreeing with my view on the meaning of the paragraph in the five newspapers, agrees on another ground with the conclusion of GREER, L.J., that the motion for a new trial must be dismissed, my views will have no effect upon the order of the court. H

Appeal dismissed with costs.

Solicitors : *Crossman, Block & Co.*, agents for *Eaton Smith & Downey* Huddersfield (for the appellants) ; *Theodore Goddard & Co.*, agents for *Wade, Tetley, Hill & Co.*, Bradford (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ, *Barrister-at-Law.*]

WYATT *v.* WYATT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), **July 20, 1937.**]

Divorce—Collusion—Separation—Discussion as to divorce—Evidence to be provided by husband—Hotel bill—Subsequent proceedings not collusive—Reality of the matter.

A husband and wife separated in the summer of 1935, there being no suggestion of adultery up to that time. Before parting, discussions had taken place as to a divorce based upon evidence to be provided by the husband, the wife even suggesting that, for the sake of the husband's career, he should divorce her, but this the husband refused to consider. There was some suggestion that a separation was all that was required, but subsequently the husband wrote to the wife to the effect that a divorce after a lapse of six months or a year would be better. Later the husband sent a hotel bill upon which the wife based a petition for divorce. The judge found that the wife at no time wanted a divorce and that she never really assented to the husband's proposal that, whatever the reality of the matter might be, she should present a petition on evidence which he would provide. The petition was later amended to include an additional charge of adultery with another woman :—

HELD : (i) if the petition as originally presented was tainted with collusion, no kind of amendment by adding a different charge would cure the defect.

(ii) the mere fact that the adultery charged is with a woman known or unknown on an isolated occasion at a hotel is not of itself evidence of collusion.

(iii) the reality of the case was that the wife decided to act upon the evidence of the hotel bill, not in pursuance of any existing understanding, but because for the first time she had made up her mind that it was the proper thing to do in the circumstances. The petition was accordingly not presented as a result of collusion, and a decree *nisi* ought to be pronounced.

[EDITORIAL NOTE. Upon the separation of spouses there must almost inevitably occur discussions and suggestions of divorce. These will not make subsequent divorce proceedings collusive ; but it must be shown that the petitioner has not acted in pursuance of an understanding come to at the time of such discussions.

AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003 ; and FOR CASES, see DIGEST, Vol. 27, pp. 333-336, Nos. 3123-3160.]

Cases referred to :

(1) *Sandler* v. *Sandler*, [1934] P. 149 ; Digest Supp. ; 103 L.J.P. 88 ; 151 L.T. 313.
(2) *Woolf* v. *Woolf*, [1931] P. 134 ; Digest Supp. ; 100 L.J.P. 73 ; 145 L.T. 36.

PETITION by a wife for dissolution of marriage on the ground of the adultery of the husband with a named woman at a hotel in May, 1936. The case was undefended. At the hearing, the judge, not being satisfied with the proof of the petitioner's evidence and the correspondence, at counsel's request ordered an adjournment, directing that, if the case should be restored to the list, the matter should be referred to the King's Proctor for his assistance. The petition was subsequently amended to include an additional charge of adultery with another named woman.

W. N. Stable, K.C., and *Talbot Dyer* for the petitioner.

F. L. C. Hodson for the King's Proctor.

Sir Boyd Merriman, P.: The original petition, which was before me in Jan., 1937, was a petition based on a charge of adultery with a Mrs. Cooper at the Grosvenor Hotel on the night of May 7-8, 1936. That was the only specific act of adultery charged or proved. Since the last hearing, namely, on Apr. 5, that petition has been amended by the addition of a charge of adultery with a woman whose identity is known, and has been described to me, and I have been told where she carries on her profession. The King's Proctor has satisfied himself about that further charge of adultery, that there is no question whatever that the wife has a grievance in respect of that adultery, but this also is quite plain, that, at the time when the wife commenced her petition originally, she had not the faintest idea of any misconduct between her husband and the woman who was the subject of these amendments, I may say no idea of any misconduct between her husband and anybody else at all. The matter stands in this way, that, so far as any allegations of misconduct, up to the time when the parties separated in the summer of 1935, are concerned, the wife stated definitely and categorically that she had no grievance of that kind against her husband at all, and the husband has stated to the King's Proctor, and the King's Proctor's investigations bore it out, that he had not, in fact, committed adultery with anybody at all up to the time that the parties separated in the summer of 1935. It follows, therefore, and Mr. Stable has not attempted to contest the point, that, if the petition as originally presented was tainted with collusion, no kind of amendment by adding a charge different from that which was presented would cure that defect. The authority for that is *Sandler* v. *Sandler* (1) in the Court of Appeal. Therefore, I am brought back to the position in which the case was left last time, and the question for decision one way or the other is: was that evidence presented in collusion ? If it was, then I must dismiss it; if not, there is evidence on the petition as originally presented which enables me to pronounce a decree, satisfied, as I am, by what the King's Proctor has said, that the husband has admitted—and the King's Proctor has no reason to doubt it—that, in fact, adultery was committed at the hotel in question with the woman named in the petition.

I regard this case as of some importance, and, therefore, I am going quite shortly to state my reasons for pronouncing, as I propose to pronounce, a decree of divorce in this case. The difficulty surrounding the presentation of this petition may be stated shortly: the wife told me that, after a long history of matrimonial incapability, moodiness, and depression, on the part of the husband, dislike for the wife's company, and complete cessation, on his part, of sexual intercourse for five years, they parted in the summer of 1935. They parted after a series of discussions had taken place between them, in the course of which the husband had proposed to her that she should divorce him, not upon the basis of any existing matrimonial offence—on the contrary, it appears to be common ground that no such offence had been committed—but if he did in future provide her with evidence of such an offence. It appears that, so far from repelling that suggestion, the wife had said that, if it had got to come to that, she would prefer, for the sake of his professional career, that he should divorce her. Again, it is common ground that there was not the slightest attempt to suggest against the wife's character A that there was any sort of ground on which such action could be taken by the husband. That something of that sort occurred is shown quite plainly by a letter which was written by the husband to the wife on Aug. 3, where he says, " Of course your idea of my divorcing you is utter nonsense and you need think no more about that." Then he goes on to B explain again his views on divorce between them, which it was thought she had understood. He says, " If such a thing does not occur, I agree with you that a separation is all that is required." It is important to notice that sentence. It is important to notice that all that was required was a separation, and I am now quite satisfied, and always had been, C that the one thing that she did not want was a divorce. Mr. Stable has quite frankly admitted that, if there was an agreement, or anything which could be called an agreement, in connection with the presentation of this petition, the fact that it was arrived at reluctantly on the part of the wife is neither here nor there, although her reluctance in the matter D is obviously a thing to be taken into account. Here she is expressing that a separation was all that was required. The husband goes on :

> But suppose that in five or ten years time either you or I do want to re-marry, it is not impossible—though I do not think it likely—nevertheless it might be so. . . . If it did happen the whole wretched business would have to begin again, either you or I would be yanked out of our grooves and appear in a divorce court. E Surely it is better to get it all over at one go than to have to go through it twice Of course I don't mean at once, say in six months' or a year's time. Things will have steadied down a little by then, and they will probably look very different from what they do now. I will write again to you about this in a few months' time.

Then he added a postscript about divorce, he added an argument based F upon the ages of the children, " Was not it much better for them that they should get it over now instead of later." Mr. Stable does not pretend to argue that that letter was anything but the plainest possible invitation to an arrangement of an entirely collusive character, to present, in other words, a false case to the court. He also accepts the position that, if G that arrangement or that suggestion was assented to, and the petition was presented in pursuance of that arrangement or understanding, it would be impossible not to argue that this was not a collusive suit, which must be dismissed. I am bound to say, and Mr. Hodson called my attention to passages in the evidence which had been given on the last H occasion, that it was quite impossible for me to accept Mr. Stable's contention that there was no evidence that the wife encouraged the husband to think that, if, in due course, after six months' or a year's reflection, evidence was sent, she would be prepared to act on his request, and set him free. I am not going through all the details of it, but it is sufficient to quote one or two passages. She said, in one place, that, if he was determined to go away, could not the matter be re-considered in six months or a year, and that was the atmosphere in which he left. She said, of the original suggestion, that the husband's request was whether she would be prepared to divorce him if he gave her sufficient grounds, that means sufficient grounds in the future, and that there was discussion about it, and that it was just before they separated. Then there is the letter which I have just read, and with reference to which she suggested that, if he were determined that nothing else but to be divorced would make him happy, it was better that it should be the other way round. Then she said she supposed that, if things did not come right, what would happen would be that her husband would send her a hotel bill. She said quite definitely that she had never accused him or suspected him of committing adultery with anybody else, and that she imagined that her husband's letter really meant that he would send a hotel bill in order that she could divorce him. When the hotel bill came, she imagined that he had let time elapse, as he had said he would, before coming to the decision that he had, that manifestly being a decision to send the evidence on which she could divorce him. It is quite plain, therefore, that it is impossible to argue that there was no evidence of that sort of understanding such as I have described. The question is whether that is the truth of the matter. I wish to say one word, because a complete misunderstanding appears to have arisen in quarters where I thought there would be no misunderstanding about the law relating to this matter and the practice of this court. It is quite true that, in this case, the evidence of adultery presented was evidence with a named woman, unconnected with the wife, and having no relation to any antecedent history of this marriage. I have said repeatedly in this court that the mere fact that the adultery charged is with a woman known or unknown on one or two nights at a hotel is not of itself evidence of collusion, and, in the vast majority of cases, in my experience, does not even lead to a suspicion of collusion. Many cases, the majority I should say, are cases in which evidence of that sort is presented, and in which it is made abundantly plain in the course of a few minutes that the evidence thus tendered is merely the culmination of a long course of grievances on the part of the wife. I have no hesitation in saying that the decision of the Court of Appeal in *Woolf* v. *Woolf* (2), to the effect that, where evidence of that sort is tendered in good faith, there is no ground whatever for doubting that adultery has been committed, or hesitating to find that adultery has been committed, is followed loyally and unswervingly by every judge sitting in this division. The emphasis in the case of *Woolf* v. *Woolf* (2) is that evidence was tendered in good faith. Mr. Stable frankly admitted that the case of *Woolf* v. *Woolf* (2) has nothing to do with a case in which there is an element of collusion. He agreed that, if there is evidence, which the court accepts, of an understanding that a petition will be presented, if evidence of adultery at a hotel, unrelated to any existing matrimonial grievance of the wife, is provided, *Woolf* v. *Woolf* (2) could not apply, because it could not be asserted that such evidence was presented as the basis of a petition in good faith. Moreover, he agreed that, if the circumstances were as I have just described them, then it would be as plain a case of collusion as could be. Of course it would. It is quite obvious that, if there is present the element of a bargain between the spouses, the class of evidence which is presented in support of the allegation of adultery must be one factor in deciding whether or not the bargain is collusive. I have never heard any responsible counsel in this court argue to the contrary. As I have just said, Mr. Stable has expressly said that that is the position. It is quite clear, therefore, that this case required searching inquiry, because there was a suggestion that there was some agreement or understanding between the parties, and there was present the element that the evidence of adultery tendered bore no relation to any antecedent history of the parties, so far as it was known to the wife. Moreover, the letter accompanying the hotel bill was of itself of a character calculated to arouse suspicion, particularly having regard to the fact that the only reference to business correspondence which was going on between the parties at that time was contained in an unattached postscript, on a separate sheet of paper. All these elements of suspicion require investigation. The wife swore last time, and has sworn again, that the last thing she wanted was a divorce. That I accept absolutely, without any qualification. She also said that she never assented, expressly or impliedly, to this suggestion of the husband that he should provide evidence, on which, if provided, she agreed to act. Mr. Hodson, while submitting that there is evidence on which one could find the other way, some of which I have summarised, does not invite me to find that this petition was presented in collusion, and I think that that is what I ought to find. I think that the wife was placed in a very difficult position here. She was quite plainly, from first to last, hoping that she would be able to forego these unhappy differences which had arisen. Although she may have felt ultimately that it might have to come to a divorce, I feel satisfied in my own mind that she never really assented to this proposal of the husband, that, whatever the reality of the matter was, she should present a petition on evidence that he would provide for that purpose. I think the reality of the matter is this, that, after this separation, which had lasted for some time, the husband, as he has freely confessed to the King's Proctor, was committing adultery, not with one woman only, but with several, and in fact he sent his wife evidence of one such act of adultery, the evidence in support of which I heard on the last occasion, and she then decided to act upon it, not in pursuance of any existing understanding, but because for the first time she had made up her mind that it was the proper thing to do in the circumstances. That being so, it would not be true to say, or to suggest, that this petition was presented as a result of any antecedent agreement, or even as a result of any antecedent understanding. It was presented because there was put before her a state of things on which she thought, exercising her own mind, that it was right to act.

That being so, I do not think it necessary to hear any further evidence in support of the charge against the woman named in the petition, because I do not think that it adds anything to the matter one way or the other. It does not assist the position if the petition were already collusive, and it does not add anything to the situation if the petition were presented *bona fides.* I therefore pronounce a decree *nisi* with costs.

Decree nisi with costs.

Solicitors: *Peacock & Goddard* (for the petitioner); *Treasury Solicitor* (for the King's Proctor).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

PAGET *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* PAGET.

[King's Bench Division (Finlay, J.), **June 14, 15, July 30, 1937.**]

Income Tax—Interest from securities—Foreign bonds—Sale of interest coupons—Liability of proceeds to tax.

(i) P. was the holder of 4½ per cent. bearer bonds of the city of Budapest. By the terms of the bonds interest coupons attached thereto were payable in London in sterling and in certain other countries. By a decree of the Hungarian government, the municipality of Budapest was directed to deposit with the Hungarian National Bank, as the payments of interest fell due, the equivalent in pengos of the sum owed. A foreign creditors' fund was formed into which the payment of the pengos was made. Further, by the decree, payment of interest coupons could be obtained in Hungary in pengos, but only with the sanction of the Hungarian National Bank for actual use in Hungary. P. sold the interest coupons as each fell due for payment, the agent or coupon dealer through whom they were sold deducting income tax from the proceeds of sale. P. was assessed to sur-tax upon the proceeds of sale:—

Held: the deposit of pengos in the Hungarian National Bank could not be regarded as a payment of interest to P., the bank being in no sense the agent of P. to receive money on P.'s behalf. The proceeds of sale of the interest coupons were therefore not income arising from the value of securities, and were not liable to tax.

(ii) P. was also the holder of 7 per cent. bearer bonds of the kingdom of Jugoslavia, the interest coupons attached thereto being payable in American dollars in New York. In 1933 the Jugoslav government expressed its inability to pay interest on the bonds in full and put before the holders of the bonds a scheme for meeting the coupons maturing from Nov. 1, 1932, to May 1, 1935. The suggested scheme was that there should be payment of each coupon in dinars in Belgrade, the disposal and use of the dinars to be governed by the general provisions of the kingdom of Jugoslavia, the alternative being a payment of 10 per cent. of the face value of such coupons in American dollars, and the issue of funding bonds for the balance of such value. P. sold the interest coupons, the agents or coupon dealers deducting income tax from the proceeds of sale. P. was assessed to sur-tax upon the proceeds of sale:—

Held: as P. had not accepted the Jugoslav Government's offer, no interest was paid to or accepted by P., and there was no receipt of interest by P. which was liable to tax.

[EDITORIAL NOTE. Upon a sale of interest coupons it must be taken that the purchaser will discount the possibility of the interest not being paid and also the liability of the interest when received to tax. The proceeds of sale of such coupons are not, therefore, interest in the hands of the seller.

AS TO INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, p. 179, para. 375; and FOR CASES, see DIGEST, Vol. 69-72, Nos. 368-380.]

Case referred to:

(1) *Simpson* v. *Maurice's Exors.* (1929), 14 Tax Cas. 580; Digest Supp.

APPEALS by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts confirming an additional assessment to sur-tax made upon the Hon. Dorothy Wyndham Paget for the year ending Apr. 5, 1933, in the sum of £1,960 (of which the sum of £787 was not in dispute) and reducing an assessment to sur-tax made upon her for the year ending Apr. 5, 1934, in the estimated sum of £50,000. The assessments in dispute related to the proceeds of sale of interest coupons appurtenant to certain bearer bonds issued by the city of Budapest, of which Miss Paget was the holder during both years of assessment, and to the proceeds of sale of interest coupons appurtenant to certain bearer bonds of the kingdom of Jugoslavia, of which Miss Paget was the holder during the year of assessment ending Apr. 5, 1934. The facts are set out in the judgment.

A. M. Latter, K.C., and *F. Grant* for Miss Paget.

The Attorney-General (*Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the Inland Revenue Commissioners.

FINLAY, J.: These appeals relate to two separate sets of bonds of which Miss Paget was the holder. They were bonds of the city of Budapest and bonds of the kingdom of Jugoslavia. The bonds of the city of Budapest were 4½ per cent. bearer bonds, with interest coupons attached, and, by the terms of the bonds, the interest coupons were payable in London in sterling and in certain other countries. The bonds are in a form not uncommon for bonds of this sort. Difficulties arose with regard to the payment of interest, and, by a decree of the Royal Hungarian Government of Dec. 22, 1931, the municipality of Budapest was forbidden to make payments of interest on the bonds, as it is found in the case, direct to creditors, though that is a term which I think is open to some criticism; but—and this is correct—the municipality was directed to deposit with the Hungarian National Bank, as the payments fell due, the equivalent in pengos of the sum owed. There was provision made for the formation of a foreign creditors' fund, and into that the payment of pengos was made, and the fund thus created was to be controlled by the Hungarian National Bank. The effect of that was that, after the decree, payment of interest coupons could be obtained in Hungary in pengos, but in very restricted circumstances, because the payment could be made only out of the sums deposited by the city of Budapest at the Hungarian National Bank, and the proceeds could be released only with the sanction of the bank, and only if required for one of three purposes: (i) for loans against mortgages on Hungarian real estate of a currency of at least three years; (ii) for the acquisition in accordance with current Hungarian laws of real estate and securities, such securities not to be available for sale within three years; (iii) to cover internal business expenses or internal cost of living. The object of the scheme, quite obviously, was that a person entitled to interest might indeed obtain the interest in pengos, but only if he or she satisfied the bank authorities that the money was wanted, to put it shortly, for actual use in Hungary. In these circumstances, it is not surprising to find that Miss Paget did not obtain any such release. What she did was to sell the various interest coupons through agents or coupon dealers in London. The gross proceeds of sale were, of course, always below the nominal value of the coupons. Miss Paget by these sales realised a gross amount of £1,172 in the one year of assessment and £1,554 in the other year of assessment, and it is stated that the agents or coupon dealers deducted income tax from the proceeds of sale on payment to Miss Paget.

With regard to the Jugoslavia bonds, Miss Paget was the owner of 7 per cent. bearer bonds of the kingdom of Jugoslavia. Coupons were attached in the usual way. These coupons were payable in American dollars in New York. Difficulties arose with regard to the payment of interest on those bonds also, and, in a circular letter of July 24, 1933, the government of the kingdom of Jugoslavia expressed its inability to pay the interest on the bonds in full, and put before the holders of the bonds a scheme for meeting the 6 coupons maturing from Nov. 1, 1932, to May 1, 1935. The suggested scheme was that there should be payment of each coupon in dinars in Belgrade, the disposal and use of the dinars to be governed by the general provisions of the kingdom of Jugoslavia, the alternative being a payment of 10 per cent. of the face-value of such coupons in American dollars, and the issue of funding bonds for the balance of such value. Miss Paget sold the interest coupons through agents or coupon dealers in London. The nominal amount of the coupons was $7,000, she realised $3,587, or, in English money, £760 1*s.* 3*d.* In this case, as in the other, the coupon dealers appear to have deducted the income tax from the proceeds of sale.

In these circumstances, it was contended for Miss Paget that no interest arose from any of the bonds in either of the years of charge. With regard to the Budapest bonds, it was said that the deposit of the pengos with the Hungarian National Bank was not payment to her. As regards the Jugoslavian bonds, it was said that Miss Paget had not accepted the offer of the Jugoslavian government, and it followed that no payment was made by that government to her, and it was further contended that the proceeds of sale, which admittedly Miss Paget received, of coupons of both bonds were not interest, but merely purchase price, or, as it is expressed in one case, the price of the expectancy of interest. The contention of the Crown was that the proceeds of the sale of the coupons were income, and fell to be included in the assessment. The commissioners, after considering the matter, gave a decision which was accepted by neither side. What they said was this :

> We hold that the 4½ per cent. city of Budapest bonds are instruments subject to Hungarian law and capable of being affected by the decrees of the Hungarian government. In our opinion the deposit of pengos with the Hungarian National A Bank in accordance with Decree No. 6900 constituted performance by the municipality of its obligation to pay interest on the bonds and the proceeds of the coupons falling due at the respective dates of deposit represents interest arising to the appellant and must be included in her return of total income for the purposes of sur-tax. As regards the 7 per cent. bonds of the kingdom of Jugoslavia, interest coupons of which fell due for payment on Nov. 1, 1932, and May 1, 1933, we hold that there was default on the part of the Jugoslavian government and that the B offer to pay in dinars or partly in United States dollars and partly in funding bonds did not in the absence of acceptance by the appellant and payment to her constitute performance or satisfaction of its obligation. In our opinion the sale of the coupons did not amount to an implied acceptance of this offer and the mere fact that the existence of the offer gave some value to the coupons in the market did not cause interest to arise. We therefore exclude this item from the assessments for the years 1932/33 and 1933/34.

C It is no doubt necessary to consider under what schedule, if any, these things are taxable. I think that, if anything, they were income from foreign securities under Sched. D, Case IV. A suggestion was made that they might fall under Sched. C. I do not think that that suggestion is well-founded, but some reliance was placed on r. 7 of the rules in that D schedule. That rule, as I think, is mere machinery, and does not really help. The main question (and on this, I think, counsel were agreed) is whether these sums are income arising from the value of the securities. The word, it is worth noting, is "income," and not "interest." I shall consider later whether that really matters. Much of the argument before me, E and also, judging from the decision, much of that before the commissioners, was on the question of whether this was interest. I do not think that, in the first case, the commissioners can be right. It seems to me that Mr. Latter's argument was right, that the deposit of pengos in the National Bank cannot be regarded as a payment of interest to the F appellant. The Hungarian National Bank was in no sense the agent of the appellant to receive money on her behalf, and the case differs altogether, I think, from *Simpson* v. *Maurice's Exors.* (1), where the German bank or banks concerned were the agents of the testator in that case, and were duly authorised to receive money on his behalf. Here there is no G authority whatever, either express or implied, from Miss Paget to the Hungarian National Bank to receive money on her behalf, and, on that ground, I would think that the decision arrived at by the special commissioners on that matter was erroneous.

As regards the Jugoslavian bonds, I agree with the conclusion of the H commissioners. I do not think that there was there a payment of interest to the appellant. An offer was made, and, if it had been accepted, would have, or might have, resulted in payment to her, but she did not accept. I therefore think that in neither of these cases was there interest paid to or accepted by the appellant. I desire to add this : One view, and the view which I think right, is that that concludes the matter. The view which I take is that the sums which Miss Paget received were simply the purchase price of coupons, and that in no sense, therefore, was there income from foreign securities. The matter is one of some difficulty, and various cases may no doubt be put. We have the simple case where a coupon is presented and interest received by the holder, and no one doubts there that there is income from a foreign possession which may be interest, and that it is taxable. Equally so, of course, if a banker or other agent presents the coupon on behalf of the holder, but, if coupons are sold, and interest is then received by the purchaser, I think that there it is a sale and purchase, and then a receipt of interest by the purchaser. The tax, it seems to me, there has to be borne by the purchaser by deduction, probably, or, if not by deduction, by direct assessment on him, and the fact, of course, that the purchaser will have to bear tax will be reflected in the purchase price. He will consider, in considering what he paid for the coupon, that he has got to bear tax upon the interest when he receives it, but the tax is, of course, paid once, and once only. It is paid, in the case I am putting, by the purchaser of the bond, and the fact, which is a fact, that he will pay less for the coupon by reason of the fact that he has got to pay tax on the interest when he receives it does not cause the vendor of the coupon to bear tax. Another case may be put, an imaginary case : Suppose that, three months before the due date, coupons for two sets of bonds, A and B, are sold ; interest on A is, three months later, paid ; the interest on B is not paid. It seems to me clear that, in such a case, the vendor receives purchase price only. In the one case, taxation arises because, and only because, interest is received, and the taxation is borne by the purchaser. In the other case, the case where, in fact, the interest is not paid, and there is a repudiation of liability—a failure to pay—then there is no taxation because there is no interest received. The substance of the thing seems to me to be this, that, if you find interest, and wherever you find interest, you tax it, but, if a thing is in truth not interest, but a purchase price of a coupon, then it is not liable to taxation. The interest will, of course, be liable to taxation if and when it is paid.

My conclusion, therefore, is that, in the first case, the commissioners were wrong, because the payment in pengos to the Hungarian National Bank cannot constitute a receipt of interest by Miss Paget. In the second case, I think that the commissioners were right, because they found, and I think rightly found, that there was no receipt of interest. The result of all this is, therefore, that the appeal of Miss Paget must be allowed, and the appeal of the Crown must be dismissed.

Miss Paget's appeal allowed with costs. Inland Revenue Commissioners' appeal dismissed with costs.

Solicitors : *Allen & Overy* (for Miss Paget) ; *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

SCINDIA STEAMSHIPS (LONDON), LTD. *v.* LONDON ASSURANCE.

[KING'S BENCH DIVISION (Branson, J.), **December 15, 16, 1936.**]

Insurance—Marine insurance—Policy—"Inchmaree" clause—"Damage to hull or machinery . . . caused . . . through . . . breakage of shafts, or through any latent defect"—Latent defect in shaft—Breakage—Liability of insurer—Marine Insurance Act, 1906 (*c.* 41), *s.* 55 (2) (*c*).

The owners of a ship took out a Lloyd's policy of insurance which contained a clause, known as the *Inchmaree* clause, in the following terms: "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging, or handling cargo, or in bunkering or in taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull." While the ship was in dry dock for a purpose which necessitated the removal of the propeller and the withdrawal of the tail-shaft, the propeller was being wedged off, when the shaft broke, owing to a latent defect in the shaft. The end of the shaft and the propeller fell into the dock and one blade of the propeller was broken. The insurers admitted liability in respect of the propeller. The shipowners contended that the insurers were liable also for the providing and fitting of a new shaft:—

HELD: (i) the words "breakage of shafts" could not be isolated from their context so as to read, "This insurance also specially to cover breakage of shafts," but must be read in the position in which they were found to cover loss of or damage to hull caused by breakage of shafts.

(ii) the breakage of the shaft could not be said to be a loss of or damage to machinery caused by the breakage of the shaft.

(iii) damage involved in a latent defect in the machinery was not the same as damage to machinery caused through a latent defect in the machinery. The breakage of the shaft was, therefore, not itself covered by the clause in the policy.

(iv) as the damage to the shaft was caused by a latent defect, such damage, apart from the clause, was excluded from the claim by the Marine Insurance Act, 1906, s. 55 (2) (*c*).

[EDITORIAL NOTE. The *Inchmaree* clause, introduced in consequence of the decision in *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 29 Digest 197, *1575*, has been the subject of one or two previous decisions, but the reference to the breaking of shafts and latent defect in the machinery has not been previously considered.

AS TO THE *Inchmaree* CLAUSE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 322, 323, para. 447; and FOR CASES, see DIGEST, Vol. 29, p. 225, Nos. 1827-1830.]

Cases referred to:

(1) *Hutchins Brothers* v. *Royal Exchange Assurance Corpn.*, [1911] 2 K.B. 398; 29 Digest 126, *791*; 80 L.J.K.B. 1169; 105 L.T. 6.

(2) *Oceanic S.S. Co.* v. *Faber* (1907), 97 L.T. 466; 29 Digest 225, *1829*.

ACTION for a declaration that the defendants were liable to the extent of their proper proportion under a policy of insurance to indemnify the plaintiffs in respect of damage to and cost of replacing the tail-end shaft of a ship owned by the plaintiffs. The facts are set out in the judgment. The Marine Insurance Act, 1906, s. 55 (2) (*c*), provides:

> Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-

matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

Sir Robert Aske, K.C., and *W. L. McNair* for the plaintiffs.
A. T. Miller, K.C., and *T. G. Roche* for the defendants.

Branson, J.: This case raises a point which has been adumbrated A for a number of years. It relates to the proper construction to be put upon the words called the *Inchmaree* clause in a Lloyd's policy. The facts of the case are not in dispute. The plaintiffs are the owners of the ship "Jalavijaya," and they took out a policy of insurance on Jan. 20, 1931, a time policy, and the policy included the *Inchmaree* clause. About B Dec. 12, 1931, the steamer was in dry dock in Bombay for the purpose of renewing the lower half of the wood lining of the stern bush. For that purpose it was necessary to remove the propeller and to withdraw the tail-shaft. While the propeller was being wedged off, the shaft broke, and the allegation of the plaintiffs is that it broke owing to a C latent defect in the shaft at that point. The end of the shaft with the propeller attached to it fell into the dock and one blade of the propeller was broken. The defendants admit that they are liable under this clause in respect of the provision of a new propeller, but they deny liability in respect of the shaft. The plaintiffs say that by reason of this disaster D they had to fit a new shaft, and the defendants say that the providing and fitting of a new shaft had nothing to do with them. The defendants add a further plea, which is that in any event the plaintiffs have suffered no loss, other than the damage to the propeller, through the breakage of this tail-shaft, since the shaft, in the condition in which it was before this E latent defect was discovered, was useless except as scrap iron, and, say the defendants, the plaintiffs have recovered the value of the shaft as scrap iron, and, therefore, the plaintiffs can recover no more under this policy than what they have been paid by the underwriters in respect of the broken propeller. The case depends upon the true construction of F the clause in the insurance policy which reads as follows:

> This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel, or caused through negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or G hull.

Then there is a proviso, which does not apply to the present case. The construction of this clause has been the subject, in various parts of it, of decisions in the courts, but the particular part upon which the plaintiffs first rely has not. The plaintiffs' case is, first, that, upon the true con- H struction of this clause, "breakage of shafts" is covered *simpliciter*, and, therefore, that all the plaintiffs have to do here is to come and say, "Our tail-shaft broke," and then, for whatever reason that may have happened, they are entitled to recover. The defendants say that this clause cannot be properly construed as covering breakage of shafts isolated from the rest of the language of the clause, but that the clause must be read as a whole, and that then it will be found that no such construction can be put upon it. They go on to say that even if that be a possible construction, still it will not assist the plaintiffs in the present case, because of the Marine Insurance Act, 1906, s. 55 (2) (*c*), it being A plain upon the pleadings, the admitted facts of this case, that this breakage arose through the inherent vice of the shaft itself. The facts with regard to the breakage seem to be plain enough. The shaft was being subjected to an ordinary operation of repair which any shaft of proper strength and construction would be able to sustain without any difficulty B at all, but, owing to what is described as a "smooth flaw extending downwards from the top as the shaft then lay" deep into the metal, about one half of the material of the shaft was involved in this flaw or crack; the other half of the shaft remained, and was broken during this operation of wedging off the propeller. On the part of the defendants, C it is said that this is a latent defect, and that, except under the words of this clause which deal with latent defects, damage caused by latent defects is excluded from this claim by virtue of the Marine Insurance Act, 1906, s. 55 (2) (*c*). That seems to me to be a sound proposition. Where there are in the policy express words dealing with latent defects, D and one tries to isolate from that portion of the policy certain other words, and to say that they insure against a particular peril *simpliciter*, I think that to those words so isolated the general provisions of marine insurance law, as indicated by the section to which I have referred, must be applied, and words so isolated must be read subject to those conditions of the law. E But, as a matter of construction, there is a further answer. It seems to me that, if you try and isolate these words "bursting of boilers, breakage of shafts" from their context, and to read them as if they were taken out from their position and written in immediately after the clause in brackets "subject to the free of average warranty," so that the clause would read, F "This insurance also specially to cover (subject to the free of average warranty) bursting of boilers, breakage of shafts," you are doing such violence to the language of the clause that it is not possible to put such a construction upon it. It seems to me that the words must be read in the position in which they are found and in the context in which G they are found, and, so reading them, one finds that they appear following one set of circumstances introduced by the words "directly caused by" another set of circumstances introduced by the words "or caused through," and themselves introduced by the words "or through." When one looks at them from that point of view, it becomes quite obvious that H they cannot be isolated in the way contended for by the plaintiffs.

The next point that is taken is that, if the words cannot be so isolated, then they may, at all events, be read in the following way: "This insurance also specially covers loss of or damage to hull or machinery through breakage of shafts." It is said that "shafts" are a portion of hull or machinery, being a portion of machinery, and that "loss of or damage to machinery caused by the breakage of the shafts " includes the actual breaking of the shaft itself. That, it seems to me, is a forced construction of the language, and not the ordinary meaning which, reading the clause as a bit of English prose, one would be inclined to put upon it. It follows other clauses in which, obviously, the loss or damage happens to something different from the thing by which the damage is said to be caused. The first group is " caused by accidents in loading," and so forth ; " caused through the negligence of master, mariners," and so forth. Both of these groups obviously envisage, as it seems to me, a state of affairs in which the main cause produces damage which has an effect on something else ; and I see no reason why, when one comes down, after these clauses, to the one with which I have particularly to deal, one should read it in any other way. It seems to me, therefore, that the proper reading is that the breakage of the shaft itself is not covered, nor can it properly be said that the breakage of the shaft is a loss of or damage to machinery caused by the breakage of the shaft. The breakage of the shaft is the breakage of the shaft, and, if, by reason of the breakage of the shaft, the machine is torn to pieces, then there would be damage caused by the breakage of the shaft. But, in this case, the only damage, beyond the damage to the propeller, which has been paid for, is the actual damage which happened to the shaft itself, to wit, the breakage of the shaft, and the breakage of the shaft is not caused by the breakage of the shaft. If that is damage to the machinery which the breakage of the shaft has caused, it seems to me that one gets a confusion both of thought and of language which I think should not be introduced into the construction of a clause of this kind.

I therefore think that the plaintiffs fail to establish a right to recover under that part of the clause which relates to breakage of shafts. But then they say, " Here is a latent defect, and this is damage which has been caused to machinery, to wit, the shaft, by reason of a latent defect in the machinery, to wit, the shaft." With regard to that, from the one circumstance that, in this case, the latent defect had proceeded so far from the ordinary wear and tear and use to which a propeller shaft is subjected that it actually resulted in a solution of the continuity of the shaft, it is said that this case can be distinguished from that of *Hutchins Brothers* v. *Royal Exchange Assurance Corpn.* (1). The plaintiffs ask me to say that this curious position arises : that, with regard to this tail-shaft (which it is now known was in such a state, owing to this latent defect, that, had the defect been discovered, it would immediately have been appreciated that the tail-shaft was worth only what it would fetch as scrap metal, because the defect had become so serious that a perfectly ordinary operation caused the shaft to break in two), the loss is thrown upon the underwriters, and that they must not only provide a new shaft but also bear the cost of installing it in the ship. If that is the true construction of the policy, effect must be given to it, but I must confess that I feel it would be wrong to be astute to find reasons for coming to the conclusion that that was the intention of the parties when they entered into this bargain. It seems to me that really the same considerations apply in this case, although the latent defect had gone so far as to cause a complete severance of the shaft in two pieces, as those that applied in *Hutchins Brothers* v. *Royal Exchange Assurance Corpn.* (1). A What I have said already with reference to the breakage of the shaft and the necessity for there being some damage caused by the breakage of the shaft other than the breakage of the shaft itself seems to me to apply also to the case of a latent defect. Damage to hull or machinery caused through a latent defect in the machinery is something different B from damage involved in a latent defect in the machinery itself. Here, applying to the facts of the present case the construction that, I think, is the right one, it results in the assured failing to recover from the underwriters the cost of replacing a tail-shaft which broke owing to a latent defect which existed in itself, and which, so far as the evidence goes, C existed before the underwriters came on risk at all. There is nothing to show that this latent defect developed or came into being during the currency of the policy. The fact that it is spoken of as "an old flaw," whether or not it had previously been discovered, tends to show that it had existed before this policy was taken out. All that has happened is D that it has gone on developing, being subjected to nothing in the shape of a peril, but to an ordinary operation of ship-repairing, which caused the breakage of this shaft.

For these reasons, I think that the construction put upon this clause by the plaintiffs is not the true construction. I have tried to approach E this case without reference to authority, dealing with it merely as a matter of construction, and applying to it my own view of what the language means, but, as it seems to me, all that I have said is to repeat, probably in much less apt language, what WALTON, J., said in *Oceanic S.S. Co.* v. *Faber* (2), where he was dealing—*obiter*, it is true—in fact, with these F words as to breakage of shafts. Except that I cannot myself feel that I entertain the doubt which he felt, I adopt everything that he said in relation to the construction of the clause. He had not to decide it. If he had, I beg leave to doubt whether he would have remained in any doubt after considering the whole matter from the point of view of one G who had to give this decision. That judgment has been cited over and over again with admiration. It is quite true that, in the Court of Appeal, this particular point was not referred to in *Hutchins Brothers* v. *Royal Exchange Assurance Corpn.* (1). It is also quite true that, when *Oceanic S.S. Co.* v. *Faber* (2) went to the Court of Appeal, certain of their Lord- H ships, having stopped counsel who was going to argue this point before them, proceeded, whilst carefully saying that nothing they were about to say should be taken as any authority, to say that they were not convinced of the correctness of the view of this matter taken by WALTON, J. But that, it seems to me, only leaves it completely open to a judge who has to find (because it is the point in the case before me) what is the true meaning to be applied to this clause to express his own opinion unfettered by authority.

In my view, therefore, this action fails, and must be dismissed.

Judgment for the defendants.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants). A

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

GABRIEL WADE & ENGLISH, LTD. *v.* DIXON & CARDUS, LTD. B

[Chancery Division (Bennett, J.), **July 28, 1937.**]

Easements—Lost grant—Whether particulars ordered.

Where a party is relying upon the legal fiction of a lost grant, the court will not make an order for particulars thereof.

Palmer v. *Guadagni* (1) *distinguished.* C

[**EDITORIAL NOTE.** Formerly considerable particularity was required in pleading a lost grant. That rule, which appears to have been considerably relaxed by the Common Law Procedure Act, 1852, and in *Palmer* v. *Guadagni* (1), seems now to be no longer in force.

As to Particulars of Lost Grant, see HALSBURY, Hailsham Edn., Vol. 11, p. 303, para. 548; and for Cases, see DIGEST, Vol. 19, pp. 76-78, Nos. 456-467.] D

Cases referred to:

(1) *Palmer* v. *Guadagni*, [1906] 2 Ch. 494; 19 Digest 78, *467*; 75 L.J.Ch. 721; 95 L.T. 258.

(2) *Brown* v. *Dunstable Corpn.*, [1899] 2 Ch. 378; 19 Digest 156, *1073*; 68 L.J.Ch. 498; 80 L.T. 650. E

(3) *Bryant* v. *Foot* (1867), L.R. 2 Q.B. 161; 19 Digest 61, *345*; 36 L.J.Q.B. 65; 16 L.T. 55; *affd.* (1868), L.R. 3 Q.B. 497.

(4) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 19 Digest 7, *4*; 50 L.J.Q.B. 689; 44 L.T. 844; *affg.* (1878), 4 Q.B.D. 162.

Procedure Summons taken out by the defendant company in the F action asking that the plaintiff company be ordered to deliver to the defendant company further particulars relating to the claim. The plaintiff company in the action in respect of a claim to a right of way pleaded a lost grant as an alternative to an express grant by deed. The summons asked that the defendant company in the action should state G (i) whether the lost deed was executed before or after a lease to which the grant was expressed to be subject; (ii) if the lost deed was executed subsequently thereto, (*a*) whether the grant alleged to be contained therein was subject to the lease or not, and, if subject, whether such qualification of the grant was express or implied, (*b*) whether the lost deed was executed H before or after the execution of the deed of grant containing the express grant; (iii) whether the right of way limited by the lost grant was in the same terms, for the same purposes, and subject to the same provisions as to payment and carriage and otherwise in all respects as are contained in the deed of grant referred to in the statement of claim. If the answer of the plaintiff company should be in the negative, the defendant company asked for particulars of the differences between the lost grant and the deed of grant specifically pleaded.

C. H. S. Preston for the applicant, the defendant in the action.

H. Heathcote-Williams for the respondent, the plaintiff in the action.

A *Preston:* It is not permissible to traverse the fiction directly. The plea is not a rule of law, but an allegation which I am not allowed to traverse directly. The scope of it is determined by the user which is shown. In the present case, the defendant company in the action is asking the plaintiff company whether the user on which it relies is before B 1889 or after. The particulars asked for are particulars of what it expects to prove by its user. The fiction cannot be traversed directly, but it may be treated, subject to that, as being analogous to a real grant. [Counsel referred to *Palmer* v. *Guadagni* (1).]

Heathcote-Williams: The question is whether the lost grant was after C the date of the lease. If I succeed on the express grant, the question of a lost grant may not arise. It is an alternative plea. The whole theory of a lost grant is a fiction. To ask for particulars of a document in a case like this is altogether contrary to the theory of a lost grant, and obnoxious to the whole principle. [Counsel referred to *Brown* v. D *Dunstable Corpn.* (2), *Bryant* v. *Foot* (3), and *Dalton* v. *Angus* (4).]

Bennett, J.: I do not think that there is any ground upon which particulars can be asked for where a case is based upon a lost grant. A lost grant is a matter of legal fiction. How you can give particulars E of something which has no existence in fact, whether it is before or after a particular date, I cannot see. *Palmer* v. *Guadagni* (1) is relied upon as an authority for the proposition that the court will order the particulars which are asked for; but I am not sure that it is, when you see that Mr. Micklem, who was arguing the case, said that he was quite willing F to plead alternative grant. If he was willing to plead alternative grant, I think that one must read the judgment of Swinfen Eady, J., in the light of that expression of his in his argument, and not as an authority for the proposition that, where a party is relying upon a legal fiction, the court will compel him to give particulars. I propose to make no order G on this summons.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the applicant company); *Metcalfe, Copeman & Pettefar* (for the respondent company).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

RAWSTHORNE *v.* OTTLEY AND OTHERS.

[MANCHESTER SUMMER ASSIZES (Hilbery, J.), **July 19, 20, 1937.**]

Negligence—Schoolmaster—Boys in playground—No supervision—Lorry delivering coke—Tip-up lorry—Boys jumping on to lorry causing it to tip and injure another boy—Liability—One man in charge of lorry—Liability of owners of lorry—Allurement.

A tip-up lorry in the charge of a single driver had delivered coke in a school playground, and was driving away when a number of boys jumped on to the rear of the lorry causing the tipping part to tip up. Another boy, the plaintiff, had jumped on to the lorry immediately behind the driver's cab, and when the tipping part of the lorry was suddenly released it came down on the plaintiff and crushed his leg. The headmaster of the school had left the boys to play in the playground and had returned into the school premises before the arrival of the lorry. He did not know of the arrival of the lorry. In an action for damages against the managers of the school, the headmaster and the owners of the lorry:—

HELD: (i) the headmaster was not negligent in leaving the boys in the playground without supervision, nor ought he to have taken steps to stop the lorry from coming during playtime. The headmaster and the managers were accordingly not liable.

(ii) the owners of the lorry had sent the lorry in the charge of a reasonable adult, and ought not reasonably to have anticipated interference.

(iii) the driver was not negligent in not looking to see if the boys had jumped on to the lorry, and he could not have anticipated sufficient weight to tip the lorry. The owners of the lorry were, therefore, not liable.

(iv) a lorry as such is not an allurement to children.

[**EDITORIAL NOTE.** The facts of this case make it an interesting one, but its legal interest will rest mainly upon the consideration of the duty of a schoolmaster to supervise children in a playground during playtime or at a time when there may be in the playground a thing which may lead to the injury of one or more of the children.

AS TO DUTY OF SCHOOLMASTERS, see HALSBURY, Hailsham Edn., Vol. 12, pp. 138, 139, para. 297; and FOR CASES, see DIGEST, Vol. 19, pp. 606, 607, Nos. 314-317.]

Cases referred to:

(1) *Ellis* v. *Fulham Borough Council*, [1937] 3 All E.R. 454; Digest Supp.

(2) *Lygo* v. *Newbold* (1854), 9 Exch. 302; 36 Digest 49, *307*; 23 L.J.Ex. 108; 22 L.T.O.S. 226.

(3) *Latham* v. *Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, *223*; 82 L.J.K.B. 258; 108 L.T. 4.

(4) *Addie (R.) & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

ACTION for damages for negligence against the managers of the Edenfield Church of England School, against Thomas Mansell (the headmaster), and against the Ramsbottom Gas Co.

The facts are set out in the judgment. The plaintiff alleged that the first and second defendants permitted boys to ride upon and/or interfere with the lorry and/or its tipping gear; that they failed to exercise proper care or supervision; that they allowed the lorry to enter the yard, where it constituted an allurement and/or trap to the plaintiff and other children; that the third defendant, the Ramsbottom Gas Co., sent a tipping lorry; that it sent the said lorry without a "second man," and that it permitted the plaintiff to ride upon the said lorry with its knowledge. The first, second and third defendants denied negligence. The third defendant set up contributory negligence, the negligence of the other scholars, that the plaintiff was a trespasser, and that he had been warned.

William Gorman, K.C., and *T. M. Backhouse* for the plaintiff.

Noel B. Goldie, K.C., and *B. S. Wingate-Saul* for the first defendants, the managers of the Edenfield Church of England School.

J. C. Jolly for the second defendant, the headmaster.

F. E. Prichard, K.C., and *A. Denis Gerrard* for the third defendant, the Ramsbottom Gas Co.

Goldie, K.C.: There is no evidence of negligence, either by permitting or by lack of control. [Counsel referred to *Ellis* v. *Fulham Borough Council* (1).]

Prichard, K.C.: If the plaintiff is a trespasser, the third defendant owes no duty to him in the circumstances. If he be a licensee, the duty is to warn of any known danger. A servant cannot, without the authority of his master, license a person to hang on to the back of a vehicle: *per* Pollock, C.B., in *Lygo* v. *Newbold* (2), at p. 305.

Jolly was not called on.

Gorman, K.C.: The duty of the headmaster and of the managers is that of a careful parent. They were guilty of negligence in not keeping some kind of control over the school playground, when it was known that this vehicle was being brought into it. [Counsel referred to *Latham* v. *Johnson (R.) & Nephew, Ltd.* (3) and *Addie (R.) & Sons (Collieries)* v. *Dumbreck* (4).]

Hilbery, J.: In this case, the plaintiff at the time of the accident was a schoolboy, aged thirteen—nearly fourteen—attending the Edenfield Church of England School. He was one of the senior boys at the school; he would be leaving when he was fourteen. On Sept. 9, 1935, the morning interval for play occurred at 10.45 a.m., or thereabouts. The plaintiff, with the class of senior boys, went into the yard or playground appropriate to the senior boys. The headmaster went with the boys into the playground, saw them start their games, and, having other duties to attend to, went back into the school premises. A boy brought him a weight-note, relating to a delivery of coke. This did not convey to him that a delivery was going on, as the note was not always brought even on the same day—it was generally brought by the caretaker or a boy. He was then apprised of the fact that an accident had happened. Meanwhile a lorry of the Ramsbottom Gas Co. had arrived with a load of coke, which the driver intended to deliver down a chute under a window in a building which forms one side of the senior boys' playground. The driver backed the lorry into position opposite the chute. The lorry was a tipping wagon, tipped by a ram operated by hydraulic action. That hydraulic device requires that somebody shall work a pump, to raise and lower the back of the wagon. The axis is at the extreme rear of the chassis. The driver did this partly for himself; then he got out of his cab to clear the chute, and, on his way back, was apparently asked A by two boys if they could pump. When the wagon was tipped to its extreme, and all the coke was out of it, the driver then says that he drove forward, with the tip down, to drag it away from the coke. This is surely a usual practice; I have not the least doubt that the driver accepted it as the next thing to be done. When he had done this, he got down, B went to the near side, to the valve, a spring valve, which, when released, lets down the tipping part to the horizontal again. Then he went back into his cab, and started the wagon up again. He may have moved a foot or two—the boys say he did move—however, next there was a clatter of clogs at the back of the lorry and a bang and a scream. He C got down to find a boy with his leg jammed between the tipper and the oil-box, which is at the front. It is clear that it takes a substantial weight suddenly applied to counteract the superior weight at the front of the tipper. What had happened was, in my view, this: As the driver got back into his cab, no boys were on the wagon. They were, of course, D about, and near, and they would be near, merely from the presence of the wagon in the playground, and, as boys, would be interested in the driver working the valve, and the like. As the driver began to move, the boys jumped on to the lorry, the plaintiff on to a part out of the sight of the driver, at the back of the cab, and other boys, at or about the same time, E after running at the wagon, leapt on to the back in sufficient numbers to pull down the back of the tipping part and to pull up the front. Then they apparently let it go, frightened at what they had done, and it came down to crush the leg of the little boy, the plaintiff, at the front.

On the facts, one would never think, in this case, that a wrong had been F done to the boy by the headmaster, or the managers, or the Gas Co. But children's cases have been fruitful of litigation, not unproductive of damages, and not unproductive, therefore, of costs. I consider a case of a very intelligent little boy with grave anxiety. This is such a case.

I consider first the case against the headmaster. The duty of care is G that of a careful parent. So be it. In what is it suggested that the headmaster committed a breach of that duty? It is said that the lorries came to deliver coke, but he had no reason to anticipate that one might come that day. It is said that he would know that the lorry which would come would be a tipping lorry, and therefore—in a phrase now established H in the law—an "allurement" to boys. The headmaster said he did not know a tipping lorry would come, and I believe him. He further says that, if he had known it would come at playtime, he would have stopped it, not because of any danger, but because it would interfere with games and proper recreation in the yard. As to the allegation of permitting, it is said that the headmaster allowed the boys to play without supervision when the lorry was there. Mr. Mansell did not see it there; he had left the yard before it came, and, in my view, quite properly; he did not know the lorry was there. It is said that a person is not exercising proper supervision if he leaves a boy of nearly fourteen to play alone. Is a tipping lorry more attractive to the child mind than was the old-fashioned tip cart to us as boys? Suppose that this had been a horse-drawn vehicle: there are plenty of cases in the books to show that horse-drawn vehicles are interfered with by children—what parent would be held negligent if he left such a child to watch a horse and cart in operation? It is true that this is a mechanical contrivance, but what more common thing is there about to-day? I myself would not say that the headmaster was negligent in leaving boys in the playground when coke was being tipped. I think that these rules can be strained too far with a view to damages.

As to control, what supervision or control ought a headmaster to have exercised over boys in the senior class in a playground in playtime? He saw them start to play; then he went in. In my view, it is not the law, and never has been the law, that a schoolmaster should keep boys under supervision during every moment of their school lives. Having regard to the fact that the schoolmaster did not know that the lorry was there, I find that there is no negligence. It has been said that he knew it might have come. I still do not think that he should have stayed, lest such a possibility should have become the event. Should he have stopped its coming during playtime? I do not think that that is lack of supervision, and it would necessitate extra supervision. Apart from its being a tipping lorry, to know that an ordinary lorry comes, and not to prevent it during playtime, is not lack of supervision. It is said, on behalf of the other parties, that the headmaster and managers permitted the operation without supervision. I think I have sufficiently indicated the answer on the facts. They did not give an actual permission, and I think that there is no tacit permission. They did not take steps to prevent it, because (i) it had happened on rare occasions only, and (ii) they anticipated no danger from the delivery of coke.

It is said that this vehicle was dangerous, an allurement or a trap. A lorry as such cannot be said to be an allurement to children to-day. As to a tipping lorry, it was not the tipping gear that brought about the accident. No permission was given to the plaintiff to interfere, or to other pupils to interfere. No one in authority anticipated that the pupils would interfere or were interfering. In my view, this disposes of the case against the headmaster, and that against the managers, who stand in the same position as did the headmaster. The case here is put against the managers, not as occupiers, but as superiors of the headmaster.

As to the Gas Co., was there anything which the company did itself which was any breach of duty? The Gas Co. was sending the lorry to deliver at playtime, and it is said that it was sending a thing that was dangerous and an allurement to children. It is said, in those circumstances, that it was under a duty not to place that in the playground in such circumstances that it could injure. It ought reasonably to anticipate interference. But the Gas Co. did not necessarily know that children would be at play when the coke was delivered, and, if it did, it sent it in charge of a reasonable adult. It had therefore taken reasonable steps. Not only did it send its lorry with an adult on it, but it sent the lorry to a school playground, where, in an atmosphere of discipline and possible punishment, boys would be less likely to trespass on it, or act mischievously towards it. I do not accede to the view that the lorry constituted an allurement. Even if it did, these boys, and boys in a class of like age, were quite capable of understanding, and, in fact, did understand, and had knowledge of, the danger of hanging on to the lorry. It was said that the boys ought to have been instructed in safety-first habits as to traffic. I am satisfied they had been so instructed, with a specific warning against "hanging on."

In the circumstances, there is no direct dereliction of duty on the part of the Gas Co. On the question of vicarious liability, it is necessary to keep clear what, on the facts, were the causes of the disaster. The driver had got the wagon back to the horizontal, and had got back into his cab. The boys, having seen this, and having seen that the driver was about to drive away, made a rush to the back of the lorry. I have listened carefully to the boys' evidence. I doubt if some of the little boys actually got into the cab and put their heads out. If they did, it was at the last second, and the driver could not get rid of them. In that last second, the plaintiff got on to the rear end of the running-board, and a second later before the driver could become acquainted with that fact, the wagon tipped, the boys let go, the wagon collapsed and crushed the boy's leg. It is said that the driver should have taken care to see that the boys were off the wagon. The cause of the accident was not the driver's starting with the boy on the lorry. The cause was the rush of boys to the back, their leap on to it, and its tipping up when the plaintiff was in that dangerous position into which he had put himself. Did the fact that the driver knew of the wagon's attractiveness to boys raise a duty to look if it had attracted them to hang on ? I am satisfied that till this happened, no reasonable being could have anticipated sufficient weight to tip it up. The rush of boys caused it to tip up. The allegation is a mere guess ; I cannot accept it. The driver says that the boys had never hung on before, and the boys do not suggest that they had been in the habit of jumping on to the back. No former experience would prompt the driver to suppose that they were going to jump. Common experience teaches that boys may jump in this way, but I do not think it was negligent not to look. He could not anticipate that boys hanging on would cause danger.

In those circumstances, the plaintiff fails to make out that the accident was due to the negligence of the headmaster or of the managers or of the Gas Co.

Solicitors: *Thomas J. Backhouse* (for the plaintiff); *Sir George Etherton* (for the first defendants); *Eric G. Floyd* (for the second defendant); *Wood, Lord & Co.* (for the third defendant).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

KUBACH AND ANOTHER *v.* HOLLANDS AND ANOTHER (FREDERICK ALLEN & SON (POPLAR), LTD., Third Party).

[KING'S BENCH DIVISION (Lord Hewart, L.C.J.), **June 16, 17, July 29, 1937.**]

Negligence—Dangerous articles—Sale for purposes of resale—Opportunity for intermediate examination—Chemicals supplied for experiments in school—Warning in invoice not transmitted—Law Reform (Married Women and Tortfeasors) Act, 1935 (*c.* 30), *s.* 6.

A schoolgirl was carrying out a chemical experiment with chemicals supplied by the teacher of the chemistry class, when an explosion occurred whereby she was severely injured. The experiment was one for the making of oxgyen by heating a mixture of potassium chlorate and manganese dioxide, a perfectly harmless experiment. The teacher had purchased the chemicals from the second defendants, receiving as manganese dioxide a black powder so labelled in a packet. In fact the black powder was a mixture of antimony sulphide and manganese dioxide, indistinguishable from manganese dioxide to the eye, but dangerous when heated with potassium chlorate. The second defendants had purchased this powder as manganese dioxide from the third party, whose invoice stated: "The above goods are accurate as described on leaving our works but they must be examined and tested by user before use. The above goods are not invoiced as suitable for any purpose but they are of the nature and quality described." The second defendants had carried out no test on the powder and had not advised the teacher that an examination or test would be advisable. The second defendants knew that the powder would be used for the purpose of school experiments, but they had not told the third party that the powder might be so used. The schoolgirl recovered damages, in an action for negligence, from the second defendants, who sought an indemnity or contribution from the third party:—

HELD: (i) as the third party had no notice of the intended user of the powder, which might have been resold for a variety of purposes or in innocuous compounds or mixtures, and as the second defendants had not carried out a test, as the invoice prescribed, and which the second defendants had ample opportunity for doing, the third party was not liable to indemnify the second defendants.

(ii) as the third party could not have been successfully sued by the schoolgirl, the third party was not liable to contribute as a joint tortfeasor.

[**EDITORIAL NOTE.** In order to render a manufacturer liable to the ultimate purchaser, it is necessary that the article must reach that purchaser in the form in which it leaves the manufacturer without opportunity for intermediate examination. The opportunity for examination, and the suggestion that the article should be tested, here enable the manufacturer to defeat a claim for indemnity by his immediate purchaser.

As to Exclusion of Implied Warranties, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, p. 163, para. 293 ; and for Cases, see DIGEST, Vol. 39, pp. 464-466, Nos. 902-916.]

Cases referred to :

(1) *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K.B. 725 ; 39 Digest 478, *1001* ; 73 L.J.K.B. 524 ; 91 L.T. 626.

(2) *M'Alister (or Donoghue)* v. *Stevenson,* [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(3) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 ; Digest Supp. ; 105 L.J.P.C. 6 ; 154 L.T. 18.

Action by an infant, a schoolgirl, aged 13, suing by her father, and by the father against the proprietress of a school, the first defendant, for damages for alleged breach of contract and negligence, and against a firm of wholesale and retail chemists, the second defendants, for alleged negligence. The infant plaintiff had sustained severe injuries to an eye as a result of an explosion during the carrying out of a chemical experiment. A special jury found that there was no breach of contract or negligence on the part of the first defendant, but that the second defendants were negligent, and they awarded £3,000 damages to the infant plaintiff and £119 5*s.* 6*d.*, the agreed amount of special damages, to the father. The second defendants claimed an indemnity or contribution from the third party. The facts are set out in the judgment.

F. J. Tucker, K.C., and *F. M. Landau* for the plaintiffs.

G. R. Blanco White, K.C., and *H. G. Garland* for the first defendant.

Rowland Thomas, K.C., and *D. A. Scott Cairns* for the second defendants.

N. L. C. Macaskie, K.C., and *Montague Berryman* for the third party.

Lord Hewart, L.C.J. : In this case, the plaintiffs sued the defendants for damages in the following circumstances. The infant plaintiff is the daughter of the second-named plaintiff, and, at the material time, was a pupil at a school in South Norwood, of which the first-named defendant, Miss Hollands, was owner and headmistress. On Jan. 17, 1936, the infant plaintiff, a girl 13 years of age, was supplied by the teacher of the chemistry class with certain materials and apparatus, in order that she and the other members of the class might make oxygen. The child, who had carried out a similar experiment in the preceding term, was told to mix certain substances, and to apply heat to them as she held them in a flask. Almost immediately, there followed a loud explosion, and her right eye was so severely injured that ultimately, on Mar. 14, it had to be removed. The facts of the case were, for the most part, admitted. The visiting science mistress proved that, on the day before the happening of the accident, she had obtained as usual from the second-named defendants the chemicals for use in the school. She had gone to the shop of those defendants, had read out a list to a shop assistant, and had watched him weigh a quantity of potassium chlorate. She asked him if the substance was suitable to be given to children for the preparation of oxygen, and he answered, "Yes." She had then asked for some manganese dioxide, and had received a pound of black powder so labelled in a paper packet. In fact, however, the black powder was not manganese dioxide, but a mixture of ten parts of antimony sulphide to one part of manganese dioxide. This mixture, according to the evidence, was certain to explode in heat if it was mixed with potassium chlorate, but the mixture of potassium chlorate with manganese dioxide itself would have been harmless. It was further proved that the difference between antimony sulphide and manganese dioxide was not easy to detect by mere inspection, but could be very easily detected by means of an extremely simple test.

The evidence showed that the second defendants were in the habit of supplying some 50 per cent. of the schools in the neighbourhood of London with chemical substances for the purpose of experiment, and the experienced manager of those defendants said that he knew that the experiment of producing oxygen by mixing and heating potassium chlorate and manganese dioxide was one of the most elementary experiments in schools. He identified the label, which incorrectly used the description manganese dioxide, as one of the labels of his company. He proved, also, that the powder had been bought as manganese dioxide by his company from the third party, and admitted that the invoice received by his company, referring to the powder, contained the following words :

> The above goods are accurate as described on leaving our works but they must be examined and tested by user before use. The above goods are not invoiced as suitable for any purpose but they are of the nature and quality described.

Nevertheless, the second defendants made no examination and no test of the powder before resale, nor did they advise the science mistress, who made the purchase, that examination or test was necessary or desirable before use. It was not suggested that the second defendants communicated to the third party any information to the effect that the manganese dioxide was to be, or might be, resold for the purpose of school experiments.

In that state of the evidence, the plaintiffs claimed damages against the first defendant for breach of contract, and for negligence in failing to supply proper materials and in failing to make reasonable or proper examination of the chemicals supplied ; and against the second defendants for negligently supplying Miss Hollands with a compound of manganese dioxide and antimony sulphide under the false description of manganese dioxide, and in so causing or permitting a dangerous mixture to be sent to her. So far as the claim for damages for breach of contract as against the first defendant was concerned, it was not pressed by the plaintiffs, on the ground that the first defendant had done nothing that was not reasonable. In the result, the jury found that there was not a breach of contract on the part of the first defendant, but that there was negligence on the part of the second defendants. In answer to the question, "Are the first or the second defendants, or both, responsible for the injury to the infant plaintiff ? " the jury answered, " The second defendants only." They awarded £3,000 damages to the infant plaintiff, and £119 5*s.* 6*d.*, which was the agreed amount of the special damage, to the father. I accordingly gave judgment for the first defendant with costs, and judgment for the plaintiffs against the second defendants with costs, together with the usual order as to the costs to be paid.

There followed a hearing of the claim, made by the second defendants against the third party, for an indemnity, or, alternatively, for contribution, and, by consent, this claim was tried by me without a jury. A little additional evidence was given, to the effect that manganese dioxide could not be rendered dangerous by mere storage, that the substance is used in small quantities for various trade purposes, and that, although there might be a slight risk, it was only a remote one, where the commercial, as distinguished from the pure, commodity was used. The manager of the second defendants gave evidence that his company always supplied " commercial " or " technical " manganese dioxide for use in schools, that it was commonly used for generating oxygen, and that the price of the " commercial " commodity was 4*d.* per lb. by contrast with 5*s.* per lb. for the " pure " commodity. In cross-examination, he said that he never told the third party that the manganese dioxide was required for use in schools, that his company bought scores of different chemicals from the third party on the terms contained in the invoice, and that the company's customers were never told to make a test. He added that he could not tell on sight the difference between manganese dioxide and antimony sulphide, and that his company had not a laboratory on its premises, which were really a shop.

After hearing and considering the very careful arguments of counsel on both sides, I have come, reluctantly enough, to the conclusion that the third party is entitled to succeed. So far as contract is concerned, it appears to me that the governing principle is that which was reiterated by Bruce, J., in *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.* (1), at p. 742 :

> No liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person uncommunicated to the original contractor or wrongdoer, although the non-performance of this contract may in one sense have resulted from the original wrongful act or breach of contract.

Light is also, I think, thrown on the present case by the decision of the House of Lords in *M'Alister* (*or Donoghue*) v. *Stevenson* (2), where it was held that the manufacturer of an article of food, medicine, or the like, sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to take reasonable care that the article is free from defect likely to cause injury to health. In that case, Lord Atkin said, at p. 599 :

> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him

with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

The case which is there contemplated is, I think, in essential respects the opposite of the present case. The manganese dioxide which the third party
A ought to have supplied here to the second defendant might have been resold for a variety of purposes or in innocuous compounds or mixtures. The use of it for school experiments was only one of the many possible uses, and the third party, unlike the second defendants, had no notice of the intended use. More than that, it was common ground that a very
B simple test, if it had been carried out, as the third party's invoice prescribed, and as the first defendant was not warned, would immediately have exhibited the fact that antimony sulphide had erroneously been made up and delivered as manganese dioxide. The second defendants had ample and repeated opportunity of intermediate examination, and,
C if they had taken the simple precaution which the invoice warned them to take, no mischief would have followed. The like conclusion is illustrated also in *Grant* v. *Australian Knitting Mills, Ltd.* (3). It is to be observed, also, that the jury have awarded damages against the second defendants, not for breach of contract, but for negligence, that is to say,
D for negligence in omitting to make any test for themselves, and yet at the same time in concealing from their purchaser the warning contained on the invoice with which they had received the powder.

Finally, it was attempted, although faintly, to derive some assistance for the second defendants from the provisions of the Law Reform (Married
E Women and Tortfeasors) Act, 1935. But the words of sect. 6 of that statute are, I think, fatal to any such attempt. It is tolerably obvious that the third party here was not "a person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage." In my opinion, there was no joint tort, nor could the plaintiffs have sued
F the third party. I do not think it is possible to contend that the third party was "liable . . . in respect of the same damage" either as a tortfeasor or as a joint tortfeasor.

In the result, therefore, so far as the third party proceedings are concerned, I must give judgment for the third party as against the second
G defendants, but without costs.

Judgment for the third party against the second defendants.

Solicitors: *W. G. R. Saunders & Son* (for the plaintiffs); *Hamilton Hill & Evershed* (for the first defendant); *William Easton & Sons* (for the second defendants); *Berrymans* (for the third party).

H *Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MANSELL *v.* STAR PRINTING & PUBLISHING CO. OF TORONTO, LTD.

[Privy Council (Lord Atkin, Lord Macmillan, Lord Wright, Lord Alness, Lord Maugham), **July 9, 12, 13, 15, 28, 1937.**]

Privy Council—Canada—Copyright—Pictures painted before 1924—*Not produced or reproduced in Canada before* 1924—*Copyright not registered in Canada before* 1924—*Copyright Act,* 1911 (*c.* 46), *s.* 25 (1) (2)—*Canadian Copyright Act* (*R.S.C.*, 1906, *c.* 70), *s.* 6—*Canadian Copyright Act,* 1921, *s.* 42.

The appellant, a publisher of fine art colour-prints, resident in England, was the owner of 31 pictures painted before Jan. 1, 1924, prints of which were manufactured by him and sold for various purposes. The pictures were not "produced or reproduced in Canada" prior to Jan. 1, 1924, nor had the appellant ever recorded the copyright thereof under the Canadian Copyright Act of 1906 (R.S.C., c. 70). The respondent company published in Canada reproductions of these pictures. In an action for infringement of copyright :—

Held : (i) as the appellant had not complied with the requirements of the Canadian Copyright Act of 1906, he had never acquired copyright in Canada in the pictures. He could not, therefore, assert any copyright under the Canadian Copyright Act, 1921, the rights conferred by that Act being substituted for pre-existing Canadian copyright.

(ii) as the legislature of the Dominion of Canada had never declared the Imperial Copyright Act, 1911, to be in force in Canada, the rights enjoyed by the appellant under that Act did not extend to Canada. The appellant could not, therefore, maintain his action.

[EDITORIAL NOTE. The first question in this case is as to the meaning of the word "copyright" in the Schedule I of the Canadian Copyright Act. This is held to refer only to Canadian copyright acquired under the provisions of the previous Canadian Copyright Act of 1906. The other and more intricate question is the meaning of the Imperial Copyright Act of 1911, s. 25 (2). This is held, after the necessary certificate has been given by the Secretary of State, to give a Canadian author rights under the Imperial Act, but not to give an author in England any rights in Canada.

As to Copyright in the Dominions, see HALSBURY, Hailsham Edn., Vol. 7, pp. 529-532, paras. 832, 833 ; and for Cases, see DIGEST, Vol. 13, pp. 162, 163.]

Cases referred to :

(1) *Graves & Co., Ltd.* v. *Gorrie*, [1903] A.C. 496 ; 13 Digest 163, *15* ; 72 L.J.P.C. 95 ; 89 L.T. 111.

(2) *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] Ch. 323 ; [1936] 1 All E.R. 177 ; Digest Supp. ; 105 L.J. Ch. 150 ; 154 L.T. 367.

(3) *Savory* (*E. W.*), *Ltd.* v. *World of Golf, Ltd.*, [1914] 2 Ch. 566 ; 13 Digest 163, *16* ; 83 L.J. Ch. 824 ; 111 L.T. 269.

(4) *Hanfstaengl* v. *American Tobacco Co.*, [1895] 1 Q.B. 347 ; 13 Digest 203, *380* ; 64 L.J.Q.B. 277 ; 71 L.T. 864.

(5) *Macdonald* v. *Eyles*, [1921] 1 Ch. 631 ; 13 Digest 190, *255* ; 90 L.J. Ch. 248 ; 124 L.T. 625.

(6) *Moul* v. *Groenings*, [1891] 2 Q.B. 443 ; 13 Digest 203, *384* ; 60 L.J.Q.B. 715 ; 65 L.T. 327.

(7) *Routledge* v. *Low* (1868), L.R. 3 H.L. 100 ; 13 Digest 181, *165* ; 37 L.J. Ch. 454 ; 18 L.T. 874.

(8) *Tuck & Sons* v. *Priester* (1887), 19 Q.B.D. 629 ; 13 Digest 211, *467* ; 56 L.J.Q.B. 553.

APPEAL from a judgment of the Court of Appeal of Ontario (LATCHFORD, C.J.A., MIDDLETON and MACDONNELL, J.J.A.), dated Jan. 27, 1937, dismissing an appeal from a judgment of the Supreme Court of Ontario (ROSE, C.J.), dated July 11, 1936. The facts of the case are set out in the judgment of their Lordships delivered by LORD MACMILLAN.

The Imperial Copyright Act, 1911, s. 25, provides:

> (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such legislature.
>
> (2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British Subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

K. E. Shelley, K.C., and *R. M. Fowler* for the appellant, referred to *Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.* (2), *E. W. Savory, Ltd.* v. *World of Golf, Ltd.* (3), *Hanfstaengl* v. *American Tobacco Co.* (4), *Macdonald* v. *Eyles* (5), *Moul* v. *Groenings* (6), *Routledge* v. *Low* (7).

Hon. S. O. Henn Collins, K.C., and *D. L. McCarthy, K.C.*, for the respondents, referred to *Tuck & Sons* v. *Priester* (8).

LORD MACMILLAN: The plaintiff in these proceedings (now the appellant) is a publisher of fine art colour-prints who resides in England and does business throughout the world. He complains that, between the months of Mar. and July, 1932, the respondent company in infringement of his rights published in Toronto, in the illustrated section of a newspaper owned by it and known as the *Star Weekly*, a number of pictures of which he claims to be entitled to the copyright. The action related originally to 38 pictures. In the course of the proceedings, the appellant abandoned his claim to 4 of the pictures, and, as regards 3 of them, which were painted after the Canadian Copyright Act, 1921, came into operation on Jan. 1, 1924, the trial judge (ROSE, C.J.) held that the appellant was entitled to copyright, and awarded him $600 damages for infringement. As regards the remaining 31 pictures, all of which were painted before Jan. 1, 1924, the trial judge held that the appellant had no copyright in them in Canada, and was consequently not entitled to any remedy against the respondent company. This judgment was affirmed by the Court of Appeal for Ontario. The appellant says in his printed case that the appeal was dismissed "without reasons," and the respondent company says that the Court of

Appeal "gave no written reasons." It appears, however, from a newspaper report of the case which was supplied to their Lordships, that the judges of the Court of Appeal, in disposing of the case, gave expression to their views on the questions raised, and their Lordships regret that no official record of these opinions has been made available to them, notwithstanding the requirement of the Judicial Committee Rules, 1925, r. 16. The only question between the parties at their Lordships' bar was whether the appellant was entitled to copyright in Canada in the 31 pictures painted or "made" before Jan. 1, 1924. The appellant maintained that he was so entitled in virtue either of (i) the Canadian Copyright Act, or (ii) the Imperial Copyright Act, 1911.

The Canadian Copyright Act, 1921, was substantially reproduced in c. 32 of the Revised Statutes of Canada, 1927, and it is to the latter statute that their Lordships will refer. It being admitted that the pictures in question were "made" before Jan. 1, 1924, the logical starting-point from which to approach the appellant's claim is to be found in sect. 42 (5) of the Canadian Copyright Act, which enacts as follows:

> Subject to the provisions of this Act, copyright shall not subsist in any work made before Jan. 1, 1924, otherwise than under and in accordance with the provisions of this section.

The appellant must, therefore, establish his case under and in accordance with the preceding provisions of sect. 42. Sect. 42 (1) reads as follows:

> Where any person is immediately before Jan. 1, 1924, entitled to any such right in any work as is specified in the first column of the first schedule to this Act or to any interest in such a right he shall as from that date be entitled to the substituted right set forth in the second column of that schedule or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made, and the work had been one entitled to copyright thereunder.

The first schedule, so far as material, is in the following form:

Existing Rights

Existing Right.	Substituted Right.
(*a*) In the case of works other than dramatic and musical works.	
Copyright.	Copyright as defined by this Act.

* * * *

For the purposes of this schedule the following expressions where used in the first column thereof have the following meanings:—

"Copyright" in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work.

* * * *

The definition does not apply to the pictures in question, for, if

"published" means, as their Lordships hold that it does mean, "published anywhere," and not merely "published in Canada," it was admitted that the pictures were published before Jan. 1, 1924. Their Lordships observe, in the first place, that sect. 42 of the Act is obviously a transitional enactment, designed to prevent the loss of rights existing
A before Jan. 1, 1924. It achieves this by conferring on those who enjoyed pre-existing rights the substituted rights defined by the new Act. In the next place, it is clear that the pre-existing copyright enjoyed must have been copyright in Canada, for the statute, in substituting "copyright as defined by this Act" for the pre-existing copyright, is plainly
B conferring a new Canadian copyright in place of a previous Canadian copyright. It was strenuously argued that sect. 42, in dealing with the case of any person "entitled to any such right in any work as is specified in the first column of the first schedule to this Act or to any interest in such a right," covered the case of a person who was entitled
C anywhere to copyright or an interest in copyright, and in particular the case of the appellant who asserted that he enjoyed in England before Jan. 1, 1924, copyright or an interest in copyright in the pictures in question. Their Lordships cannot accept this reading. As they have just said, the copyright specified in the first column of the first schedule
D must be existing copyright in Canada, for it is a new copyright in Canada that is to be substituted for it. Like is to be substituted for like. The matter is put beyond doubt by sect. 42 (2), which deals with the case where the author of any work in which "any such right as is specified in the first column of the first schedule to this Act subsists" on Jan. 1,
E 1924, has, before that date, assigned the right, or granted any interest therein for the whole term of the right; in such a case, "at the date when but for the passing of this Act the right would have expired," the substituted right conferred by the section is, in the absence of express agreement, to pass to the author of the work, and any interest therein
F created before Jan. 1, 1924, and then subsisting, is to determine, subject to certain qualifying provisions. The "right specified in the first column of the first schedule" is thus a right having a term which, but for the passing of the Act, would have expired at a certain date, and this term which the Act prolongs, must plainly be a term prescribed by law in
G Canada. The date at which, but for the passing of the Act of 1921, the right would have expired can be ascertained from the previous Canadian Act of 1906 (R.S.C., c. 70) alone, under which copyright is conferred from the time of recording the copyright.

The result of the foregoing analysis of the relevant provisions of the
H Canadian Copyright Act is to narrow the critical issue in the present case to the simple question, was the appellant, immediately before Jan. 1, 1924, entitled to copyright in Canada in the 31 pictures? If so, he must have acquired it under the previous Canadian Copyright Act, 1906. But the appellant never acquired copyright in Canada in the 31 pictures under the Act of 1906, for he never complied with the

requirements of that Act. The condition for obtaining copyright in Canada under that Act in the case of works of art was prescribed by sect. 6, viz., "that they shall be produced or reproduced in Canada," and the 31 pictures were never produced or reproduced there before Jan. 1, 1924, nor did the appellant ever record the copyright thereof, as required by the Act. As Lord Lindley said, in giving the judgment of the Board in *Graves & Co., Ltd.* v. *Gorrie* (1), at p. 500:

> Those who want copyright in Canada for paintings, drawings, and photographs must obtain such copyright by complying with the laws of that country.

There was a substantial interval of time between the passing of the Canadian Copyright Act, 1921, and its coming into operation, on Jan. 1, 1924, during which the appellant, by compliance with Canadian law, could have protected himself, but he did not do so. The result is that the appellant's case, so far as founded on the present Canadian Copyright Act, therefore fails.

Turning to the appellant's alternative submission under the Imperial Copyright Act, 1911, their Lordships are of opinion that the appellant can derive no aid from this quarter. The argument assumes that there can be simultaneously subsisting in Canada two independent copyrights, namely, copyright under the Canadian Act and copyright under the Imperial Act. Their Lordships would not readily reach so unlikely and so embarrassing a conclusion. Fortunately, it is not necessary to do so. The Imperial Act, by sect. 25 (1), provides that it shall not extend to a self-governing Dominion unless declared by the legislature of that Dominion to be in force therein. The legislature of Canada has never declared that the Imperial Act of 1911 shall be in force therein. On the contrary, the Canadian Act of 1921, by sect. 45, declared that no person should be entitled to copyright otherwise than under and in accordance with the provisions of that Act, or of any other statutory enactment for the time being in force; and sect. 47 enacted that:

> all the enactments relating to copyright passed by the parliament of the United Kingdom are so far as they are operative in Canada hereby repealed.

The appellant, however, sought to rely on sect. 25 (2) of the Imperial Act. Under that subsection, the Secretary of State may certify that any self-governing Dominion has passed legislation under which works, the authors whereof were, at the date of the making of the works, British subjects resident elsewhere than in the Dominion, or (not being British subjects) were resident in the parts of His Majesty's Dominions to which the Imperial Act extended, enjoy within the Dominion rights substantially identical with those conferred by the Imperial Act. On the Secretary of State so certifying, as he did, in the case of Canada, on Dec. 6, 1923:

> then whilst such legislation continues in force the Dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a Dominion to which this Act extends.

The certificate of the Secretary of State did not, and could not, extend the Imperial Act to Canada. His certificate had the effect merely of bringing into operation the provision that Canada should, for the purposes of the rights conferred by the Imperial Act (but for those purposes only), be treated as if it were a Dominion to which the Act extended. The Imperial Act conferred no rights in Canada, and it was only for the purposes of the rights conferred by it that Canada was to be treated as if the Act extended to it. This can mean only that, although, under sect. 1, a Canadian author writing in Canada would not, when the Imperial Act was passed, have any copyright under the Imperial Act, the effect of the certificate would be that such an author would become a person entitled to " the rights conferred " by the Imperial Act. That is to say, Canadian authors are to have the same rights under the Imperial Act, within the area to which that Act extends, as they would have if the Act extended to Canada, but they have no rights in Canada under the Imperial Act. As the Imperial Act confers on the appellant no rights in Canada, his second contention must share the fate of the first.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed, and the judgment of the Court of Appeal of Ontario of Jan. 27, 1937, be affirmed. The appellant will pay the respondent company's costs of the present appeal.

Appeal dismissed, with costs.

Solicitors: *Sole, Sawbridge & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent company).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

NOTE.

Re WILSON, WILSON *v.* BLAND.

[CHANCERY DIVISION (Clauson and Luxmoore, JJ.), **July 19, 1937.**]

[Reported p. 297, *ante.*]

This case was mentioned on minutes of order, and the court held that the proper order was for a declaration in the terms of that asked for in the motion and which is set out in the opening passage of the judgment of the court delivered by LUXMOORE, J. The declaration omitted any mention of interest on the debt of £4,200, as all claim to interest had been abandoned by the claimant during the proceedings. The order was to be dated July 19, 1937.

PITCHER *v.* MARTIN.

[KING'S BENCH DIVISION (Atkinson, J.), **June 29, 1937.**]

Animals—Dog—Loose in street with long lead trailing—Pedestrian thrown—Negligence of owner.

The defendant, walking with a dog on a long lead, held the lead so loosely that the dog escaped from her control and chased a cat. In doing so, the lead became entangled with the plaintiff's legs and she, a woman of 73 years of age, was thrown and injured :—

HELD : a dog with a long lead loose upon the road is a nuisance and the plaintiff was entitled to succeed. The plaintiff was also entitled to succeed upon the ground of the negligence of the defendant.

[**EDITORIAL NOTE.** Generally speaking an owner of a dog is not required to keep it under strict control and he is not liable for what is called an unprovoked trespass. The present case, therefore, rests upon the principle that the defendant had placed upon the highway a thing that is a nuisance.

AS TO INJURIES BY DOGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 565, 566, paras. 971, 972 ; and FOR CASES, see DIGEST, Vol. 2, pp. 232-235, Nos. 215-230.]

Cases referred to :

(1) *Jeffery* v. *St. Pancras Vestry* (1894), 63 L.J.Q.B. 618 ; 26 Digest 432, *1507*.

(2) *Brown* v. *Eastern & Midlands Ry. Co.* (1889), 22 Q.B.D. 391 ; 22 Digest 61, *345* ; 58 L.J.Q.B. 212 ; 60 L.T. 266.

(3) *Jones* v. *Owen* (1871), 24 L.T. 587 ; 2 Digest 233, *219*.

(4) *Gayler & Pope, Ltd.* v. *Davies (B.) & Son, Ltd.*, [1924] 2 K.B. 75 ; Digest Supp. ; 93 L.J.K.B. 702 ; 131 L.T. 507.

(5) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J. Ex. 161 ; 19 L.T. 220.

(6) *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652 ; 36 Digest 89, *594* ; 78 L.J.K.B. 1063 ; 101 L.T. 411.

ACTION for damages for personal injuries against Surgeon-Captain Martin and his wife.

The plaintiff, a woman of 73 years of age, was walking home along the road when she saw a dog chasing a cat. The dog had a lead some 50 ins. long, which was trailing along the ground. As the dog passed the plaintiff, the lead became entangled in her legs and she was thrown to the ground. Her left wrist was fractured and her arm had to be in plaster for six weeks. She was, however, able to resume her duties as a housekeeper three days after the accident, but extra assistance had to be paid for. The defendants were out walking with the dog, and the action was brought against both of them, but the evidence showed that the dog was in the sole control of Mrs. Martin.

R. A. Willes for the plaintiff : A dog with a lead at large on the highway is a nuisance, unless it can be justified or explained. A dog with a lead rushing down the highway is *prima facie* evidence of negligence, but nuisance eliminates the necessity of proving negligence. [Counsel referred to *Jeffery* v. *St. Pancras Vestry* (1), *Brown* v. *Eastern & Midlands Ry. Co.* (2), *Jones* v. *Owen* (3) and *Gayler & Pope, Ltd.* v. *B. Davies & Son, Ltd.* (4).]

Denis Murphy for the defendants : In no case has an animal on the road been held to be a nuisance. It might be otherwise if the dog were dangerous. [Counsel referred to *Rylands* v. *Fletcher* (5) and *Wing* v. *London General Omnibus Co.* (6).]

ATKINSON, J.: The first question is whether liability has been made out. The plaintiff puts her case in this way. She says that there are A two grounds on which the owner of the dog may be liable. First, a dog with a loose lead, 50 ins. long, running about by itself in the streets of London, is a nuisance, and, secondly, *prima facie* it is negligent for an owner to have a dog with a loose lead running about in a big town. Both those propositions are sound. *Prima facie*, there would here be a B case of liability. I have no difficulty in holding that a dog with a loose lead in the streets of London is a cause of danger to users of the highway, and a dog with a loose lead, being free in the streets, is something which calls for explanation by the person in control, to rebut the allegation of negligence. Mrs. Martin was watching her husband, with the lead in C her hand, and whether she saw the cat at the time or not I do not know, but certainly she felt a pull and the dog was away. Then she saw that it was chasing a cat. The question is whether she has explained away the fact that the dog with a loose lead was at liberty, and has she proved enough to evade the responsibility of the dog being a nuisance on the D highway? Her duty was to hold the dog sufficiently firmly to guard against those contingencies which might reasonably be anticipated. Surely one of the contingencies was that the dog would make a sudden dart after another dog or a cat. To say that it darted swiftly is not sufficient excuse for letting it go. She might have twisted the lead E round her wrist in such a way that the dog could not get away. The hold which she had on the dog was such that, as soon as the dog gave a sharp pull, it got away. The dog was a small fox terrier, which doubtless could move very quickly, but a child could have held the lead sufficiently firmly to prevent the animal's escape. The evidence satisfies F me that Mrs. Martin was negligent, and that she was, therefore, responsible for something being on the highway which she knew would be dangerous to people using the road. It was there by her negligence, and she is liable, but there is no case against Surgeon-Captain Martin.

Judgment for the plaintiff for £100, including special damages against G *Mrs. Martin; judgment for Surgeon-Captain Martin.*

Solicitors: *Warren & Warren* (for the plaintiff); *Le Brasseur & Oakley* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

R. *v.* STONE.

[Court of Criminal Appeal (Swift, Finlay and du Parcq, JJ.), **July 29, 1937.**]

Criminal Law—Murder—Constructive murder—No intention to kill—Intention to commit rape—Death resulting.

The appellant was charged with the murder of a girl. At the trial the jury asked the judge: "If, as a result of an intention to commit rape, a girl is killed, although there was no intention to kill her, is the man guilty of murder?" The judge answered "Yes":—

Held: the judge had answered the jury correctly.

[**EDITORIAL NOTE.** It was suggested in this case that the law of constructive murder had become more humane in recent years and the decisions of the court in cases where there had been illegal operations causing death were referred to. These, however, are distinguished on the ground that in those cases, although the act was an illegal one, there was no intention to do any harm or anything against the wish of the person hurt.

As to Constructive Murder, see HALSBURY, Hailsham Edn., Vol. 9, p. 437, para. 749; and for Cases, see DIGEST, Vol. 15, pp. 787-789, Nos. 8486-8515.]

Cases referred to:

(1) *R.* v. *Serné* (1887), 16 Cox, C.C. 311; 15 Digest 788, *8502*.

(2) *Public Prosecutions Director* v. *Beard*, [1920] A.C. 479; 15 Digest 788, *8498*; 89 L.J.K.B. 437; 122 L.T. 625.

(3) *R.* v. *Whitmarsh* (1898), 62 J.P. 711; 15 Digest 788, *8503*.

(4) *R.* v. *Lumley* (1911), 76 J.P. 208; 15 Digest 789, *8505*.

Appeal against conviction by Leslie George Stone, who was convicted at the Central Criminal Court on June 29, 1937, of the murder of Miss Ruby Keen on Apr. 11, 1937.

Maurice Healy, K.C., and *S. Granville Smith* for the appellant.

Richard O'Sullivan, K.C., and *Christmas Humphreys* for the Crown.

Swift, J.: On Monday, Apr. 12, 1937, early in the morning, Ruby Keen was found lying in a place called "The Firs." She was dead, her clothes were torn right down so that the front of her body was naked, her knickers and stockings were pulled down to her shoes, and her scarf was knotted so tightly about her neck that she had been strangled. There were signs of a struggle in the soil on which she lay, and the medical evidence was that her left leg had been pulled sideways into such an unnatural position that it must have been moved by somebody after her death. There can be no doubt that the most wicked, cruel and violent assault had been made upon this woman, and I should think nobody could doubt that the object of it was to ravish her. The question, and the only question, was, who was the person who had perpetrated this outrage? On the night before her body was found, she was seen walking up the Plantation Road at Leighton Buzzard towards "The Firs," where she was subsequently found, and she was walking with Leslie George Stone. Leslie George Stone was seen a few minutes later, alone. Next day he went to a local constable's house and said he had been with Ruby Keen the night before, but he said that they had parted at "The

Stag " at a quarter past 10 and she had gone up Plantation Road and he had gone along Heath Road, and he gave various other accounts of what had happened. Then at the trial which took place before LORD HEWART, L.C.J., at the Central Criminal Court on June 28, 29, of this year, he told a story to the effect that he had been with Ruby Keen, that they had quarrelled about some incident, that he got into some sort of a rage, that he thereupon tied her scarf around her neck and caught at her clothes, knelt down beside her, and then he got up and left her, not thinking that she was badly hurt. There can be no doubt, one would think, and apparently the jury thought there was no doubt, that it was Leslie George Stone who was responsible for the physical condition in which that unhappy woman was found on the morning of Apr. 12. He was tried at the Central Criminal Court for murder, and there is no complaint of the summing-up or of the conduct of the trial—there could not be—with one exception, and the exception is this. After the jury had been directed with great propriety, they returned into court to ask this question : " If, as a result of an intention to commit rape, a girl is killed, although there was no intention to kill her, is the man guilty of murder ? " It seems obvious to us that that means : " He had no intention, in our view, of killing her, but he did intend to ravish her if he could, and it was in his efforts to ravish her that she died." When the jury propounded that question to him, LORD HEWART, L.C.J., answered : " Yes, undoubtedly," and, in our view, that answer was right.

By the law of this country, as is clear from several of the cases which Mr. Maurice Healy has submitted to our attention, it is clear that, if a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in doing so killed her, that would be murder. It was so said in 1887 in *R.* v. *Serné* (1) by STEPHEN, J. It was repeated again in *Director of Public Prosecutions* v. *Beard* (2), in 1920, by LORD BIRKENHEAD, L.C., when he said this, at p. 493 :

> The evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness.

It has been said to us to-day that some guidance or assistance should be gathered from the cases which have been decided—*Whitmarsh's* case (3) was one, and *Lumley's* case (4) another—with reference to questions as to the liability of a person who had been concerned in an illegal operation for the purpose of procuring abortion when death resulted, but the distinction seems quite obvious. There, although an illegal and improper act was being done, there was no intention to do any harm ; there was no intention to do anything against the wish of the person hurt ; indeed the desire was to help or assist the person who was hurt. It may well be, in those circumstances, that a proper direction is that, if a jury thinks that no reasonable person could contemplate that death would result from the act, they may find a verdict of manslaughter. But how different are those cases from the case which has been brought into this court to-day. In the opinion of this court, there is no ground whatever for the suggestion that LORD HEWART, L.C.J., in any way misdirected A the jury in the answer which he gave to this question. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown). B

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

R. *v.* SOUTHERN CANADA POWER CO., LTD.
SOUTHERN CANADA POWER CO., LTD. *v.* R.

[PRIVY COUNCIL (Lord Atkin, Lord Macmillan, Lord Wright, Lord Alness and Lord Maugham), **July 5, 6, 8, 9, 28, 1937.**]

A *Privy Council—Canada—Waters—Dam—Flooding—Statutory liability for all damage—Contributory negligence—Mitigation of damages—Railway owned by Crown and worked by company with statutory power to sue—Parties.*

A power company constructed a dam across the St. Francis River. Upon the occasion of exceptional floods in the spring of 1928, a railway embankment was severely damaged and a serious accident occurred to a passenger train. The dam was constructed under statutory authority B which provided that the owner or lessee of the work should be liable for all damages resulting therefrom whether from excessive elevation or otherwise. The railway was the property of the Dominion of Canada, and the ownership had never been conveyed to the Canadian National Railways Co., although the company had been entrusted with its management and operation by statute, and also by statute given a right to bring C an action of this kind. It was proved at the trial that the flood was being watched by the inhabitants generally for some time before the accident, but it was not until a short time before the accident that the disintegration of the embankment was apparent. The power company contended that the action should have been brought by the railway company and not by the Crown, and that the railway company was guilty of contributory negligence :—

D HELD : (i) the Crown was the proper party to bring the action.

(ii) the statute imposed an absolute duty on the power company, and contributory negligence could not be pleaded except as to foolish and irrational acts of the claimants.

(iii) upon the facts the railway company had no opportunity of warning and stopping the train, and damages for injury and loss of the locomotive and carriages were recoverable.

E *Decision of the Supreme Court of Canada*, [1936] S.C.R. 4, *reversed.*
Decision of the Exchequer Court of Canada, [1934] Ex. C.R. 142, *restored.*

[**EDITORIAL NOTE.** This case raises a number of interesting points. It will be noted that the railway company had been given statutory power to bring an action for damage to its property, but their Lordships, affirming the unanimous decision F of the court below on this point, agreed that this did not detract from the Crown's right to sue as owner. There is also a reference to the question of the availability of the defence of contributory negligence to a claim for breach of statutory duty, but the point is not dealt with at length. The matter is one upon which there is some conflict of authority in England, and the exact position has probably still to be ascertained. The last question discussed is really only an inference of facts, but G one upon which the courts below differed, and the examination of the position is of particular interest to countries where the spring thaw sets in suddenly and there is always a certain amount of flooding at that time of the year.

AS TO LIABILITY FOR OVERFLOW OF WATER, see HALSBURY, 1st Edn., Vol. 28, Waters and Watercourses, pp. 453-459, paras. 914-922 ; and FOR CASES, see DIGEST, Vol. 44, pp. 58-65, Nos. 422-453.]

H Cases referred to :

(1) *Dominion Building Corpn., Ltd.* v. *R.*, [1930] A.C. 90 ; Digest Supp.
(2) *Greenock Corpn.* v. *Caledonian Ry. Co., Greenock Corpn.* v. *Glasgow & South Western Ry. Co.*, [1917] A.C. 556 ; 36 Digest 104, *700* ; 86 L.J.P.C. 185 ; 117 L.T. 483.
(3) *Proulx* v. *Tremblay* (1881), 7 Q.L.R. 353.

APPEAL by special leave from a judgment of the Supreme Court of Canada dated Jan. 15, 1936, reducing the amount of damages awarded by a judgment of the Exchequer Court of Canada, dated Dec. 29, 1933, in favour of the appellant from $80,923.20 with interest thereon from the date of judgment to $31,418.03. By a cross-appeal by special leave the respondent company sought to have the judgment of the Supreme A Court set aside and the action dismissed. The facts are set out in the judgment of their Lordships delivered by LORD MAUGHAM.

Hon. J. E. Perrault, K.C., and *J. P. Pratt, K.C.*, for the appellant.

Alphonse Décary, K.C., *Hon. J. L. Ralston, K.C.*, and *J. Marier, K.C.*, for the respondent company. B

LORD MAUGHAM: The litigation arises from the fact of the construction by the power company, in the year 1925, of a large power plant and dam across the St. Francis River, in the province of Quebec, about two-and-a-half miles above a railway line and bridge belonging C at the material time to the Crown, in right of the Dominion of Canada, and managed by the Canadian National Railways Co. It is not in dispute that the power plant and dam were erected according to plans approved by the Minister of Public Works of Canada pursuant to the provisions of a law of Quebec, generally known as the Watercourse Act D (R.S.Q., 1925, c. 46). By sect. 12 of that Act, it is provided, in reference to any dam or similar structure in a river constructed pursuant to the provisions of the Act, that:

> the owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise. E

The action was brought by the Crown for damages alleged to have been caused by a disastrous rush of water and ice in the spring of 1928, by which damages of different kinds were occasioned to a railway embankment near the town of Drummondville, to rolling-stock, and in other ways. The trial judge, ANGERS, J., after a trial which lasted 14 days, F and at which more than 100 witnesses gave evidence, came to the conclusion, which he stated in a very careful judgment, that the power company's dam "was responsible for the wash-out of the railway embankment at Drummondville on Sunday, Apr. 8, 1928," and he awarded to the Crown the sum of $80,923.20 as damages. On the appeal to the G Supreme Court of Canada, that court by a unanimous decision agreed with the trial judge that the power company's dam was responsible for the washing out of the railway embankment. As will be seen, there was a difference of opinion on other matters arising on the appeal, but the question whether the tremendous rush of water and ice which H occasioned some at least of the damage was caused by the interference of the power company with the natural condition of the St. Francis River is a pure question of fact. Their Lordships see no reason for departing from their long-established rule in relation to concurrent findings of fact, and they must, accordingly, deal with this appeal upon the basis that this difficult question has been decided adversely to the power company. It will accordingly be necessary to state the facts only in so far as they are relevant to the other questions that arise on the appeal.

The dam of the power company, commonly called the Hemmings Falls A Dam, raised the level of the water upstream by 9.2 ft., and created a basin about 5½ miles in length, where there had previously been one about 3½ miles in length. This basin had also become much wider. The dam consists mainly of a concrete wall about 54 ft. in height, and there are, of course, sluice-gates and a spillway in connection with it. About B 5½ miles upstream from the dam there are some rapids called the Dauphinais Rapids. At the foot of these rapids, near an island called La Ronde, No. 71 of the township of Wickham, an extensive jam of broken ice and frazil had formed before the end of Mar., 1928. It was almost totally obstructing the river, since it rested upon the bed of the C river, extended from shore to shore, and was some 20 ft. to 25 ft. high.

About Apr. 4, weather of remarkably warm character set in. The minimum temperatures in the neighbourhood were well above freezing-point, and the maximum temperatures rose steadily, and on Apr. 6 and Apr. 7 exceeded 70° F. The snow on the banks of the river melted D rapidly, and water and ice began to come down in large quantities from above the jam. On Saturday, Apr. 7, at about 4.30 p.m., the Dauphinais Rapids jam finally gave way, and the ice flowed down the river till held up by the ice in the basin above the Hemmings Falls Dam. On Easter Sunday, Apr. 8, at about 1 p.m., the whole basin above the dam was E filled with broken ice and frazil (ice needles, which form in waters flowing too rapidly to allow the formation of surface ice), gradually piling up where it was held by the dam. This artificial jam, if it may be so described, must be taken, according to the findings above mentioned, to have occurred at a place where it would not have occurred in nature. F At 3 p.m. on Easter Sunday, the water in the basin having risen, this jam suddenly gave way, and vast quantities of ice and water, amounting, it is said, to 600 million cubic feet, rushed over the dam and in due course reached the railway bridge over the river, some 2½ miles downstream. The river here runs from south to north. The railway which crosses G the bridge is the line from Quebec to Montreal, and the station close to the river is at the town of Drummondville, which is on the west side of the river. Before reaching that station, the line, coming from Quebec, crosses a viaduct over a highway, and reaches the railway bridge some 100 ft. further on; but between the viaduct and the bridge there is an H embankment of gravel about 90 ft. in length and 20 ft. in height. On the other, the west, side of the bridge there is another similar embankment. North of the railway bridge, and close by, there is a road bridge, which carries the road from Drummondville in the direction of Quebec. When the flood reached the bridge, on Apr. 8, the railway embankment on the east side of the river began to be undermined by the sudden rush of water and ice. The sleepers and rails were soon hanging over a gap. A passenger train from Quebec bound for the city of Montreal was expected. It was due at 4.15 at Drummondville, about half a mile from the bridge, and it was on time. A woman residing on the east side of the river, Madame Malvina Grondin, whose name deserves to be recorded for her exceptional presence of mind and energy, had been watching the rising flood of water and ice. She heard the whistle of the locomotive, and, having told her sister and child who were with her to save themselves, she ran along the track towards the approaching train. She signalled and doubtless screamed to the engineer to stop, and he at once applied the emergency brakes. She called to the fireman who was leaning out of the cab to jump; he jumped and in jumping knocked her down. The brakes greatly reduced the speed of the train, but the engineer could not altogether stop the train before the gap was reached, and the locomotive and two leading cars subsided or plunged downwards into the water. The engineer in the cab of his engine was so seriously burnt that he died within a week. Two men in the baggage-car were drowned. Several passengers were injured. The cars, and, of course, the track, were badly damaged. The fireman escaped.

As already stated, the Crown recovered judgment in the Exchequer Court of Canada for the full amount of the claims, less only the sum of $600, being the amount of a gratuity made to the woman who had signalled the train to stop. The different items of damage in the claim fell into three general classes: (i) damage involved in the destruction of the embankment, and the damage to the tracks, amounting in all to $18,259.04. It should be explained that the bridge itself was in no way injured; (ii) the cost of repairs to the locomotive and the cars, and the cost of auxiliary and wrecking train service, and of the diversion of the train service, amounting to $43,671.81; (iii) a class of items made up of disbursements for medical and hospital services, funeral and ambulance expenses, indemnities to passengers and employees, wages paid to the disabled conductor of the train, and the $600 gratuity paid to Madame Grondin. The items in this class amounted to $19,592.35.

There was a preliminary objection raised by the power company, which, if successful, related to the whole action, namely, a contention that, by statute, the right of action was vested in the Canadian National Railways Co., and that that company alone could sue for the damages in question, and that the action should not have been brought in the Exchequer Court of Canada. This objection failed in the Supreme Court, as in the trial court, but it is raised by the cross-appeal. In the Supreme Court, all the judges held that the third class of damages, amounting to $19,592.35, was not recoverable, and the Crown has abandoned its claim to recover these damages, which need not further be mentioned. The judges held unanimously that the power company was responsible for the damage caused to the embankment, the tracks, and the diversion of the train service, i.e., $31,418.03. Assuming that the preliminary objection fails, and that the main question of responsibility is not now open, having regard to the concurrent findings above-mentioned, the power company does not dispute liability for these damages. But the Supreme Court, by a majority of three to two (CANNON, DYSART and CROCKET, JJ., against LAMONT and DAVIS, JJ.), held that the damages caused to the locomotive and the two cars and certain incidental expenses were due to the failure of the railway employees to guard against the danger to the railway embankment, and that the power company was accordingly relieved from liability in respect of this item of damage, which amounts to $30,512.82. The judgment of the trial court was, therefore, reduced to the sum of $31,418.03. Hence the present appeal is by the Crown, claiming to recover the additional sum of $30,512.82 and interest, while the cross-appeal by the power company seeks to set aside the whole judgment, on the ground that the Crown is not entitled to sue. The alternative claim, to set aside the judgment on the ground that the events which led to the damage were not due to the dam at Hemmings Falls, is one which, for the reason already given, must be rejected by their Lordships.

On the objection that the Crown had no right to sue, and that the action should not have been brought in the Exchequer Court of Canada, the power company has failed to obtain any encouragement from any of the 6 judges who have had to deal with the case. It seems to their Lordships that on these points there is little to add to the admirably clear statement contained in the judgment of DAVIS, J., concurred in, apparently, by the other judges. After stating the contention DAVIS, J., observed:

> The learned trial judge carefully reviewed the statutory law upon the subject and concluded, I think rightly, that the Crown was the owner of the railway and had never given up its right to sue for any claim it had in connection with the operation of the railway. The particular section of the railway in which the accident occurred has an interesting history as part of the old Intercolonial Railway, it having become the duty of the government of Canada by virtue of sect. 145 of the British North America Act to provide for the commencement within 6 months after the Union of a railway connecting the River St. Lawrence with the city of Halifax in Nova Scotia, and for the construction of such railway without intermission and its completion with all practicable speed. It was in the fulfilment of that duty imposed upon the government of Canada by the Act of Confederation that the undertaking of the Drummond County Ry. Co. was acquired in 1899, and thereafter formed part of the Intercolonial Railway. It became and has continued to be the property of His Majesty in right of the Dominion of Canada. The ownership has never been conveyed to the Canadian National Railways Co., but to that company the management and operation of the railway have been entrusted by statute. While a right of action was given to the railway company by sect. 33 of the Canadian National Railway Act, R.S.C., 1927, c. 172, and this action might have been taken in the name of the Canadian National Railways Co., His Majesty in right of the Dominion of Canada did not relinquish his right as owner to sue. That being so, there is no ground for the further objection that the action should not have been brought to the Exchequer Court of Canada. The learned trial judge has carefully and correctly reviewed and stated the pertinent statutory provisions and the authorities, and it is unnecessary to repeat them.

It may be added that sect. 33 of the Canadian National Railway Act, using, as it does, the word "may" in empowering certain actions, suits or other proceedings to be brought by the Canadian National Railways

Co., contains nothing to indicate that the Crown, in right of the Dominion, was giving up its right to bring such proceedings. There was an obvious convenience, from the point of view both of Crown and of subject, in permitting the managing company, though it possessed as owner neither the line nor the rolling-stock, to bring actions and to be sued without the fiat of the Attorney-General; but it seems to their Lordships that no good reason can be stated for holding that the Crown by implication was itself precluded from suing. Their Lordships observe that this conclusion is in line with a statement which is to be found in the judgment of this Board in the case of *Dominion Building Corpn., Ltd.* v. *R.* (1), at p. 96.

The question as to the correct quantum of damages must now be dealt with. It raises two points, (i) a question as to the true construction of sect. 12 of the Watercourse Act (R.S.Q., 1925, c. 46), and (ii) a question of fact, which will be defined later, upon which will turn the right to recover the damages to the locomotive and two cars.

The Watercourse Act, 1925, was originally enacted as 19-20 Vic. c. 104, and has been the subject of many judicial pronouncements, some of which have been referred to in the judgment of Cannon, J., in the Supreme Court. He held that the damages contemplated by sect. 12 of the statute are those suffered by any riparian owner in respect of his riparian property either above or below the dam, and must be limited to actual damages caused to the owner of a riparian piece of land as a result of the construction and maintenance of the dam. This view has not found favour with any of the other judges, and their Lordships are unable to accept it. It may be observed that it has always been held in Quebec that sect. 12 is not limited to damages caused by the original construction of a dam, and that damages occurring long after the construction is complete can be recovered in the courts of Quebec. This view was not contested at the hearing. Why, then, should the generality of the words " all damages resulting therefrom to any person " be limited in the way suggested? It is plain that lands and houses belonging to persons who are not riparian owners, but occupiers of low-lying land in the vicinity of the river, may well be damaged as the result of a flood due to the dam. Why should these people not be within the words " any persons "? Moreover, it is difficult to see why the liability imposed on the persons who are allowed, under a statute, to interfere with the flow of a natural watercourse, on the terms of being liable for all damages, should be limited in the way suggested. On this point the judgments of Lord Finlay and Lord Dunedin in the case of *Greenock Corpn.* v. *Caledonian Ry. Co., Greenock Corpn.* v. *Glasgow & South Western Ry Co.* (2), and the authorities therein cited, are conclusive to show that, at common law, apart from statute, the duty of one who obstructs the natural flow of a river is to prevent damage, and, if damage results to any persons, he will be liable to them, irrespective of whether or not they are riparian owners. Their Lordships are of opinion, in

agreement with the other judges before whom this case came, that the liability under the section cannot be limited by the articles of the Code of Quebec dealing with real servitudes, and they think that the authorities cited by Cannon, J., have not the effect which he attributes to them, though no doubt judges dealing with cases of injury sustained by
A riparian owners have at times used language which referred only to the cases they were considering. Their Lordships need not add anything in relation to the final words " or otherwise " in the section, since it is well-settled in Quebec that they are quite general: see *Proulx* v. *Tremblay* (3), where Sir L. N. Casault, at p. 358, remarks, after quoting
B the section, "*Cette dernière expression, ' ou autrement,' ne laisse aucun recours à découvert ; elle les comprend tous.*"

It is now necessary to deal with the question whether the power company ought to be held liable for the damage to the locomotive and cars, disallowed, as already stated, by the majority of the Supreme Court.
C In order to appreciate this point, some further facts should be stated. The railway bridge over the River St. Francis was constructed in the year 1887 by the Drummond County Ry. Co. The connecting embankments on the east and west sides of the bridge were constructed of the gravel material commonly used in the district. They were normally
D on land above the level of the water, but in floods and freshets the lower parts of them would be under water. In 1899, the Government of Canada bought the railway and undertaking. As already stated, the Hemmings Falls Dam was built in 1925. There was also a much smaller dam, originally of wood, some 1,100 ft. upstream from the bridge, but
E the part it played as a cause of the accident is so small that it may, for the present purpose, be disregarded.

The Canadian National Ry. Co. was managing not only the line from the city of Quebec to the city of Montreal but also a line with a station at Richmond, 25 miles in a straight line from Drummondville, and about
F 42 miles upstream from the railway bridge. The thaw having begun at the beginning of April, the railway tracks at Richmond were flooded, and traffic over them was stopped. The fact is mentioned because the power company relies upon it. It was a matter of general knowledge that the ice-jams on the river would break up in a few days, and that,
G when that happened, the river at the railway bridge would no doubt rise several feet. Floods on such occasions are not unusual on this part of the river. Before the dam was constructed, there were floods in 1887, 1913, 1915, and 1921 ; after the dam was made (in 1925), there was a very severe flood in 1927, which gave rise to several actions against
H the power company. It should be mentioned that the trial judge found that the three worst floods in that section of the river were those of 1927, 1928, and 1932.

The reasons which induced the majority of the Supreme Court to come to the conclusion that the Crown could not recover damages in relation to the locomotive and the two cars are very clearly stated in the judgment of DYSART, J. After describing the "break-up" which caused the damage on Sunday, Apr. 8, he proceeds as follows:

> For some days prior to the wash-out, the local community was well aware of the condition of the river, and many citizens were watching the progress of the flood, and on Sunday, for several hours preceding the final burst, and during its progress, hundreds of citizens lined the banks, watchful and expectant. Although the railway company has within a few hundred yards of the embankment a station A at which it maintains a staff, its railway officials or employees do not appear to have been on the scene. There is no suggestion that, at any time during the several days preceding the wash-out nor during the final critical hours, any steps were taken by them to safeguard the trains; even when the washing out process began—and it continued for some little time before finally completed—the only person of all the throng to do anything effective in giving warning to approaching trains was . . . [Madame Grondin, whose action in the matter has been already described]. B Common knowledge of the conditions which had been prevailing should have been sufficient to put railway officials on guard as to the possibility—not to say probability—of danger to the embankment and connecting bridge with all that such dangers entailed. The mere fact that the power company's employees did not call upon the railway employees to take precautions does not of itself relieve the latter from performance of their duty—nor mean that the need of precautions was not apparent, we may fairly suppose the appellant's employees were engrossed in trying to minimise the flooding and to protect their own property, and that they naturally C assumed that the railway employees would look after the protection of railway property. In all these circumstances, the failure of the railway employees to safeguard the train was a failure in an obvious duty, and relieves the appellant from responsibility for all damage resulting directly and indirectly from the destruction of the train.

If the employees of the railway company had owed a duty (on behalf D of the owners) to the power company to safeguard the embankments and the bridge from possible damage arising from a spring "break-up," these reasons, if fully justified on the evidence, would have considerable force. In the first place, however, their Lordships must observe that there was no such duty in a legal sense, since they are dealing with the E obligations of the power company under a statute, and that no question of negligence or contributory negligence, properly so called, on the part of the employees of the railway company can arise. The liability of the power company, under sect. 12 of the Watercourse Act, for the damages resulting from the interference with the natural flow of the F river, is not qualified in any way. This is not to say that claims for damage in such a case can include damages due to the foolish and irrational acts of the claimants. The latter are expected to behave as reasonable men, and, in the event of probable danger, to take such steps to avoid injury or damage as reasonable men would take, and to G minimise damage if an accident occurs. This obligation will not, however, require them to foresee dangers which ordinary men would not be likely to anticipate. The onus of establishing the case against the Crown on these lines is clearly on the power company. It is from this standpoint that their Lordships have examined the evidence in the case. H The trial judge in his judgment dealt with great care with the material before him relating to this point. He appreciated that there were two matters to be considered, (i) whether the persons in charge of the railway in the Drummondville area ought to have foreseen, for some days prior to Apr. 8, the probability or possibility of the damage to the railway

line when the break-up of the ice should take place, and should, therefore, have taken special precautions; and (ii) whether they ought to have stopped the approaching train on Apr. 8, as soon as it became apparent that the two embankments or either of them were being seriously damaged by the ice and flood. He came to the conclusion
A that neither of these propositions had been made out, and, since he had heard the evidence of many local witnesses, and had carefully considered the mass of documentary evidence (records, plans, charts, photographs and so forth) as to previous floods, his view is entitled to great respect. As already stated, LAMONT and DAVIS, JJ., in the Supreme
B Court, agreed with him, and held that no blame could be attached to those in charge of the railway for not foreseeing the danger to the bridge, or for not stopping the approaching train which met with so disastrous an accident.

In order to appreciate their view, certain circumstances of consider-
C able importance should be stated. The first is that the embankments on both sides of the bridge, constructed, as we have seen, in 1887, had resisted the floods and the ice " break-ups " for 40 years without damage, and, in particular, had suffered no injury from the serious flood of 1927. The second is that there seems to have been no reason, in the spring of
D 1928, for anticipating a worse flood at the railway bridge than that of the preceding year. The third is that the officials of the power company, who were carefully watching the progress of events above the dam, being naturally concerned with the possible damage to their power-house and other buildings, gave no notice or warning whatever to the station-
E master or other railway employees at Drummondville that any exceptional *débâcle* of ice and water was to be anticipated or had taken place. There was, indeed, till 3 p.m. on Apr. 8, nothing unusual in the height of the water at the dam, and the flooding at Windsor, where the railway lines are on low-lying land, was not exceptional, and suggested no risk
F of danger below the dam. The recorded water level at Hemmings Falls on Apr. 7, at 7 p.m., was 320.5 ft. It could be controlled, at least to some extent, by opening or closing the sluice-gates. They were fully opened, and the water level fell till, at 9 a.m. on Apr. 8, the level was 316.8 ft. By 3 p.m., this level had only increased to 317.4 ft., but a
G few minutes later it rose suddenly, and reached its peak, namely, 325.6 ft. It was at this moment that the ice, which had previously begun to move in the middle of the basin, leaped over the dam. When this unusual occurrence took place it did not apparently suggest danger to the employees of the power company. They sent no telephone message to
H the station, as they might have done, and the persons who were there on duty could not know what had happened 2½ miles upstream. It may be observed here that no such event took place on the *débâcle* of 1927. In that year, except for a few pieces of ice that went over the spillway, the large amount of ice in the basin melted gradually. It seems reasonable to suppose—as did LAMONT and DAVIS, JJ.—that the power com-

pany's officials did not think that there would be any trouble at the railway bridge due to the ice and water jumping the dam. It is at first sight very strange to hear that on Sunday, Apr. 8, a large number of citizens of Drummondville for some hours before the accident to the train was watching the progress of the flood, but, if this statement is carefully analysed, it is difficult to see that it suggests that the officials of the railway company are in any way to blame in not stopping the train expected at Drummondville at 4.15 p.m. before it reached the embankment. The *débâcle* or spring flood is of annual recurrence, and, on an Easter Sunday afternoon, many sightseers would come to watch it. There was, however, nothing unusual to be seen till after 3.30 p.m. The water was fairly high, but normal for the season. The bridge and embankments were intact, and an express had passed a little after 1 p.m. It was proved beyond doubt that the " washing out " of the embankments was remarkably sudden, and it seems to have been this circumstance which led to so many spectators continuing to watch the flood and the catastrophe, and not one of them taking the course of running back a few hundred yards to the station and warning the station-master that the embankments were giving way. From this point of view, the time factor is very important. The ice and water, as stated, came over the dam soon after 3 p.m., and could not have reached the railway bridge till about 3.40 p.m., perhaps 3.45 p.m., about half-an-hour before the train from Quebec was due. The railway men would, in the ordinary course, have been on their way to the station, or have already reached it, and it is not at all surprising that none of them was at the railway bridge watching the flood. The train could have been stopped at St. Cyrille, some five miles and a-half from Drummondville, and, apparently, not at a later stage of its journey, except by the method adopted by Madame Grondin. But their Lordships, like the trial judge, have been quite unable, on the evidence, to conclude that the railway employees had, or ought to have had, any knowledge of the fact that an unusual flood of water and ice had reached the railway bridge, still less that some minutes later the railway embankments were being cut into by the ice and the water, a process which, according to the evidence, did not become apparent till shortly before 4 p.m. The evidence of Severin Pineau, an agent of the Canadian National Railway at Drummondville, may here be cited. On the day of the accident he was off duty. At noon, he went to the river : the water was high, but normal for the season : it carried little ice. About 4 p.m., he went down towards the railway bridge. Large quantities of ice were then going down the river. After watching for some minutes, he went closer to the bridge. He then noticed that at one place the embankment on the east side of the bridge was beginning to disintegrate. He at once thought of signalling the train to stop, but realised, on looking at the time, that the train had probably passed St. Cyrille, and that he had not time enough to cross to the other side of the river to give the signal to stop. He telephoned to the station agent and told him to telephone, but it was too late to stop the train, and, at 4.13 p.m., the accident occurred. A number of witnesses speak to the suddenness of the collapse of the embankment. "*C'est parti tout d'un coup*" is a phrase which represents this impression. No doubt it is only an impression, for the undermining of a substantial embankment would take a little time, even if bombarded by blocks of ice borne by a flood of water. The probability is that, during the first minutes of the process, it would not be noticed by persons at a higher level. The point is that the disintegration process was not apparent till a moment of time when the train, unfortunately up to time, was too near the embankment to be stopped by ordinary means. This fact is a sufficient answer to the criticism that the railway officials at Drummondville should have stopped the train, unless it can be established that special guards (two at least would have been necessary) ought to have been continually watching the embankments to see that they were not being damaged.

It seems to their Lordships that it is impossible, in the circumstances, to reach the conclusion that the railway company acted with a lack of ordinary prudence in not placing such guards. There was no reason to suppose that the mass of ice and water would come over the dam in the way it did. In the high flood of the previous year, as already stated, it did not. It was impossible with ordinary prescience to foresee either the event or the time at which it would take place, nor was there any reason to suppose that that which did in fact happen would, with such startling rapidity, wash out embankments which had stood uninjured for 40 years. It seems to be a probable conjecture, though it is no more, that the unusually high temperature during the preceding three days had had the effect of thawing the surface of the embankments, so as to deprive them of the resisting power which they would usually have possessed at the time of the annual *débâcle*. The railway company took the usual precautions of having the whole of the line inspected daily. This duty was performed on Easter Sunday by one Noel Tessier, who passed the embankments between 7.15 a.m. and 7.30 a.m., and again about an hour later. Everything was then in order, and, in the circumstances above stated, there was no reason for anticipating that which actually happened some hours later. On a careful review of the whole of the evidence relevant to the issue now under consideration, their Lordships must come to the conclusion that the respondent company has failed to establish any failure of the ordinary duty of managing the railway with reasonable care. The result is that there is no interruption of the chain of causation between the flood of water and ice due to the dam on Apr. 8, and the damage caused to the oncoming train, and this damage must, therefore, be taken to be part of the damages sustained by the Crown. The judgment of the trial judge on this point, concurred in by LAMONT and DAVIS, JJ., was correct.

For these reasons, the appeal must succeed with costs, and the Crown must have judgment for a sum of $30,512.82 and interest, in addition to the sum of $31,418.03 and interest. The cross-appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed with costs. Cross-appeal dismissed with costs.

Solicitors: *Charles Russell & Co.* (for the appellant); *Blake & Redden* (for the respondent company). A

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